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The International Comparative Legal Guide to:

Lending & Secured Finance 2014

2nd Edition

A practical cross-border insight into lending and secured finance

LSTA

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the second edition of *The International Comparative Legal Guide to: Lending & Secured Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of lending and secured finance.

It is divided into three main sections:

Three editorial chapters. These chapters are overview chapters and have been contributed by the LSTA, LMA and APLMA.

Fourteen general chapters. These chapters are designed to provide readers with a comprehensive overview of key issues affecting lending and secured finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in lending and secured finance laws and regulations in 46 jurisdictions.

All chapters are written by leading lending and secured finance lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Thomas Mellor of Bingham McCutchen LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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PREFACE

Welcome to the 2014 edition of *The International Comparative Legal Guide to: Lending & Secured Finance*. Bingham McCutchen LLP is delighted to serve as the *Guide*'s Contributing Editor, and I am honoured to have been invited to write this preface.

Cross-border lending has increased dramatically over the last decades in terms of volume of loans, number of transactions and number of market participants. There are many reasons for this: the globalisation of business and development of information technology; the rise of emerging economies that have a thirst for capital in order to develop economies to their full potential; and the development of global lending markets, which has led to a dramatic rise in the number of market participants searching for the right mix of return and risk, a search that often leads to cross-border lending opportunities. For these reasons it is increasingly important to maintain an accurate and up-to-date guide regarding relevant practices and laws in a variety of jurisdictions.

The *Guide*'s first edition established itself as one of the most comprehensive guides in the practice of cross-border lending. Building on that success, this second edition, with contributions from the LSTA, the LMA, the APLMA, coverage of 46 jurisdictions and useful overview chapters exploring certain topics in-depth, serves as an even more valuable, authoritative source of reference material for lenders, global businesses leaders, in-house counsel and international legal practitioners.

We hope you find the *Guide* useful and practical, and we encourage you to contact us with suggestions to improve future editions.

Thomas Mellor
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Loan Syndications and Trading: An Overview of the Syndicated Loan Market

Bridget Marsh

Ted Basta

The Loan Syndications and Trading Association

In the past 25 years, the art of corporate loan syndications, trading, and investing has changed dramatically. There was a time when banks lent to their corporate borrowers and simply kept those loans on their books, never contemplating that loans would be traded and managed by investors like stocks and bonds in a portfolio. In time, however, investors became drawn to the attractive features of loans – unlike bonds, loans were senior secured debt obligations with a floating rate of return – and, over the years, an institutional asset class emerged. Today, such loans are not only held by banks but are also typically sold to other banks, mutual funds, insurance companies, structured vehicles, pension funds, and hedge funds. This broader investor base has brought a remarkable growth in the volume of loans being originated in the primary market and subsequently traded in the secondary market. The syndicated loan market represents one of today's most innovative capital markets.

In 2013, total corporate lending in the United States exceeded $2.1 trillion – the highest volume recorded in the past 23 years.[1] This figure encompasses all three subsectors of the syndicated loan market – the investment grade market, the leveraged loan market, and the middle market. In the investment grade market total lending – or issuance – stood at approximately $749 billion in 2013. Most lending in the investment grade market consists of revolving credit facilities to larger, more established companies. The leveraged loan market, where loans are made to companies with non-investment grade ratings (or with high levels of outstanding debt), represented $1.14 trillion.[2] Leveraged loans are typically made to companies seeking to refinance existing debt, to finance acquisitions, leveraged buyouts, or to fund projects and other corporate endeavours such as dividend recapitalisations. Although investment grade lending and leveraged lending volumes are roughly comparable, leveraged loans comprise the overwhelming majority of loans that are traded in the secondary market. Then there is the middle market. As traditionally defined, middle market lending includes loans of up to $500 million that are made to companies with annual revenues of under $500 million.[3] For these companies, the loan market is a primary source of funding. In 2013, middle market lending totaled more than $200 billion, with $160 billion of that amount considered large middle market deals.[4]

Of these three market segments, it is the leveraged loan market that has evolved most dramatically over the past 25 years. Attracted by the higher returns of the loan asset class, the investor base has expanded significantly and become more diverse. This, in turn, has fueled demand for loans, leading to a commensurate rise in loan origination volumes in the primary market. For the loan market to grow successfully, for the loan asset class to mature, and to ease the process of trading and settlement, these new entrants to the market have needed uniform market practices and standardised trading documentation. In 1995, in response to these needs, the Loan Syndications and Trading Association ("LSTA" or "Association") was formed, and its mission since inception has included the development of best practices, market standards, and trading documentation. The LSTA has thus successfully spearheaded efforts to increase the transparency, liquidity, and efficiency of the loan market; in turn, this more standardised loan asset class has directly contributed to the growth of a robust, liquid secondary market.

The LSTA's role has expanded to meet new market challenges. After the Global Financial Crisis of 2008, the LSTA assumed more prominence in the loan market, regularly engaging with the U.S. government and its regulatory bodies on recent legislative and regulatory initiatives. Policymaking in the wake of the financial crisis had included sweeping changes to the financial industry, including to the loan market, even though the regulatory impact on the loan market was sometimes an unintended byproduct of reform legislation aimed somewhere else. The LSTA has, therefore, dedicated substantial time and energy since the crisis to building awareness among regulators about the loan market and how it functions, seeking to distinguish it from other markets and, at times, persuading policymakers to exempt the loan market from particular legislative measures. With most of the comment periods for those regulatory changes having expired, the LSTA will move into a second phase of its regulatory outreach program, where it plans to maintain a dialogue about the loan market with regulators and to promote the many benefits of a vibrant leveraged loan market for US companies.

This chapter examines: (i) the history of the leveraged loan market, focusing on the growth and maturation of the secondary trading market for leveraged loans; (ii) the role played by the LSTA in fostering that growth through its efforts to standardise the practices of, and documentation used by participants active in, the secondary loan market to bring greater transparency to the loan asset class; and (iii) the regulatory challenges faced by the loan market in a post-financial crisis environment, which our members believe is the most important concern for the loan market.

Growth of the Secondary Market for Leveraged Loans

The story of the leveraged loan market starts approximately 25 years ago in the United States, with the first wave of loan market growth being driven by the corporate M&A activity of the late 1980s. Although a form of loan market had existed prior to that time, a more robust syndicated loan market did not emerge until the M&A deals of the 1980s and, in particular, those involving leveraged buy-outs (LBOs), which required larger loans with higher interest rates. This had two significant consequences for the loan market. First, because banks found it difficult to underwrite very

large loans on their own, they formed groups of lenders – syndicates – responsible for sharing the funding of such large corporate loans. Syndication enabled the banks to satisfy market demand while limiting their own risk exposure to any single borrower. Second, the higher interest rates associated with these large loans attracted non-bank lenders to the loan market, including traditional bond and equity investors, thus creating a new demand stream for syndicated loans. Retail mutual funds also entered the market at this time and began to structure their funds for the sole purpose of investing in bank loans. These loans generally were senior secured obligations with a floating interest rate. The resultant asset class had a favourable risk-adjusted return profile. Indeed, non-bank appetite for syndicated leveraged loans would be the primary driver of demand that helped fuel the loan market's growth.[5]

Although banks continued to dominate both the primary market (where loans are originated) and the secondary market (where loans are traded), the influx of the new lender groups in the mid-1990s saw an inevitable change in market dynamics within the syndicated loan market. In response to the demands of this new investor class, the banks, which arranged syndicated loans, began modifying traditional deal structures, and, in particular, the features of the institutional tranche or term loan B, that portion of the deal which would typically be acquired by the institutional or non-bank lenders. The size of these tranches was increased to meet (or create) demand, their maturity dates were extended to suit the lenders' investment goals, and their amortisation schedules tailored to provide for only small or nominal instalments to be made until the final year when a large bullet payment was scheduled to be made by the borrower. In return, term loan B lenders were paid a higher rate of interest. All these structural changes contributed to a more aggressive risk-return profile, which was necessary in order to attract still more liquidity to the asset class.

A true secondary market for leveraged loans in the United States emerged in the 1990s. During the recession of the early 1990s, default rates rose sharply, which severely limited the availability of financing, particularly in transactions involving financing from regional and foreign banks. Interest rates to non-investment grade borrowers thus increased dramatically. Previously, banks had carried performing loans at par or face value on their balance sheets, while valuations below par (expected sale prices) were only generally assigned to loans that were in or near default. During the credit cycle of the early 1990s, however, a new practice developed in the banking industry. As banks in the U.S. sought to reduce their risk and strengthen their balance sheets, they chose to sell those leveraged loans which had declined in value since their syndication, rather than hold the loans until their maturity date as they had in the past. In so doing, a new distressed secondary market for leveraged loans emerged, consisting of both traditional (bank) and non-traditional (non-bank) buyers. Banks were not simply originators of these loans but now were also loan traders, and thus, in their role as market makers, began to provide liquidity for the market.

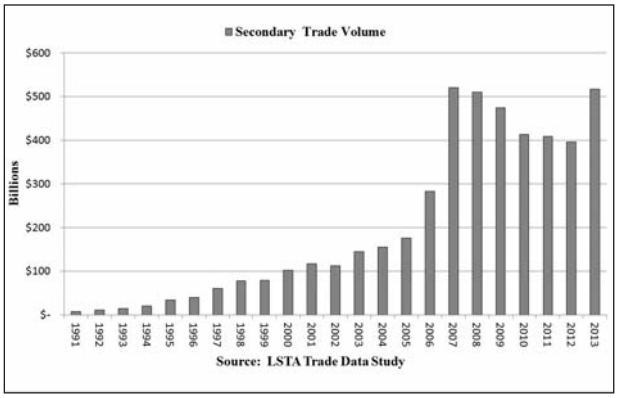
Although leveraged lending volume in the primary market had reached approximately $100 billion by 1995, trading activity was still relatively low, standing at approximately $40 billion.[6] The early bank loan trading desks at this time initially acted more as brokers than traders, simply brokering or matching up buyers and sellers of loans. As liquidity improved and the lender base expanded, investors began to look to the secondary market as a more effective platform from which to manage their risk exposure to loans, and eventually active portfolio management through secondary loan trading was born. With the advent of this new and vibrant secondary loan market, there naturally was a greater need for standard trading documents and market practices which could service a fair, efficient, liquid, and professional trading market for commercial loans – a need reflected in the LSTA's creation in 1995. (The LSTA and its role in the development of a more standardised loan market is discussed more fully below, under "The Standardisation of a Market".)

Around the same time, the loan market acquired investment tools similar to those used by participants in other mature markets, for example, a pricing service, bank loan ratings, and other supporting vendor services. In 1996, the LSTA established a monthly dealer quote-based secondary mark-to-market process to value loans at a price indicative of where those loans would most likely trade. This enabled auditors and comptrollers of financial institutions that participated in secondary trading to validate the prices used by traders to mark their loan positions to "market". Within a few years, however, as leveraged lending topped $300 billion and secondary trading volume reached $80 billion, there was a need to "mark-to-market" loan positions on a more frequent basis.[7] In 1999, this led to the LSTA and Thomson Reuters Loan Pricing Corporation jointly forming the first secondary mark-to-market pricing service run by an independent third party to provide daily U.S. secondary market prices for loan market participants. Shortly thereafter, two other important milestones were reached, both of which facilitated greater liquidity and transparency – (i) the first loan index was created by the LSTA and Standard and Poor's, and (ii) bank loan ratings became widely available to market participants.

Just as the market's viability was on the rise, so was its visibility. In 2000, the Wall Street Journal began weekly coverage of the syndicated loan market and published the pricing service's secondary market prices for the mostly widely quoted loans. All these tools – the pricing service, the bank loan ratings, the loan index, and the coverage of secondary loan prices by a major financial publication – were important building blocks for the loan market, positioning it for further successful growth.

At about this time, the scales tipped, and the leveraged loan market shifted from a bank-led market to an institutional investor-led market comprised of finance and insurance companies, hedge, high-yield and distressed funds, loan mutual funds, and structured vehicles like collateralised loan obligations or "CLOs". Between 1995-2000, the number of loan investor groups managing bank loans grew by approximately 130 percent and accounted for more than 50 percent of new deal allocations in leveraged lending. By the turn of the millennium, leveraged lending volume was approximately $310 billion and annual secondary loan trading volume exceeded $100 billion as illustrated in the chart below. With these new institutional investors participating in the market, the syndicated loan market experienced a period of rapid development that allowed for impressive growth in both primary lending and secondary trading.

Chart 1



Unfortunately, as the credit cycle turned and default rates increased sharply in the early 2000s, there was a temporary lull in the market's growth, with secondary loan trading stalled for a number of years. By 2003, however, leveraged lending (and trading) volumes quickly rebounded as investor confidence was restored.

Even the most bullish of loan market participants could not have predicted the rate of expansion that would take place over the next four years, from 2003-2007. Once again, this growth was driven by M&A activity and large LBOs. Increasing by nearly 200 percent in that four-year period, leveraged loan outstandings were more than half a trillion dollars and secondary trading volumes reached $520 billion – a record that still stands today. Although hedge funds, loan mutual funds, insurance companies, and other investor groups played a large part in this phase of the loan market's expansion, the growth of the past three years had only been possible because of the emergence of CLOs; this type of structured finance vehicle changed the face of the leveraged loan market and was responsible for its revival after the Global Financial Crisis.

The Global Financial Crisis in 2008 led to a recession in the United States, a contraction of global supply and demand, and record levels of default rates. Several years passed before leveraged lending issuance was restored to pre-crisis levels, finally reaching $665 billion in 2012. And then in 2013, the market would enter into its next phase of expansive growth.

In 2013, record levels of refinancing activity drove leveraged lending volumes to an all-time high of $1.1 trillion – surpassing 2012's prior record by almost 50 percent. On the institutional side, lending reached $639 billion, surpassing 2012's prior record by almost 90percent. Lenders also financed a substantial amount of new loans in 2013, including a number of mega-sized deals such as Heinz and Dell. As a result, the size of the secondary loan market finally returned to its pre-crisis size, and by the end of June 2013, outstandings on the S&P/LSTA Leveraged Loan Index (LLI) equalled the previous record high of $595 billion set in late 2008. By year end 2013, the LLI had grown by a total of $133 billion to a fresh record of $682 billion. These record levels of supply were funded by record levels of demand. Although CLOs still dominated institutional lending activity in the primary leveraged loan market by accounting for 53percent of non-bank institutional lending, also notable was the leap forward taken by retail loan funds, which accounted for one-third of all non-bank institutional lending in 4Q13, a three-fold increase in three years. In total, a record $144 billion of new loan demand came to market through CLOs and retail fund in-flows. On the CLO side, new and old managers alike printed north of $81 billion in deals – about $14 billion ahead of the previous two years combined. CLO "2.0s" now manage roughly half of the $300 billion in U.S. CLO assets under management (AUM). On the retail side, investors contributed $63 billion to loan mutual funds in 2013 as they sought low duration, floating-rate assets. Loan fund AUM now exceeds $168 billion.

It was certainly a year for the record books but unfortunately secondary-trading volumes just missed their own entry. According to the LSTA's 4th Quarter Secondary Trade Data Study, annual trade volumes had remained range-bound in the $400 billion context for the past three years, seemingly the new normal. But in 2013, volumes reached $517 billion (2013's figure represented a post-recession high that was only $3 billion shy of 2007's all-time record high of $520 billion). Although secondary trading activity had been in steady decline since 2007, the asset classes' investment thesis (senior secured, floating rate, high risk-adjusted return) coupled with all the investment tools put in place years earlier – an independent pricing service (LSTA/TRLPC Mark-to-Market Pricing), a standard benchmarking tool (the LLI), ratings, and the standardisation of legal and market practices – have enabled today's secondary loan trading market to be even more liquid and transparent than it was before the financial crisis.

The Standardisation of a Market

No regulatory authority directly oversees or sets standards for the trading of loans in the United States, although, of course, loan market participants themselves are likely to be subject to other governmental and regulatory oversight. Instead, the LSTA leads the loan market by developing policies, guidelines, and standard documentation and promoting just and equitable market practices. The LSTA's focus is attuned to the distinctive structural features of the loan market which stem from the fact that corporate loans are privately-negotiated debt obligations that are issued and traded subject to voluntary industry standards. Because the LSTA represents the interests of both the sellers and buyers of leveraged loans in the market, it serves as a central forum for the analysis and discussion of market issues by these different market constituents and thus is uniquely placed to balance their needs and drive consensus.

Loan market participants have generally adopted the standardised documents and best practices promulgated by the LSTA. Although the LSTA is active in the primary market, where agent banks originate syndicated loans, it is most prominent in the secondary market, where loan traders buy and sell syndicated loans. Over the years, the Association has published a suite of standard trading documents: forms or "trade confirmations" are available to evidence oral loan trades made by parties and form agreements are available to document the terms and conditions upon which the parties can settle those trades. The adoption of the LSTA's standard trading documents by the market has directly contributed to the growth of a robust, liquid secondary market.

It is customary for leveraged loans to be traded in an over-the-counter market, and, in most instances, a trade becomes legally binding at the point the traders orally agree the material terms of the trade. Those key terms are generally accepted as including the borrower's name, the name, facility type, and amount of the loan to be sold, and the price to be paid for the loan. For commercial reasons, most U.S. borrowers choose New York law as the law governing their credit agreements, and for similar reasons, the LSTA has chosen New York as the governing law in their trading documentation. Since 2002, loan trades agreed over the telephone, like agreements relating to derivatives contracts and certain other financial instruments, have benefited from an exemption from a New York law which would otherwise require them to be set forth in a signed writing to be enforceable. Because of the LSTA's lobbying efforts, the applicable New York law was changed in 2002 to facilitate telephone trading. Thus, provided both parties have traded together previously on LSTA standard documentation, even if one party fails to sign a confirmation evidencing the terms of the trade, the loan trade will be legally binding and enforceable, if it can be shown that the parties orally agreed the material trade terms. This was a critical legislative reform that contributed to legal certainty in the loan market and harmonised its status with that of other asset classes.

After agreeing the essential trade terms, loan market practice requires that parties then execute a form of LSTA trade confirmation (the legislative change discussed above merely makes it possible legally to enforce an oral trade even if a confirmation has not been signed). Loans can be traded on what is referred to as par documentation or on distressed documentation. Two forms of trade confirmations are available for this purpose and the choice of which one to use is a business decision made at the time of trade. Performing loans, where the borrower is expected to pay in full and

on a timely basis, are typically traded on par documentation which means that the parties evidence their binding oral trade by executing an LSTA Par Confirmation and then settling the trade by completing the form of Assignment Agreement provided in the relevant credit agreement (the term par is used because performing loans historically traded at or near par). Alternatively, where a borrower is in, or is perceived to be in, financial distress or the market is concerned about its ability to make all interest payments and repay the loan in full and on a timely basis, parties may opt to trade the borrower's loans on distressed documentation. In this case, the trade is documented on an LSTA Distressed Confirmation, and the parties settle the transaction by executing the relevant assignment agreement and a supplemental purchase and sale agreement. The LSTA has published a form agreement for this purpose which has been refined over the years and is generally used by the market. This agreement includes, amongst other provisions, representations and warranties, covenants, and indemnities given by seller and buyer. The adoption of standard documents in this regard, particularly for distressed debt trading, significantly contributed to a more liquid loan market, for market participants, knowing that an asset is being traded repeatedly on standard documents, can then uniformly price the loan and more efficiently settle the trade.

When a loan is traded, the existing lender of record agrees to sell and assign all of its rights and obligations under the credit agreement to the buyer.[8] In turn, the buyer agrees to purchase and assume all of the lender's rights and obligations under the credit agreement. The parties must then submit their executed assignment agreement to the administrative agent which has been appointed by the lenders under the credit agreement. The borrower's and agent's consent is typically required before the assignment can become effective. Once those consents are obtained, the agent updates the register of lenders, and the buyer becomes a new lender of record under the credit agreement and a member of the syndicate of lenders.[9]

If, for some reason, the borrower does not consent to the loan transfer to the buyer, the parties' trade is still legally binding under the terms of the LSTA's Confirmation and must be settled as a participation.[10] The LSTA has published standardised par participation agreements and distressed participation agreements which may be used to settle par and distressed trades respectively where loan assignments are not permissible. Under this structure, the seller sells a 100 percent participation interest in the loan to the buyer and retains bare legal title of the loan. Although the seller remains a lender of record under the credit agreement and the borrower will not typically be aware that a participation interest in the loan has been sold, the seller must pass all interest and principal payments to the buyer for so long as the participation is in place. The transfer of a participation interest on LSTA standard documents is typically afforded sale accounting treatment under New York law. Thus, if the seller of the participation becomes a bankrupt entity, the participation is not part of the seller's estate, and the seller's estate will have no claim to the participation or the interest and principal payments related thereto.

The LSTA continues to expand its suite of trading documents but forecasts that it will play a more active role in the primary market in 2014. Later this year, it will release new versions of its primary documents, including an expanded publication of its Model Credit Agreement Provisions which will include language addressing refinancing mechanics, "amend and extends" whereby certain lenders may extend their loan's maturity date in exchange for a higher margin (pursuant to this post-financial crisis credit agreement development, only those lenders participating in the extension need consent to it), sponsor and borrower acquisitions of loans on the open market or through a "Dutch Auction" procedure, and guidelines regarding the borrower's creation and updating of a list of competitors it seeks to ban from joining the syndicate of lenders or acquiring participations in the loan (typically referred to as a "Disqualified Lender List").

Regulatory Challenges

The financial crisis and the myriad financial reform regulation it spawned has required the LSTA to be in frequent communication with regulators. The U.S. loan market faces regulatory pressure directly on leveraged lending and also on one of its key demand streams, CLOs. CLOs represented 53 percent of the institutional loan market in 2013, and CLO formation could be impaired (indeed, possibly even shut down) by Dodd-Frank's Risk Retention and Volcker Rule. The elimination of CLOs would leave a significant gap in the syndicated loan market – one not easily filled by banks in light of the regulators' "Guidance on Leveraged Lending" in effect as of May 2013 and the increased capital requirements to be implemented under Basel III and Dodd-Frank. In addition, FATCA – the Foreign Account Tax Compliance Act – poses additional challenges for the loan market.

Dodd-Frank's Volcker Rule has two components: (i) a ban on proprietary trading; and (ii) a ban on banks owning or sponsoring private equity funds or hedge funds. The final rules implementing the Volcker Rule were published in December 2013 – almost two years after the proposed rules were first released and the LSTA submitted its request for an exemption for CLOs. The final rules have a number of wins for the loan market: (i) loans were exempted from the proprietary trading restrictions imposed on banks for most other assets; and (ii) a clear path was set out for a complete exemption from the Volcker Rule for CLOs. However, in order to qualify for the exemption, CLOs may not hold any securities or structured products other than short-term cash equivalents. Moreover, if a CLO does not qualify for the exemption and is indeed a "covered fund" for purposes of the Volcker Rule, banks would be prohibited from holding its ownership interests. Because the final rules define ownership interest to include debt securities that have "indicia of ownership", such as the right to participate in the removal or replacement of the investment manager of the covered fund, it may not be possible for banks – the traditional owners – to hold CLO debt tranches. The LSTA has been actively campaigning for relief from the agencies, otherwise, banks will be required to divest or restructure these debt securities by July 21, 2015.

The second threat to CLO formation is Risk Retention, which requires securitisers of these vehicles to retain five percent of the credit risk of securitised assets. Although Dodd-Frank identifies the securitisers as those entities that initiate or originate an asset backed security by "selling" or "transferring" assets, the reproposed risk retention rules released in August 2013 actually target the CLO manager as the entity that selects loans to be purchased for inclusion in the CLO collateral pool and then manages the securitised assets once deposited in the CLO structure. CLO managers would presumably be required to retain CLO securities equal to five percent of the fair value of the CLO on their balance sheet for the life of the vehicle, without the ability to sell or hedge - an impossible requirement for all but a handful of CLO managers. Although the LSTA has urged an exemption for CLOs on the basis that there is actually no "securitiser" in an Open Market CLO because no one entity originates assets on its balance sheet and sells or transfers them to an issuer, the LSTA has been working extensively to craft an alternative retention scheme that would work for CLOs and the agencies The LSTA's proposal for a "Qualified

CLO" would require a CLO to be subject to a number of restrictions and protections, but for which a manager would only have to purchase and retain five per cent of the equity, not of the fair value of the deal. (For instance, $2.5 million of a new $500 million CLO, not $25 million.) It remains to be seen whether the agencies will adopt such a proposal in their final rules – expected this summer. Fortunately, CLOs would not be subject to risk retention until two years after the final rules are written (1Q2016 at the earliest).

Unfortunately, CLOs are not the only regulatory target – banks, too, face new challenges. In addition to the increased capital requirements to be implemented under Basel III and Dodd-Frank, the federal bank regulators' issued final Interagency Guidance on Leveraged Lending in March 2013 – replacing Guidance from 2001 – which could materially impact banks' ability to underwrite and hold certain types of leveraged loans. The Guidance allows banks to craft their own definitions of "leveraged lending" based on a number of enumerated criteria, such as companies which engage in an acquisition or recapitalisation transaction and companies with total leverage greater than four times, or senior leverage greater than three times, debt/EBITDA. The Guidance seeks to address not only loans arranged by banks, but also loans held by banks and takes a step further than the earlier guidance by addressing pipeline risk. Perhaps the most significant change in the Guidance is the suggestion that a loan to a company that cannot show the ability to amortise from free cash flow all its senior debt or half its total debt within five to seven years will likely be criticised. The Guidance also looks sceptically at loans to companies that would have leverage levels of six times or more after planned asset sales and also loans which lack meaningful maintenance covenants. Based on the language in the Guidance, the number of criticised loans a bank holds may significantly increase. Structured as guidance rather than rules, but with a compliance date of May 21, 2013, banks are struggling to understand exactly how to interpret the Guidance and fully comply. It remains to be seen if, and to what extent, the Guidance impacts banks' ability to engage in the leveraged lending business.

Finally, FATCA, enacted in 2010, imposes a 30 percent withholding tax on U.S. source payments to any foreign financial institution, for example, a foreign bank, offshore fund or CLO, which does not sign an agreement with the IRS and agree to provide information on its U.S. accounts. The final regulations implementing FATCA were published on January 17, 2013, although a six-month extension of some implementation dates was granted in July 2013. For loans, FATCA means a potential 30 percent withholding on interest payment, many fees, principal payments, and sales proceeds. FATCA hits loans especially hard, because while loans issued before the grandfathering deadline of July 1, 2014 are not subject to FATCA, loans are routinely amended and any material modification of a loan, such as a 25 basis points spread change or a tenor extension, is deemed a new loan for FATCA purposes and subject to FATCA withholding. Withholding on interest payments begins in July 2014 and withholding on principal payments and gross sale proceeds begins in January 2017. Unfortunately for the loan market, FATCA poses additional specific compliance problems for vintage CLOs, and the LSTA continues to engage with the IRS seeking permanent relief for vintage CLOs in further guidance.

Conclusion

Today's loan market certainly looks very different from that of before the financial crisis and represents a new and more challenging period for not only investors but also the LSTA. Loan prices are now said to be closely correlated to, and no longer shielded from, the daily price fluctuations of other asset classes. Although the risk-adjusted returns of leveraged loans are still advantageous, today's returns come with a higher level of volatility. In this environment, the LSTA remains committed to promoting a fair, efficient, and liquid market for loans and maintaining its position as the market's principal advocate.

Endnotes

1 Thomson Reuters Loan Pricing Corporation.

2 "Leveraged" is normally defined by a bank loan rating by Standard & Poor's of BB+ and below (by Moody's Investor Service, Ba1 and below) or, for non-rated companies, typically an interest rate spread of LIBOR + 125 basis points.

3 For a more detailed description on the loan market sectors, see Peter C. Vaky, *Introduction to the Syndicated Loan Market*, in THE HANDBOOK OF LOAN SYNDICATIONS & TRADING, 39 (Allison Taylor and Alicia Sansone, eds., 2007); Steve Miller, *Players in the Market*, in THE HANDBOOK OF LOAN SYNDICATIONS & TRADING, *supra*, 47.

4 Thomson Reuters Loan Pricing Corporation.

5 For a more detailed description of the history of the loan market, see Allison A. Taylor and Ruth Yang, *Evolution of the Primary and Secondary Leveraged Loan Markets*, *in* THE HANDBOOK OF LOAN SYNDICATIONS & TRADING, *supra*, 21.

6 Thomson Reuters Loan Pricing Corporation.

7 Thomson Reuters Loan Pricing Corporation.

8 For a detailed comparison of assignments and participations, see Richard Wight with Warren Cooke & Richard Gray, THE LSTA'S COMPLETE CREDIT AGREEMENT GUIDE, 507-508 (McGraw-Hill 2009).

9 For further information on the structure of assignments, *see id.* at 508-522.

10 For further information on the structure of participations, *see id.* at 522-527.

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LSTA

Since 1995, the Loan Syndications and Trading Association has been dedicated to improving liquidity and transparency in the floating rate corporate loan market. As the principal advocate for this asset class, we aim to foster fair and consistent market practices to advance the interest of the marketplace as a whole and promote the highest degree of confidence for investors in floating rate corporate loans. The LSTA undertakes a variety of activities to foster the development of policies and market practices designed to promote just and equitable marketplace principles and to encourage coordination with firms facilitating transactions in loans and related claims. For more information, please visit www.lsta.org.

Loan Market Association – An Overview

Loan Market Association

Nigel Houghton

Loan Market Association

Founded in 1996, the Loan Market Association (LMA) is the trade body for the syndicated loan market in Europe, the Middle East and Africa (EMEA).

The LMA's principal objective is to foster liquidity in the primary and secondary loan markets, a goal which it seeks to achieve by promoting efficiency and transparency, by the establishment of widely accepted market practice and by the development of documentation standards. As the authoritative voice of the syndicated loan market in EMEA, the LMA works with lenders, law firms, borrowers and regulators to educate the market about the benefits of the syndicated loan product, and to remove barriers to entry for new participants.

The purpose of this chapter is to give the reader an insight into the background and development of the LMA, the scope of its work, and recent and current initiatives.

Background to the LMA

Banks have bought and sold loans for decades but standard market practice is still relatively recent.

Growth in borrowing requirements in the 1970s had seen loan facilities, traditionally provided on a bilateral basis, increasingly replaced by larger credit lines from a club of lenders, and then by loan facilities syndicated to the wider market. In the US in the 1980s, a more formal secondary market evolved in parallel with demand on banks' balance sheets and into the 1990s also with the proliferation of non-bank lenders hungry for assets. Proprietary loan trading began to increase and crossed the Atlantic into Europe initially via London-based units of US banks.

By the mid-90s, the secondary market in Europe had itself evolved to become of increasing importance to banks looking to manage their loan book more actively, be it for single client exposure reasons, return on equity or otherwise. Proprietary trading added to its growing relevance. Despite this, it was evident to practitioners that the market, as it was at the time, lacked any standard codes of practice, was inefficient and opaque. In response, a group of banks agreed to form a market association tasked with promoting transparency, efficiency and liquidity and, in December 1996, the LMA was formed.

Initial Focus and Development

Within a few years of inception, the LMA had introduced standard form secondary trade documentation for performing loan assets and distressed debt, proposed standard settlement parameters and built out a contributor-based trading volume survey. Based on the success of the Association's secondary market initiatives, its remit was then broadened to cover primary, as well as secondary, loan market issues.

Just 2 years after it was founded, LMA membership had grown from an initial 7 founding bank practitioners to over 100 institutions. Steady growth since then has seen the membership base expand to 513 in 2013, including banks, non-bank institutional investors, law firms, ratings agencies and service providers from 52 countries.

The evolution of the market from the mid-90s to today and the requirements of its increasingly diverse membership have seen the LMA's work become broadly subdivided into the following categories:

- Documentation.
- Market guidelines.
- Advocacy and lobbying.
- Education and events.

An overview of each category, a brief market overview and outlook summary are given below.

Documentation

From secondary to primary

Following widespread adoption of the LMA's secondary trade documentation as the European market standard, focus was turned to primary documentation. A recommended form of primary documentation was developed by a working party which included LMA representatives and those of the UK-based Association of Corporate Treasurers (ACT), the British Bankers' Association (BBA), as well as major City law firms, with documents first launched in 1999. Involvement of the ACT and BBA from the outset played a major role in achieving broad acceptance of the LMA recommended forms among borrowers and lenders alike. This success was complemented by the subsequent addition of other forms of primary documentation, including a mandate letter and term sheet.

Following the English law recommended forms in terms of format and style, French law (2002) and German law (2007) versions of investment grade primary documentation were later developed, further broadening general acceptance of LMA standards.

From corporate to leveraged and beyond

The increasing importance of the European leveraged loan market in the early 2000s saw the Association also focus on the development of standardised leveraged loan documentation, with recommended forms agreed in early 2004.

All proposed forms of documentation produced by the LMA are to be regarded as a starting point for negotiations, with the expectation that the more complex the transaction, the more tailoring will be required. This notwithstanding, the fact that all documents have been developed after extensive consultation with market practitioners has led to the recommended documents being viewed as a robust framework upon which to base subsequent individual negotiations. This is particularly true of the leveraged document, where significant input was also sought from non-bank investors within the membership via an institutional investor committee.

As the financial crisis of 2007 began to bite, work commenced on a recommended form of intercreditor agreement, a document generally bespoke to the structure of each transaction. Launched in 2009, the document met with market-wide acclaim again as a robust framework and as the product of comprehensive discussion by market practitioners.

Historically, the LMA's principal focus has been on documentation relating to corporate investment grade and leveraged loans, alongside a full suite of secondary loan trading documentation. However, in recent years, and in response to member demand, the association has significantly expanded its coverage. 2012 saw the launch of a commercial real estate finance document for multi-property investment, a facility agreement for developing markets and a pre-export finance facility agreement. The LMA continued to expand its suite of documentation in these areas in 2013, with the launch of a single property development finance facility agreement, and four further facility agreements intended for use in developing markets transactions.

Back within the leveraged corporate market, Q4 2013 saw the launch of an intercreditor agreement and super senior revolving credit facility for use in conjunction with a high yield bond.

For 2014, a real estate finance intercreditor agreement is in the pipeline, to sit alongside the multi-property investment agreement. In February 2014, the association published a guide to Schuldschein loans, the result of extensive collaborative work by a working party based in Germany. Appropriately the guide has been published in both German and English. The LMA has also announced its intention to produce a standardised template for European private placements.

Review and development

In response to member feedback, market developments, legislation and regulation, the LMA's document library is constantly reviewed and updated. Primary and secondary recommended forms have undergone several revisions and seen some significant amendments, a notable example being the combination of secondary par and distressed trading documents in 2010, updated once again in 2012. Continuing the theme, terms & conditions for secondary loan trading were subject to a full "Plain English" review in 2013 with the goal of making these more navigable, particularly for those whose native language is not English.

Market Guidelines

LMA guidelines are widely regarded as defining good market practice and typically address those aspects of loan market business not specifically documented between parties. Guidelines produced include those covering the use of confidential information, a guide to waivers and amendments and transparency guidelines.

As the market has evolved so has the investor base and with it the LMA's role in the provision of market guidance. Where new sources of liquidity are sought, the LMA can provide such guidance and reassurance in a private and unregulated market.

Advocacy and Lobbying

The LMA seeks to maintain a dialogue with regulators and government bodies wherever new or revised regulatory proposals may impact the loan market, whilst also proactively promoting the market as a core funding source in the corporate economy. Since the financial crisis of 2007, this area of the Association's work has grown in importance as the number of new regulatory proposals has dramatically increased. Policy decisions underlying the new proposals are largely to be supported, the overarching aim being a more robust financial system better able to shoulder economic shock and withstand periods of stress. The LMA's lobbying focus has been on the potentially negative implications of these proposals for the loan market, both intentional and unintended, and the effects on its members.

Clearly, with Basel III likely to come into legislative force in the near term, there has been market-wide discussion of the potential impact of the new Liquidity Coverage Ratio (LCR) and Net Stable Funding Ratio (NSFR) proposed by the Basel committee, with banks' balance sheets likely to be constrained by the restrictive regulation. Recent regulatory developments are manifold, however, and the LMA has sought to make representations on behalf of its membership on all relevant issues.

Over recent years, the LMA has actively lobbied regulators in the UK, EU and US on various proposals potentially impacting the loan market. Responses to regulatory bodies are too numerous to list. Examples of activity in this field are submissions to the Internal Revenue Service in the US regarding certain provisions under the Foreign Account Tax Compliance Act ("FATCA"), also to the European Commission relating to the drafting and interpretation of the Capital Requirements Directive IV and the Commission's consultation on shadow banking. Proactive lobbying has led to tangible results, including confirmation from the Securities Exchange Commission and the Commodity Futures Trading Commission that US derivatives regulations under Dodd-Frank were not intended to capture LMA-style participations, and confirmation from the European Banking Authority that risk retention requirements in new Collateralised Loan Obligations are to be kept at 5% (*cf.* Article 394 CRD IV, previously referred to as Article 122a). Other notable dialogue includes a response to a European Commission consultation to request that the list of eligible assets under Article 50 of the UCITS IV Directive be expanded to include certain types of loan. Also, following consultation with a working party comprising a cross-section of its membership, the LMA recently responded to a European Commission consultation on the need to overcome barriers to long-term financing and diversify the system of financial intermediation for long-term investment in Europe.

The LMA expects to continue to play a leading role in the dialogue with regulators going forward, from Basel III to risk retention, from FATCA legislation to UCITS.

Education and Events

As a core objective, the LMA seeks to educate members and others regarding documentation and legislative, regulatory, legal,

accounting, tax and operational issues affecting the syndicated loan market in EMEA. As the industry's official trade body, the LMA is the ideal education and training resource for what has become an increasingly technical market. Relationships with the key players in the market afford the LMA access to some of the leading experts in their field and as such the credentials of contributors can be guaranteed.

Evening seminars and documentation training days are regular calendar events in the UK. Also, to reflect the multi-jurisdictional membership base, seminars and conferences are held in many other financial centres, including Frankfurt, Paris, Milan, Stockholm, Moscow, Dubai, Nairobi, Lagos, Johannesburg and New York.

In September 2013, 800 delegates attended the LMA's 6th annual Syndicated Loans Conference in London, the largest loan market event in EMEA. In total, over 20,000 delegates have attended LMA events across EMEA in the last 6 years.

In 2005, the inaugural LMA Certificate Course was held in London. Consistently oversubscribed, the course is now entering its 9th year and will be run four times in 2014. Held over 5 days, the course covers the syndication process through to secondary trading, including agency, portfolio management, pricing and mathematical conventions, terms sheets and an introduction to documentation.

The Syndicated Loans Course for Lawyers is a 2-day programme, designed specifically for those working in the legal profession, providing detailed tuition on all aspects of the primary and secondary loan markets.

In 2011, the LMA published The Loan Book, a comprehensive study of the loan market through the financial crisis, with contributions from 43 individual market practitioners. Over 10,000 copies of The Loan Book have been distributed to date since publication. In 2013 the association published Developing Loan Markets, a volume dedicated to the analysis of various regional developing markets, both from an economic and loan product perspective.

The first in a series of market guides, Regulation and the Loan Market, published late 2012, also met with considerable interest from the membership. This publication has subsequently been updated to reflect ongoing regulatory developments. Other guides in the series include Insolvency in the Loan Market, Using English Law in Developing Markets and Guide to Syndicated Loans and Leveraged Finance Transactions.

Other Initiatives

Operational issues have long been raised by LMA members as an area of concern, particularly around administrative agency and the potential for significant settlement delays in the secondary market. Syndicate size alone can lead to process overload when waivers and amendments are combined with transfer requests. The LMA is in dialogue with both agency and operations representatives from its membership, along with commercial service providers, to scope the potential for increased automation. The LMA also continues to work closely in this regard with its sister association in the US, the LSTA.

Market Overview

A detailed study of the development of the syndicated loan market in EMEA, particularly post the financial crisis of 2007, is beyond the scope of this chapter. The Loan Book, as mentioned above, gives a practitioner's overview and detailed reference guide. It goes without saying, however, that the crisis sparked by the US sub-prime mortgage market had a significant impact. Fuelled by an abundance of liquidity, particularly from institutional investors in the leveraged market, primary volumes in EMEA soared in the years building up to the crisis. The liquidity crunch saw primary issuance fall dramatically by 2009 to barely one-third of the record $1,800BN seen in 2007. Volumes recovered some ground through to 2011 but dipped again in 2012 against the backdrop of the Eurozone sovereign debt crisis and the US "fiscal cliff". In contrast, 2013 saw markets rebound and loan issuance increase substantially. Policy intervention and specifically the Outright Monetary Transactions programme announced by the ECB in the 2nd half of 2012 was a significant driver of confidence. At just over $1,000BN, 2013 volumes in EMEA were up 30% year on year. Issuance volumes in leveraged finance recovered particularly strongly, more than doubling levels seen the prior year.

Demand for the leveraged loan product has spread across a broader investor base than seen prior to the 2007 financial crisis. Institutional investors have also become more visible in other loan asset classes, such as real estate and infrastructure finance. Several funds have more recently been set up to lend directly to small and medium companies, particularly in the UK. Retrenchment by banks post crisis opened the door to alternative sources of finance across the loan market and many institutions are now established participants. A significant driver of institutional demand within leveraged finance pre-crisis, the CLO returned to European markets in 2013 with new vehicle issuance volume of €7.4BN, compared with virtually zero since 2008.

The Way Forward

Results from a survey of LMA members at the end of 2013 suggest that market participants expect overall growth to continue into 2014. Some 60% of respondents expect loan market volumes across EMEA to increase by more than 10% year on year. Competitive pressure was cited as the single biggest influencing factor on the syndicated loan market in the short term, replacing regulatory requirements which topped the poll the previous year. As the final detail and implementation of regulatory measures become clearer and nearer, however, the LMA's focus on lobbying and advocacy will continue unabated.

Other trends will also determine the focus of the LMA's work into 2014 and beyond. With bank capital constraints in mind, we have seen borrowers access funding sources on an increasingly global basis and the LMA will continue to work to promote further cross-border liquidity. The institutional investor base will continue to grow and non-bank finance will increase in importance across loan asset classes; the LMA will seek to give voice to investors in all market sectors. Developing markets will continue to grow and more borrowers will begin to require funding from beyond domestic boundaries; the LMA will continue and expand its work in these markets to promote the acceptance of regional standards. In December 2013 the LMA announced the integration of the African LMA. By combining experience and resources, coverage of markets across the African continent will increase significantly. Through 2014 a series of events will be held in several African regions.

The LMA's principal objective some 17 years ago was to promote greater liquidity in the syndicated loan market, an objective which remains as, if not more, relevant today.

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Nigel joined the LMA as a Director in 2012. He has over 20 years' experience in banking and finance with a focus on debt capital markets. Nigel joined the LMA from GE Capital in London where he was Head of Secondary Sales & Trading within Leveraged Finance Capital Markets. During 10 years at Commerzbank AG, Nigel was an LMA Board Member for several years and a founding member of the bank's London-based Structured Finance & Loan Syndications team. Nigel began his career in banking via a graduate programme at Deutsche Bank AG following training at Coopers & Lybrand Deloitte. Nigel has a BA (Hons) from the University of Durham.

Loan Market Association
the authoritative voice of the European market

The Loan Market Association (LMA) has as its key objective improving liquidity, efficiency and transparency in the primary and secondary syndicated loan markets in Europe, the Middle East and Africa (EMEA). By establishing sound, widely accepted market practice, the LMA seeks to promote the syndicated loan as one of the key debt products available to borrowers across the region.

As the authoritative voice of the syndicated loan market in EMEA, the LMA works with lenders, law firms, borrowers and regulators to educate the market about the benefits of the syndicated loan product, and to remove barriers to entry for new participants.

Since the establishment of the LMA in 1996, the Association's membership has grown steadily and now stands at 490 organisations covering 46 nationalities, comprising commercial and investment banks, institutional investors, law firms, service providers and rating agencies.

Asia Pacific Loan Market Association – An Overview

Asia Pacific Loan Market Association

Janet Field

About the APLMA

2014 marked the 15th anniversary of the Asia Pacific Loan Market Association (APLMA). Founded in 1998, the APLMA is a pan-Asian not-for-profit industry association dedicated to promoting growth and liquidity in the primary and secondary loan markets of the Asia-Pacific region, and advocating best practices in the syndicated loan market.

The APLMA is headquartered in Hong Kong with branches in Singapore and Australia. Due to the size and diversity of the Asia Pacific region, the operations of the APLMA are decentralised. As well as the branch network, the APLMA has a number of offshore committees in China, Taiwan, Malaysia, India and New Zealand, and we aim to continue to establish new chapters in the key markets of the region, as well as forging working relationships with other associations in the region.

The APLMA currently has 245 institutional members from Asia Pacific, Europe, the US and the Middle East. Membership comprises commercial and investment banks, non-bank financial institutions, law firms, rating agencies, financial information service providers and online trading platforms. There are also ten Honorary members comprising regional regulators and trade associations.

The APLMA represents the common interests of the many different institutions active in the syndicated loan markets across Asia. The Association's key objectives are to:

- provide leadership in the syndicated loan industry and act as the collective voice of the members;
- promote growth and liquidity in Asia's primary and secondary loan markets;
- facilitate the standardisation of primary and secondary loan documentation;
- develop and promote standard trading, settlement and valuation procedures;
- develop the secondary market for loan sales and trading;
- promote prudent banking practices;
- serve as a liaison between major loan market players and regional regulators;
- monitor legislative, regulatory and market changes for impact on the syndicated loan market;
- enhance industry education through seminars, conferences and training courses; and
- provide a dynamic professional pan-Asian networking forum.

The APLMA works together with its sister associations in Europe and North America to advocate common market standards and practices with a view towards improving global loan market liquidity. Through its close contact with the Loan Market Association (LMA) in London, the Loan Syndications and Trading Association (LSTA) in New York, and other associations across Asia, the APLMA monitors global market trends as part of its efforts to more closely integrate the Asian loan markets into an increasingly globalised loan market.

Standard Documentation

Documentation has been a core focus of the APLMA since its inception and one of the association's key missions is to standardise both primary and secondary documentation for syndicated loan transactions in the Asia Pacific markets. The APLMA documents have rapidly become the market standard for Asia.

The first APLMA template, launched in 1999, was a par trade loan document substantially modelled on the template of the LMA in London. Since then, all APLMA templates have been modelled on the LMA standards.

In 2000, the APLMA entered into an agreement to adapt the LMA's standard primary loan documentation for use in the Asia Pacific region. A multicurrency term loan facility agreement was launched in the same year based on the LMA primary document for investment grade corporates.

This was followed by the launch of a suite of secondary par trading documents in a joint initiative with the LMA. Following consultation with its members, the APLMA elected to adopt the LMA standard secondary documents, which were drafted in consultation with the APLMA Documentation Committee. Whilst used widely by the APLMA membership, these documents are branded as LMA documents as they are identical to those used by the LMA, unlike the primary market documents. The APLMA also produced its own Trader Check List.

Different Jurisdictions

In addition to the English law and Hong Kong law documents, the APLMA has produced Australian Law and Singapore Law standard templates, and a Chinese translation (for reference purposes only).

The first Australian law document, launched in 2001, was produced under the direction of the APLMA Australian Documentation Committee. The documents have been adapted to reflect the unique features of Australian law and local market practices. This was followed by the launch of the S.128F loan note structure documents (multicurrency term and revolving facilities subscription agreement and loan note deed poll).

A Singapore law single currency term and revolving facility agreement followed to provide a standard template for the Singaporean market.

Other Templates

As well as the primary facility agreements, the APLMA has developed a number of templates to provide alternative wording for use by members.

A financial covenants template provides sample wording on financial covenants commonly applicable to investment grade borrowers. In the APLMA primary facility agreement, the financial covenant section is left blank.

The APLMA has also produced a sample Asia arbitration clause with a litigation option for a hybrid dispute resolution process (under such process both parties are required to submit all disputes to arbitration). The sample clause provides various options under which arbitration can be administered.

A suite of standard confidentiality letters includes templates for primary syndication and for sale/sub-participation/CDS under both English law and Hong Kong law.

Documentation Updates

In 2011, the APLMA Documentation Committee produced revised primary and secondary confidentiality undertakings and jurisdiction clause language for hybrid arbitration, and made a number of revisions to the Hong Kong Law and English Law single currency agreements in line with LMA revisions and market changes.

These amendments were then cloned into the multicurrency term and revolving facilities agreements. A full set of English law templates was rolled out including:

i) APLMA multiple borrower, multiple guarantor, single currency term facility agreement (English Law);

ii) APLMA single borrower, single guarantor, single currency term facility agreement (English Law); and

iii) APLMA multiple borrower, multiple guarantor, multicurrency term and revolving facilities agreement (English Law).

In 2013, all primary Hong Kong law and English law documentation templates were further revised to reflect the additional changes to the LMA documents and market changes, including new wording on market disruption and Basel III and a new footnote on FATCA.

New Hong Kong law and Australian law secured facility agreement templates were also rolled out. The secured facility agreements are based on the APLMA multiple borrower, multiple guarantor, multicurrency term and revolving facilities agreement, but with additional provisions which are typically required if security is granted, and incorporate security agency provisions.

The APLMA Australian Branch also produced a new AUD bilateral term and revolving facilities agreement and new language in respect of the Personal Property Securities Act.

Major Projects 2014

The APLMA is currently revising all primary documents to incorporate the new "IBOR" definition and the change in LIBOR administrator from the British Bankers Association to ICE Benchmark Administration which was announced in February 2014.

A new Singapore Documentation Committee was formed in 2013 and this committee is close to finalising a suite of updated Singapore law templates which are expected to be launched in 2014.

Other than revisions of the primary facility agreements, the following document templates are also scheduled for roll-out in 2014:

i) English law and Hong Kong law mandate letters and term sheets for "unsecured" and "secured" transactions respectively;

ii) offshore RMB (CNH) facility provisions; and

iii) an updated Chinese translation of standard templates to reflect recent template revisions.

Agency Issues

The APLMA Agency Committee was formed in 2012 as a sub-committee of the Documentation Committee to review agency provisions in the documentation, and to provide a forum for discussion on issues relating to the agency function. It has since become a separate Committee in its own right.

Over the past year, the Agency Committee has drafted sample wording for a number of agency related provisions such as snooze you lose, break costs, and interpolated rates for members' reference whenever any of these provisions is applicable. A number of Agency Notes were produced and passed to the Documentation Committee for incorporation, where appropriate, into the APLMA standard agreements.

As the use of websites is now the norm in the loan market, the Agency Committee has drafted a new note with suggested provisions on e-communications and the use of deal sites which will be formally rolled out in 2014 to provide guidance on best market practice and proper usage.

Regulatory Issues

Regulatory issues continue to be at the forefront of the APLMA's remit. Regulators across the globe continue to introduce legislation to bring further regulation to the financial markets. Some of these are unique to individual jurisdictions, and some are being co-ordinated across the global markets. These will impact all areas of banking products and services.

The APLMA has been hosting a series of regulatory seminars across the region to update members on how these regulatory changes will impact on the loan market in Asia, with particular focus on the ongoing development of the Basel III proposals and implementation in Asia, extra territoriality issues embedded within European and US legislation, and the introduction of taxes on banks' businesses, such as those levied under FATCA and how these will impact on Asian financial institutions and transactions.

In 2013, the APLMA produced a new FATCA Guidance Note for Agents. The APLMA also recommends that members refer to the LMA FATCA riders (which are available to all members on the APLMA website) which were revised following the release of the final FATCA regulations issued by the US in January, 2013 and further updated in July 2013 following the IRS update.

CNH HIBOR Fixing

The APLMA China Working Group was formed to facilitate the growth and development of the offshore RMB (CNH) syndicated loan market. One of the key challenges identified by the Working Group was the requirement for a standard CNH HIBOR reference rate. The committee held a number of consultations with the

Treasury Markets Association (TMA) and in June 2013 the TMA announced the launch of a new CNH HIBOR fixing. This includes tenors from overnight to 12 months and provides a formal benchmark for market participants to make reference to in pricing CNH loans.

The next step, as the market develops, will be for the APLMA to draft new standard CNH provisions to facilitate the ongoing development of the market.

Best Market Practices

The APLMA has drafted a set of non-binding recommendations on best practice in the Asian cross-border syndicated loan market. In establishing best practice, the APLMA aims to help to reduce disputes between banks or users of the syndicated loan market in areas where best practice is unclear. Over the past year, a number of new recommendations were drafted relating to the following issues:

i) fee sharing among MLAs with different final holds;

ii) listing of banks in communications such as tombstones, information memoranda and cover pages of facility agreements;

iii) confidentiality undertakings; and

iv) amendments and waivers.

In 2014, best practices will continue to form a key focus as the APLMA looks to address some of the regulatory changes and how they are impacting on our members.

Education and Training

As part of its commitment to enhancing industry education and providing a vibrant pan-Asian professional network, the APLMA holds over 70 seminars, conferences, training courses and networking events each year in all the major financial centres, most of which are free of charge.

These include a programme of documentation training and regulatory seminars across the region, as well as specialist seminars on a range of issues including the secondary and distressed markets, leveraged finance, project finance, Islamic finance and an institutional seminar.

The two largest events of the year are the APLMA 3rd Annual Global Loan Market Summit, which this year was held in Hong Kong on 13 February in association with the LMA and the LSTA, and the APLMA 16th Annual Asia Pacific Syndicated Loan Market Conference which will be held on 4-5 June in Macau. These conferences tackle topical issues such as trends and developments in the regional and global loan markets, economic indicators, leveraged finance, the secondary market, and the outlook for growth.

Each year, the APLMA also holds a series of 1-week Syndicated Loan Certificate Courses. This hands-on workshop style course is aimed at members new to the syndicated loan market and focuses on how to structure, price and document syndicated loans.

Other events include overseas conferences in China, Taiwan, India, New Zealand, Indonesia and Malaysia, the APLMA Young Leaders' series for members with less than five years' experience, and the Women's series aimed at providing mentoring and professional development for women in the loan market.

APLMA Awards

A recent major development was the introduction of APLMA-sponsored Awards for the syndicated loan market as an independent alternative to those organised by financial magazines.

The APLMA Awards are voted on by industry professionals, they are anonymous, and no one has to pitch. As an industry body, APLMA members, who are all active in the syndicated loan market, are ideally placed to decide who to vote for based on their own discretionary criteria.

Banks and law firms are not allowed to vote for themselves in the bank and legal categories, but can vote for deals they participated in. The votes are then counted by an external independent accountancy firm in the interests of neutrality.

The APLMA Awards are not tied into any form of sponsorship, and the names of the winners are a closely guarded secret, only revealed at the Awards Ceremony.

Looking Ahead

In mid-January, the APLMA chairman and two APLMA branch chairmen were asked to state their wish for the coming year.

APLMA Chairman Atul Sodhi said "Asia-Pacific loan volumes had a record year in 2013 – Thomson Reuters figures show an annual increase of 50%. An important feature was the return of underwriting, which was partially due to the lack of economic shocks and greater predictability of the economic environment. My wish is that the economic outlook remains positive to give companies the confidence to invest and as a result borrow and, in turn, that banks have the confidence to grow their business and help create strong deal flow".

Aditya Agarwal, Singapore Branch Chairman commented that "loan markets have been quick off the block in 2014 – a slew of launches in December have meant we were all busy playing catch up in January. However, upcoming elections in the two largest democracies in Asia (India, Indonesia) coupled with an uncertain political climate in Thailand threaten to dampen the enthusiasm of borrowers and investors alike. Along with China, India and Indonesia are the three largest markets for G3 loans in the region and a 'sub-optimal' political situation could derail the strong momentum of the last few months".

Sean Sykes, Australian Branch Chairman added that "from the Australian perspective, the fourth quarter of 2013 saw a significant positive shift in confidence which unlocked greater intent and issuance. My wish is for this positive sentiment to prevail over 2014 because if it can we will see a great year for the loan market, with more event-driven activity, strong volumes and more demand for underwriting and arranging. More transactions will require distribution onshore and, equally importantly, offshore to banks and institutions in Asia".

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Founded in 1998, the APLMA is a pan-Asian not-for-profit industry association dedicated to promoting growth and liquidity and advocating best practices in the primary and secondary loan markets of the Asia-Pacific region. Its main tasks include:

- providing standard loan documentation templates;
- formulating guidelines on market practices;
- organising seminars, trainings and networking events;
- monitoring legislative, regulatory and market changes for impact on the syndicated loan market; and
- serving as a liaison between major loan market players and regional regulators.

The APLMA is headquartered in Hong Kong. It has branches in Australia and Singapore and offshore committees in China, India, Malaysia, New Zealand and Taiwan. Currently it has 245 institutional members from Asia Pacific, Europe, the US and the Middle East. Membership comprises commercial and investment banks, non-bank financial institutions, law firms, rating agencies and financial information service providers.

Chapter 4

An Introduction to Legal Risk and Structuring Cross-Border Lending Transactions

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1. Introduction: The Rise of Cross-Border Lending

Increase in Cross-Border Lending. For lenders and lawyers who practice in the cross-border lending area, whether in the developed economies or the emerging markets, this is a dynamic and exciting time. Cross-border lending has increased dramatically over the last couple of decades in terms of volume of loans, number of transactions and number of market participants. According to the Bank for International Settlements, the amount of outstanding cross-border loans held by banks worldwide was approximately $6.85 trillion in 2013, an increase from $1.71 trillion in 1995. There are many reasons for this increase: the globalisation of business and development of information technology; the rise of emerging economies that have a thirst for capital in order to develop their economies to their full potential; and the development of global lending markets, especially in the US, which has led to a dramatic rise in the number of market participants searching for the right mix of yield and risk in the loan markets, a search that often leads to cross-border lending opportunities.

Challenges of Cross-Border Lending. In addition to understanding the creditworthiness of a potential borrower, the overlay of exposure of a lender to a foreign jurisdiction entails analysis of a myriad of additional factors, the weighting of which will vary from country to country, and many of which are overlapping. This mix of political, economic and legal risks, bundled together, are referred to collectively as *country risk*. Understanding country risk is imperative for a lender to a cross-border loan and for investors to be able to compare debt instruments of similarly-situated companies located in different countries.

Examination of Legal Risk. This first overview chapter of the Guide provides some observations on an element of country risk that is closest to the hearts of lawyers: *legal risk*. Together with tax considerations, understanding legal risk can be important for structuring cross-border loan transactions. But what exactly is legal risk? Can legal risk be measured? What tools do lenders traditionally use to mitigate legal risk? Do these tools work? Finally, we complete this chapter with some observations on how conventional notions of legal risk are being challenged.

2. Legal Risk in the Cross-Border Lending Context

What is Legal Risk? Young lending lawyers are taught that when a loan transaction closes, "the borrower walks away with a pile of the lender's money and the lender walks away with a pile of paper *and the legal risk*". If the borrower refuses to pay the money back, then the lender must rely on the *pile of paper and the legal process*, in order for the money to be returned. This notion helps drive the point home that legal risk is primarily something that keeps lenders (rather than borrowers) awake at night. While there is no settled description of legal risk, it can be thought of as having a number of components, starting with *documentation risk*, which is mitigated by having competent counsel ensure that legal documentation correctly reflects the business arrangement and is in the proper form. In a cross-border lending context it is useful to think of legal risk as having two additional related and sometimes overlapping components: (1) *enforcement risk* and (2) *the risk of law reform*.

Enforcement Risk. Lenders want to enter a lending transaction knowing that a number of "enforcement components" are in place to allow for enforcement of loan documentation (*that pile of paper*) and to resolve disputes and insolvency in a predictable way. These components include a well-developed body of commercial law, an independent judiciary and an expedient legal process. This reliance exists in the context of an unsecured loan, a secured loan or an insolvency of the borrower, since as a general matter courts have the power to adjudicate issues with respect to property of a company located in their jurisdiction. Thus, in a cross-border lending context, especially if a borrower's primary assets are located in a foreign jurisdiction, there is typically some reliance by a lender on the laws, legal institutions and legal process of that foreign jurisdiction.

For example, a US lender seeking to enforce a loan agreement against a foreign borrower could do so in one of two ways. Assuming the borrower has submitted to the jurisdiction of New York courts, the lender could file suit in New York against the borrower, obtain a judgment from a New York court, and then seek to have that judgment enforced against the assets of the borrower in the borrower's home country. In the alternative, the lender could seek to enforce the loan agreement directly in the courts of the foreign jurisdiction. In either case, there is reliance on the laws, institutions and legal process in the borrower's home jurisdiction. If the foreign jurisdiction's local law is not consistent with international norms, or its legal institutions are weak, corrupt or subject to undue political influence, then enforcement risk may be considered high. It should be noted that enforcement risk may be high even in a jurisdiction that has modernised its commercial laws if legal institutions have not also matured (the latter taking more time to achieve).

Law Reform Risk. Lenders also want to know that the laws they are exposed to in connection with a loan to a borrower will not arbitrarily change to the lender's detriment. This aspect of legal risk is closely associated with political risk. Law reform risk detrimental to lenders is at its highest when a country is undergoing

some sort of systemic crisis. For example, in 2002 during Argentina's financial crises, the government of Argentina passed a law that converted all obligations of Argentine banks in US dollars to Argentine pesos. Given that pesos were only exchangeable at a fixed rate that did not accurately reflect a true market rate, this change in law had the effect of immediately reducing the value of the lenders' loans.

Why Legal Risk Matters. If enforcement risk is high, this weakens a lender's negotiating position in the case of a workout of a loan (as compared to a similarly situated borrower in a country where enforcement risk is low). If law reform risk is high, lenders risk a multitude of unsettling possibilities, some examples of which are described below. In each case, this increased risk should be reflected in increased pricing. In cases where the risk and/or pricing of a loan is considered too high, then a loan transaction may be structured in order to attempt to mitigate the legal risk and/or reduce pricing. Lenders have a number of tools at their disposal in order to mitigate legal risk. In this way, loan transactions that might otherwise not get done, do get done.

3. Can Legal Risk be Measured?

Before examining ways to mitigate legal risk, it is interesting to examine the extent to which legal risk can be measured. Measuring legal risk certainly is not an exact science, though it nevertheless can be a useful exercise to consider yardsticks that might provide a sense of one country's legal risk relative to another's. A threshold challenge is that while there are many tools available to measure *country risk*, as mentioned above legal risk is only one component of country risk. Nevertheless, there are some tools that may be helpful. In terms of measuring legal risk, the conventional wisdom is that developed economies have stronger legal institutions and less legal risk when compared to emerging market jurisdictions.

The Usefulness and Limitations of Sovereign Ratings. Sovereign ratings measure the risk of default on a sovereign's debt. These ratings are useful to get a "systemic" view of how a country is doing economically. A country that has a high sovereign debt rating is likely to be financially stable. A country that is financially stable is less likely to undergo systemic stress, at least in the short term, and therefore less likely to undergo *law reform* adverse to lenders (remember the link between systemic stress and law reform noted above).

But does it follow that there is a correlation between a sovereign's rating and *enforcement risk* against private borrowers in the sovereign's jurisdiction? A sovereign's risk of default on its debt instruments may be low because the country has extensive state-owned oil production that fills the country's coffers. This would not necessarily indicate that a country's legal institutions would fairly and efficiently enforce a pile of loan documents against a borrower in that jurisdiction – the legal institutions in such a country might be as corrupt and/or inefficient as the day is long. While a quick review of sovereign ratings does suggest that there is at least some correlation between ratings and enforcement risk, there are also some outliers (for example, at the time of the writing of this article, Bermuda and China have similar sovereign ratings, though international lenders probably consider enforcement risk to be more significant in China than in Bermuda).

Sovereign Rate Spreads and Sovereign Credit Default Swap Prices. One of the simplest and most widely used methods to measure country risk is to examine the yields on bonds issued by the country in question compared to a "risk free" bond yield (still usually considered the US, notwithstanding the recent credit downgrade). A comparison of sovereign debt credit default swap prices provides a similar measure. As with sovereign ratings, this tool is useful to obtain a measure of potential systemic stress and *law reform risk* but seems less useful in terms of measuring *enforcement risk* of a borrower in that jurisdiction for the same reasons provided above.

Recovery after Default Analysis. A type of analysis performed by ratings agencies that might be considered useful for measuring legal risk from country to country is corporate default and recovery analysis. A reasonable hypothesis might be that the average recovery for creditors after a borrower default would be higher countries with low legal risk: stronger institutions means higher recoveries for creditors. But a review of the data suggests there is little or no such correlation. Why is this? There are a few possible explanations: recovery rates depend on a variety of factors other than legal risk, including the severity of default and the makeup of the individual borrowers subject to the analysis. It also is probable that lenders in a country with strong legal institutions (and low risk) may be more willing to make "riskier" loans (based on a portfolio theory of investment) given they have confidence in the jurisdiction's strong legal institutions to resolve defaults and insolvency in a predictable manner.

World Bank "Doing Business" Rankings. The World Bank publishes an interesting study each year titled the *Ease of Doing Business Rankings*. These rankings rate all economies in the world from 1 to 185 on the "ease of doing business" in that country, with 1 being the best score and 185th the worst (see http://doingbusiness.org/rankings). Each country is rated across eleven categories, including an "enforcing contracts", "resolving insolvency" and "protecting investors" category. The rankings provide a helpful tool for comparing one country to one another. While there is not space to detail the methodologies of the rankings in this chapter, the methodologies can produce some strange results. For instance, in the 2013 rankings both Belarus and the Russian Federation have a better "enforcing contracts" score than Australia. Nevertheless, these rankings can be a useful benchmark and are worthy of mentioning.

Subjectivity. Ultimately, in addition to the quantitative and qualitative data described above, a lender's perception of the legal risk of lending into a particular country will be driven by a number of geographic, historical, political, cultural and commercial factors peculiar to the lender and the country in question. For example, as a general matter, French lenders seem more comfortable than US lenders when lending to borrowers in Africa, while US lenders seem generally more comfortable than French lenders lending to borrowers in Latin America. (English lenders seem comfortable lending anywhere!) Lenders will measure legal risk differently based on their institution's experience and tools at hand to work out a loan should it go bad.

4. Tools Used to Mitigate Legal Risk

The fact that a borrower is located in a jurisdiction with a high level of legal risk does not mean that a loan transaction cannot be closed. Lenders have been closing deals with borrowers in far-off lands since the Venetians. Today, lenders use a number of tools to help mitigate legal risk, both in terms of structuring a transaction and otherwise. These concepts are used in all sorts of financings, from simple bilateral unsecured corporate loans to large, complicated syndicated project financings with a variety of financing parties. Which of these tools will be available to a lender will depend on a variety of factors, especially the relative negotiating positions of the borrower and lender for a particular type of transaction. Observations on the effectiveness of certain of these tools in practice are provided in section 5.

Governing Law. As a starting point, the choice of governing law of a loan agreement is important because it will determine whether a contract is valid and how to interpret the words of the contract should a dispute arise. The governing law of most loan agreements in international transactions has historically been either New York or English law. This is primarily because these laws are considered sophisticated, stable and predictable, which lenders like. Also, lenders generally prefer not to have a contract governed by the law of a foreign borrower's jurisdiction, since lawmakers friendly to the borrower could change the law in a way detrimental to the lender (law reform risk). As part of any cross-border transaction, lending lawyers spend time ensuring that the choice of governing law will be enforceable in the borrower's jurisdiction, often getting coverage of this in a legal opinion delivered at closing.

Recourse to Guarantors in a Risk-Free Jurisdiction. A lender to a borrower in a jurisdiction with high legal risk may require a parent, subsidiary or other affiliate of the borrower in a "risk-free" jurisdiction guarantee the loan. In this type of situation, the lender would want to ensure that the guaranty is one of "payment" and not of "collection", since the latter requires a lender to exhaust all remedies against a borrower before obligating the guarantor to pay. In a cross-border context, this could result in a lender being stuck for years in the quagmire of costly enforcement activity in a foreign and hostile court. While almost all New York and English law guarantees are stated to be guarantees of payment, it is nevertheless always wise to confirm this is the case, and especially important if the guarantee happens to be governed by the laws of another jurisdiction.

Collateral in a Risk-Free Jurisdiction. With secured loans, if the legal risk of a borrower's home country is high, lenders will often structure an "exit strategy" that can be enforced without reliance on the legal institutions of the borrower's jurisdiction. This has been a classic tool of project finance lenders for decades and has contributed to the financing of projects in a variety of countries that have high legal risk.

a. *Offshore Share Pledge*. For example, a lender often requires a share pledge of a holding company that ultimately owns the borrower. This type of share pledge may be structured to allow for an entity organised in a risk-free jurisdiction to pledge the shares of the holding company, also organised in a risk-free jurisdiction, under a pledge document governed by the laws of a risk-free jurisdiction. Such a pledge, properly structured and vetted with local counsel, is a powerful tool for a lender, allowing a lender to enforce the pledge and either sell the borrower as a going concern to repay the loan or to force a replacement of management. In the case of such a pledge, it is important to ensure that the borrower's jurisdiction will recognise the change in ownership resulting from enforcement of such a pledge under its foreign ownership rules. When preparing such a pledge, it is important to carefully examine the enforcement procedures to ensure that the pledge can, to the maximum extent possible, be enforced without reliance on any cooperation or activity on the part of the borrower, its shareholders or directors.

b. *Offshore Collateral Account*. Another classic tool is to require a borrower to maintain an "offshore collateral account" in a risk-free jurisdiction into which the borrower's revenues are paid by its customers. In project finance structures, lenders will often enter into agreements with the borrower's primary customers requiring that revenues be paid into such an account so long as the loans are outstanding. It is important to point out that these accounts will only be as valuable as the willingness of customers to pay revenues into them. Creditworthy, offshore customers from jurisdictions where the rule of law is respected are likely to provide more valuable credit enhancement than customers affiliated with the borrower and located in the same jurisdiction.

c. *Playing Defence and Offence*. It should be noted that, in the case of a secured transaction, offshore collateral should not be viewed as a substitute for the pledge of the borrower's local assets. In such a case, a pledge of local assets is also vitally important since, at least theoretically, it preserves the value of the lender's claim against those assets against third party creditors. To use a football analogy, collateral can be thought of as having an "offensive" component and a "defensive" component: the pledge of local assets to the lender is a "defensive" move because this keeps other creditors from obtaining prior liens in these assets, while an equity pledge might be considered an "offensive" tool, allowing the lender to foreclose and sell a borrower quickly and efficiently in order to repay a loan with the proceeds.

Partnering with Multilateral Lenders or Export Credit Agencies. A multilateral development bank is an institution (like the World Bank) created by a group of countries that provides financing and advisory services for the purpose of development. An export credit agency (ECA) is usually a quasi-governmental institution that acts as an intermediary between national governments and exporters to provide export financing. Private lenders to borrowers in risky jurisdictions are often comforted when these government lenders provide loans or other financing alongside the private lenders to the same borrower, the theory being that the "governmental" nature of these institutions provides additional leverage to the lenders as a whole given these entities are considered to be more shielded from possible capriciousness of a host country's legal and political institutions.

Reputation in the Capital Markets. A borrower or its shareholders may be concerned with their *reputations* in the capital markets in connection with a long and contentious loan restructuring exercise. This may be particularly true in the case of family-owned conglomerates in emerging markets, especially if other parts of the business need to access international financing. If access to the capital markets is not considered to be important, they may be willing to weather the storm. See T. DeSieno & H. Pereira, *Emerging Market Debt Restructurings: Lessons for the Future*, 230 N.Y.L.J. 39 (2003). In sovereign or quasi-sovereign situations, a government seeking *foreign investment* or striving to *maintain good relations with the international capital markets* is less likely to be heavy-handed in a dispute with international investors. While Argentina today probably does not fall into this category, in our firm's experience it has been the case in certain other emerging market jurisdictions.

Personal Relationships. The value of personal relationships should not be overlooked in mitigating legal risk. While personal relationships are important in both the developed and emerging markets, personal relationships play a particularly special role in those countries that do not have well-developed institutions and processes to resolve disputes. Some institutions, when working out problem loans in emerging markets, often turn the loan over to different personnel than those who originated the loan. In certain cases, it may be helpful to keep those with the key personal relationships with the borrower involved in these negotiations.

Political Risk Insurance and Credit Default Swaps. A lender may purchase "insurance" on a risky loan, in the form of political risk insurance or a credit default swap. Rather than mitigating risk, this instead shifts the risk to another party. As such, this is a good tool to have in the lender's toolbox.

Why Good Local Counsel is Important. Finally, the value of high-quality local counsel in a cross-border loan in a high-risk

jurisdiction cannot be overstated. This value comes in three forms: knowledge of local law and which legal instruments provide the most leverage to lenders in an enforcement situation; providing local intelligence on where other "leverage points" may be; and finally, by being well-connected to the local corridors of power and thereby being able to predict or "deflect" law reform in a manner helpful to clients. For local counsel in high-risk jurisdiction, it's best not to be penny-wise.

5. Recent Developments and Anecdotes that Both Support and Challenge the "Conventional Wisdom"

The Sovereign Debt Crisis: Ireland and Greece. As mentioned above, the conventional wisdom suggests that legal risk is higher in the emerging markets than in the developed economies. But consider what happened to creditors in Ireland and Greece recently. In both cases, lawmakers in these countries *changed the law* in a manner that materially and adversely impacted the rights of creditors. In Ireland, Irish lawmakers changed the bank resolution rules to *favour equity over debt*. In Greece, lawmakers changed Greek law in a way that allowed for collective active mechanics in a form that did not exist previously, effectively forcing minority shareholders to be bound by a majority vote. See T. DeSieno & K. Dobson, *Necessity Trumps Law: Lessons from Emerging Markets for Stressed Developed Markets?* (Int'l Ass'n of Restructuring, Insolvency and Bankruptcy Professionals, International Technical Series Issue No. 25, 2013). These and other examples make clear that even in the so-called developed economies law reform can be a risk to creditors, especially when economies are under systemic stress.

Why New York or English Law is Still a Good Choice. In the Greek situation mentioned above, the majority of Greek bonds were issued under Greek law and some bonds were issued under English law. Bondholders holding English law governed bonds did not suffer the same consequence of the change in Greek law (since Greek lawmakers could not change English law). In this instance at least, the conventional wisdom held true.

Why Local Law May Sometimes Be A Better Choice. In a recent transaction in the emerging markets, lenders were provided with a choice to have a guarantee governed by either New York law or local law. Conventional wisdom would suggest the lenders should opt for New York law. However, on the advice a top local law firm, the lenders opted for the guarantee to be governed by local law. Why? Because after considerable weighing of risks and benefits (including the law reform risk associated with the choice of local law) it was determined the local law guarantee would provide considerably more leverage against the guarantor in the event of enforcement. It could be enforced more quickly and efficiently in local courts than a New York law guarantee (used by other creditors under other facilities) thus potentially providing an advantage to its beneficiaries. This notion of local law being better is probably more often going to be the exception rather than the rule.

Are Offshore Share Pledges Really Risk-Free? Even in cases of offshore pledge agreements that are perfectly documented as described above, lenders who have tried to enforce these pledges have sometimes run into difficulties. In jurisdictions with high legal risk, borrowers and their shareholders can prevent lenders from being able to practically realise on the value of their collateral in a number of ways: they may use the local legal system to their advantage by making baseless arguments that the change of ownership should not be legally recognised, they may transfer assets to other affiliated companies in violation of contractual obligations, or engage in countless other activities unimaginable to lenders when the loan was closed. This "hold-up" value effectively gives the borrower and its shareholders leverage not available in risk-free jurisdictions, even when the equity is "out of the money".

Does Teaming Up With Government Lenders Help or Hurt Private Lenders? As mentioned above, private lenders are often comforted when government lenders co-lend to a borrower. Is this comfort warranted? Government lenders may have motivations during a workout that extend beyond recovery on debt to other goals. These goals may be maintaining good relationships with the foreign country in question, maintaining employment at home (in the case of ECAs), or instituting environmental, anti-terrorism or other policy goals. Experience with government lenders in restructuring exercises suggests that government lenders may be less willing to engage in difficult negotiations with foreign borrowers and, in the eyes of at least some private investors in certain restructuring exercises, their inclusion in a transaction has led to decreased recoveries. While government lenders can certainly be helpful to a workout process under the right circumstances, private lenders should be clear-sighted on the benefits government lenders provide.

Challenges to New York and English Law? As transaction and insolvency laws in emerging markets are modernised and become more uniform, and as legal and political institutions develop and mature, many local borrowers may push harder for local law to govern their loan agreements. At a recent syndicated lending conference focused on Latin America, local lenders in the region made clear they thought they had a competitive advantage over international lenders because they had an ability to make loans under local law, something local corporate borrowers seemed to value. The extent to which the market would soon see syndicated loans governed by local law was much discussed. While this phenomenon likely may not occur on a significant scale in the near term, it does seem that the choice of governing law may be one consideration that is increasingly in play when lenders are competing for lending mandates.

6. Final Thoughts

With the world becoming smaller, emerging markets developing and lenders searching for yield, more lenders will seek opportunities in cross-border lending. As a result, the question of legal risk will be one of increasing relevance, and local knowledge will be of increasing importance.

Lenders have a number of useful tools available to help mitigate legal risk. Ultimately, it may not be possible to reduce risk to that of a "risk free" jurisdiction. Lenders should be careful to not overestimate the comfort certain structural tools will ultimately provide. A borrower and its shareholders in a jurisdiction where the rule of law is weak typically enjoy a significant advantage over a foreign lender in a debt restructuring exercise.

Focus on structural tools should not overshadow perhaps the most important mitigant of all: the best protection against legal risk is to make a good loan to a responsible borrower with "sound commercial fundamentals". In the case of a cross-border loan to a borrower in a high-risk jurisdiction, "sound commercial fundamentals" goes beyond looking at a borrower's financial statements, projections and understanding its strategies. The most forward-thinking lenders will strive at the outset of a transaction to understand the full array of leverage points it may have against a

borrower and its shareholders, including the need for future financing and/or access to the capital markets, and of the consequences of default for a borrower and its shareholders.

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Global Trends in Leveraged Lending

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Global trends in leveraged lending in 2013 have largely been driven by substantial liquidity in US dollar markets, together with cautious investor optimism in the face of regulatory and political black clouds on the horizon. In the face of continued Eurozone uncertainty, US fiscal policy ineffectiveness, US debt default posturing, and frothy asset markets with relatively anemic growth in maturing economies, the leveraged finance market has nonetheless remained relatively stable and a backbone to global economic stability in 2013. We discuss below specific trends in leveraged lending from 2013.

1. Market Ended Strongly

Although the market faltered at times in the early part of 2013 and the yield curve moved dramatically as a result of concerns that the US Federal Reserve would rapidly taper monetary stimulus, the global leveraged markets recovered and finished on a positive note at the end of 2013; we note, in particular, that this was despite the European market being adversely impacted by the Cyprus restructuring and the US market being adversely impacted by the temporary US federal government shut down. US primary issuance was USD $828 billion of leveraged loans, and issuance in the global market exceeded USD $1 trillion. The 2013 leveraged finance market on both sides of the Atlantic proved to be surprisingly robust, driven by an increased appetite for leveraged products by investors hungry for yield while interest rates remain low. M&A deal flow remained thin and, combined with an excess of credit supply over demand, borrower-friendly terms, higher total leverage and a reduction in pricing ensued. Dealogic reported that global average pricing decreased to 346bps in 2013. Frothiness in pricing was also matched by frothiness in deal structures; e.g., 2013 saw significant issuance of PIK notes (including PIK toggle notes) and strong continued growth in second-lien financing to over USD $30 billion; this data supports, in part, a general trend that investors have been willing to ease up on credit terms in the hunt for yield.

The majority of transactions in 2013 were in the form of opportunistic refinancings and repricings, although dividend recaps were also robust. Borrowers were keen to access the markets while interest rates remained low. New money deals were relatively modest in 2013, reflecting, in part, a subdued M&A market and significant cash "on the sidelines" at large corporates. Less than 35% of 2013 leveraged loan volume represented new loan assets. As a result of the large refinancing trend, the maturity profile of institutional leveraged debt has been pushed out to 2017, and portfolio churn has forced asset managers to work hard to maintain their leveraged loan assets under management. Soft call protection to compensate for early refinancing as part of a repricing transaction remained necessary in 2013; e.g., a borrower needs to pay a premium of 101% or 102% if its first-lien loans are refinanced with loans with a lower effective yield (based on margin and OID) within a specified period after initial funding (ranging from six months to two years). The depth and breadth of liquidity in the US leveraged loan market, together with lower US pricing, provided cross-border financing opportunities to both European and Asian borrowers that were unavailable in their home markets. A significant trend in 2013 was that European and Asian borrowers robustly accessed the US credit markets to borrow term loan B facilities and to enter the high yield market. The Asia Pacific leveraged market remained relatively small with about 18% of the volume of high yield issuance in the US (compared with Europe, which has about 60% of the volume in the US), but is showing signs of growth.

2. The Reshaping of Liquidity and CLO Issuance

Liquidity from the traditional bank market shrunk in 2013 as banks were affected by increased regulation. However, those banks that had repaired their balance sheets re-emerged in 2013 as underwriters of larger facilities and facilitated other liquidity solutions that have strengthened the leveraged loan market. For example, CLO issuances increased dramatically in 2013: USD $818 billion of CLOs priced in 2013 compared with USD $54.3 billion in 2012, and the CLO market shows continued strength in 2014. The resurgence of this form of securitisation reflects the continued normalisation of the global credit markets in 2013 and a stabilisation of the money supply.

Investors' appetite for yield through leveraged exposure to the loan asset class coupled with managers' desire to build assets under management in advance of the effective date for the risk retention rules (e.g., rules that may effectively require managers to retain 5% of the securities issued by the CLO) drove a significant demand for CLO investments among managers and junior noteholders. The limiting factor currently seems to be a scarcity of AAA investors despite spreads in the AAA tranches of about 145-150 basis points over LIBOR. This scarcity was, in part, driven by a combination of regulatory uncertainty and the effects of Basel III. For example, the Volcker Rule prohibits banking entities from acquiring or retaining any "ownership interest" in covered funds. Since an actively managed CLO with a bond basket would be a covered fund, and since the rights of senior noteholders to remove a CLO manager prior to an event of default could be viewed as a prohibited ownership interest, it is likely that some banks are passing on CLO investments while the uncertainty persists. The Volcker Rule exempts loan-only CLOs from the covered fund definition, and it is likely that banks will show increased

willingness to invest in the senior tranche of such CLOs. The Basel III treatment for securitisations is also still in flux, and although the most recent proposals decrease the capital requirement for certain securitisation exposures compared to earlier proposals, the capital requirement for other securitisation exposures has been increased. The European risk-retention rules have a similar effect. Failure to satisfy the risk-retention requirements imposes higher capital charges on financial institutions investing in such non-conforming securitisations. Until recently, it seemed possible for certain third parties to retain the required risk, while newer guidance seems to retreat from that position and reintroduces uncertainty among European AAA investors, again with what is likely to be a dampening effect on demand among affected financial institutions.

Basel III also introduced a new requirement: the Net Stable Funding Ratio. This is a metric designed to mitigate funding risk and which, among other things, would require 5% of undrawn portions of committed credit facilities to be matched by stable funding (where regulatory capital and deposits are regarded as the most stable type of funding). In addition, this ratio, intended as a constraint against excess leverage and the gaming of risk-based capital requirements, does not involve a recognition of the risk exposure – reducing effects of any credit mitigation techniques (e.g., through guarantees, CDS, collateral or netting of loans and deposits). This is widely regarded as resulting in higher capital requirements for banks, which in turn has a dampening effect on loan asset growth.

Alternative finance entities continued to emerge in 2013 as liquidity providers and active market participants (e.g., insurance companies, pensions, wealth funds, private equity funds, hedge funds and credit funds). These non-bank entities were generally able to provide more flexible credit structures (e.g., unitranche financings) and take advantage of regulatory overhang in 2013. The emergence of business development companies (BDCs), being investment funds which lend to the middle-market in exchange for robust returns at relatively low leverage levels, also presented a compelling alternative for investors in 2013. Many of these alternative providers are not subject to the constraints of Basel III and are deemed to operate in the shadows of the traditional banking sector; as such, they represent stiff competition for the regulated banks and traditional structured finance market. This is but another example of investors' appetite for high yield and corresponding tolerance for higher risk.

3. European and Asian Borrowers Accessing the US Loan Financing Markets

There was continued appetite among European and Asian borrowers to raise dollar-denominated term loan B leveraged facilities in 2013, as such TLB loans were available with lower pricing than equivalent debt products in domestic European currencies and often were "cov-lite", meaning no financial maintenance covenants applied. Cash-rich US investors facing a limited supply of deals warmed to foreign borrowers in 2013. Nearly 30% more European companies raised dollar loans in the US institutional market last year than in 2012, the clear trend being that the TLB market is showing signs of becoming a global, rather than regional, market. The structural currency risk presented by these cross-border deals where a borrower does not have sufficient US dollar cash flows for a natural hedge raises complexities that may burden this market in the coming years.

4. Cov-lite Loans

A significant proportion of sponsor TLB loans issued in the US markets are cov-lite, and 2013 saw lower-rated corporate borrowers seeking cov-lite terms. Cov-lite deals traditionally exclude quarterly-tested financial maintenance covenants, but many still retain incurrence-based financial covenants (i.e., compliance with a fixed-charge coverage test or leverage test measured at the time debt is incurred, investments made or dividends issued). In addition, some revolving credit facilities only contain a springing financial covenant that is tested only while the RCF is drawn upon or the outstanding borrowings thereunder exceed certain predetermined thresholds. Financial maintenance covenants in the TLB market still remain relatively common where the TLB is structurally subordinated to an amortising term loan A or where the structure is all senior with no subordinated debt.

Borrowers with cov-lite terms effectively have a longer period of time to deal with underperforming companies without having to negotiate with syndicate lenders, but at the cost of increased credit risk to the lenders who are losing the early warning signs of deteriorating credit. Lenders also have to wait longer to reprice cov-lite loans resulting in greater credit risk exposure and the prospect of lower returns. Restructuring of a borrower of a cov-lite loan is likely to happen at a later stage of financial distress and in a more compressed time frame when fewer options may be available to preserve enterprise value. Senior bank lenders may no longer be "at the table" negotiating with the borrower ahead of other creditors. However, it is interesting to note that recovery rates for US borrowers of cov-lite loans do not seem to have been less than for loans with maintenance financial covenants. There is little data yet for Europe where bankruptcy laws are generally less creditor friendly than Chapter 11 of the US Bankruptcy Code.

Cov-lite issuance increased dramatically during 2013 and represented a majority of total issuance in the United States, and Thomson Reuters LPC reports that the total issuance was USD $381 billion versus the prior 2007 record of USD $108 billion. There have been reports that CLOs have been increasing the proportion they are permitted to invest in cov-lite loans from 30-40% to 50% and narrowing the definition of cov-lite for the purposes of their investment guidelines to allow greater investment in the asset class. The abundance of cov-lite loans was highlighted in a paradoxical statement by a senior analyst at Moody's Investors Services, who noted that if one does come across a new transaction today with a full set of maintenance covenants, this may "*suggest other problems with the credit, maybe that it is new to the market or exiting from bankruptcy*".

In the Interagency Guidance on Leveraged Lending, 78 Reg. 17766 March 22, 2013 (the "Leveraged Guidance"), US regulators expressed concerns regarding the additional risk cov-lite loans carry compared to loans with financial maintenance covenants and indicated that they would review such loans as part of the overall credit evaluation of an institution. It is possible that increased regulation or a rise in the default rate may affect cov-lites in the next couple of years. US regulatory focus on counter-cyclical monetary policy in the leveraged finance market to control asset bubbles was a notable and significant trend in 2013; it remains to be seen how this new regulatory focus will play-out and the potentially new competitive landscape that will evolve in response.

5. Amend and Extend Transactions

2013 saw borrowers elect to negotiate an amendment and extension of their facilities at lower pricing rather than incur the fees for a full refinancing. Amendment fees were often between 50 and 100bps for a European amend-and-extend ("A&E") transaction, which is much cheaper than a refinancing. CLOs nearing the end of their reinvestment period also preferred A&E transactions as they locked in yield for a longer period. In the US market, it is common for A&E transactions to only require the consent of the majority of

affected lenders. Recent changes have been made to the European Loan Markets Association precedent facilities agreement to also allow for structural changes with the consent of only the majority of affected lenders and to allow non-*pro rata* debt buybacks by a modified Dutch auction.

6. Accordion Facilities

US facilities often have an accordion feature allowing the introduction of new tranches of debt by upsizing existing facilities or allowing incremental equivalent debt in the form of a new term loan tranche or an increase in an existing revolving credit commitment or the issuance of second-lien or subordinated debt, subject to certain terms and conditions. Generally such incremental loans (or, in certain instances, notes) are subject to a dollar cap and/or the satisfaction of a leverage test alongside the requirement that existing loan financial covenants be complied with unless the majority lenders agree to vary them. A new incremental tranche is almost always required to have a later maturity and a longer weighted average life to maturity than the existing or initial tranche(s). US facilities usually also include a most favoured nations (MFN) clause. If the effective total yield (including OID, margins and floors) on new *pari passu* debt exceeds that on the existing debt by an agreed amount (usually 50bps), then the margin on the existing debt increases to reduce that differential to only 50bps – thereby providing the existing lenders with interest rate protection for the excess in the effective yield differential over 50bps. Sponsors have sought, with mixed success in 2013, that the MFN interest rate protection end, or "sunset", after a period of time (usually 18 months). One of the primary reasons is that in a situation where the original loan and incremental loan have identical terms but are issued for different prices that result in different accruals of OID (or one loan having OID and the other not), there is the question as to whether the loans are fungible from a tax perspective (bearing in mind that tax non-fungibility will impair liquidity and therefore potentially increase the all-in effective cost to the borrower). In Europe, accordion facilities have often been limited to uncommitted acquisition or capital expenditure facilities but US style accordion features are appearing. It is becoming more usual for European intercreditor agreements to provide for the introduction of new *pari passu* debt and the possible release and re-grant of security where this is the only route under local law for such security to secure the new existing debt.

7. Structural Adjustments

Structural adjustment provisions are now often included in both US and European credit agreements. Introduction of a new tranche or increase or extension of an existing facility or an extension of a payment date or reduction in pricing requires only the consent of the affected lenders and the majority lenders (typically 50.1% of lenders in the US and 66 2/3% of lenders by commitment in Europe). These provisions have been used to allow borrowers to reprice or amend and extend without unanimous lender consent.

English law schemes of an arrangement have been used successfully by both English and non-English borrowers to cram down dissenting senior lenders to achieve a restructuring of facilities (such as the Icopal deal).

As A&E transactions have become easier to do, forward start facilities have become less common. Forward start facilities are facilities previously seen in the European market, which are negotiated 12 to 24 months before existing facilities mature, and become available upon the maturity date of existing facilities. These facilities remove refinancing risk for the borrower but are more expensive than A&E transactions.

8. Dividend Recapitalisations

Dividend recapitalisations remained an important part of the story in 2013, continuing a strong trend from 2012. Return of capital through dividends, *in lieu* of full exits, has remained attractive to asset owners where exits are not optimal and the cost of debt remains relatively modest on a WACC basis. Repeat "drive-by" dividend recapitalisation deals have been received by the market with mixed success, but have remained, while the market remains highly liquid, reasonable and plausible deals to bring to market for stronger stable credits. Certain credits that were on the cusp of exits in 2012 were converted to dividend recap deals in late 2012 and early 2013 due to weakening sell-side conditions, but were able to exit completely in 2013 as sell-side stories improved; a heart-warming story of dividends followed by very attractive P/E exits for these sponsors. For those sponsors that have pushed the envelope on leverage and fixed charge coverage ratios, dividend recap deals have, occasionally, led down the less pleasant path of negative ratings actions, increased negative scrutiny by investors and a scepticism when the credit returns to market for refinancing; this was particularly the case for credits where the equity investors had already received a complete cash return of equity.

9. Downward Pricing Trends and Reverse Flex

Strong credits took advantage of market conditions in 2013 to push the envelope on pricing through so-called "reverse flex" during syndication. In March 2013, approximately four times as many deals saw pricing move down versus deals that were forced to increase pricing. In response to strong investor demand, issuers continue to push down pricing during syndication, tightening spreads and accelerating commitment deadlines. However, explicit "reverse flex" provisions in commitment papers were rare in 2013 and reserved only for the most creditworthy and sought-after borrowers in bespoke circumstances.

10. Convergence of Bank and Bond Terms

There continues to be a convergence between high yield bonds and the TLB market, particularly as the same investors continue to invest in both products. Bond style features are now often seen in US facilities, and some are appearing in European and Asian term facilities, particularly where a borrower already has US facilities. These include:

(a) the ability to designate subsidiaries as "Unrestricted Subsidiaries" (which are ring fenced but to which many of the covenants and events of default do not apply);

(b) the inclusion of builder baskets, being a percentage (usually 50%) of cumulative consolidated net income (or retained excess cash flow) plus new equity injected plus returns on investments, which can be used (in the absence of a default and subject to compliance with a leverage ratio test) to make investments, pay dividends, return capital or prepay junior debt; and

(c) being subject to some negative covenants mirroring those of high yield bonds; e.g.: debt may be permitted to be incurred subject to satisfaction of a *pro forma* leverage test (rather than a cap); liens to secure debt may be permitted subject to satisfaction of a tighter *pro forma* senior secured leverage test or if such liens are silent junior liens, and, in each case, subject to an agreed intercreditor agreement; and asset sales may be permitted for fair market value where 75% of the consideration is in cash and where proceeds are reinvested or used to prepay the term facilities.

The negative covenants in a European super senior RCF for a bank and bond financing are generally the same as those incurrence covenants in the applicable bond indenture together with a restriction on purchasing notes over a threshold without reducing the super senior revolving credit facility *pari passu*. European lenders generally still require customary loan style affirmative undertakings, a cross default, loan style insolvency event of default tailored for the jurisdictions concerned, a grace period for non-payment of three business days and breach of representation event of default and, for term loan financings, an excess cash flow sweep.

In the US market, traditional distinctions generally still exist for term loan events of default and affirmative covenants from that contained in the high yield bond market. However, in a small number of recent deals in the US market, there has been a gradual move towards: (i) events of default and affirmative covenants that are similar to those in the bond indenture (where a breach of a representation is not an event of default); (ii) a longer grace period for a payment default (instead of the usual three business days); (iii) a longer grace period for a covenant default (instead of no grace period); (iv) no annual excess cash flow sweep (which is strongly resisted by lenders who are looking for a clear path to deleveraging); and (v) a cross acceleration and cross payment default instead of the usual cross default provision. Even though at this stage the convergence of bond-like events of default and affirmative covenants remains relatively small (and often concentrated in certain segments of the market), it is not inconceivable that this trend may strengthen in years to come.

11. Super Senior Revolving Credit Facilities and "First Out" Facilities

"First out" RCFs have traditionally been relatively uncommon in the US market but gained popularity in 2013 in middle-market financings and restructurings. In these deals, RCF lenders seek additional protection as compensation for the low yield on these types of facilities, which are typically only drawn when the borrower comes under financial pressure. The RCF and term lenders share the same collateral on a *pari passu* basis, but the proceeds of the collateral enforcement are paid first to the RCF lenders under a waterfall usually included in the security documents or in an intercreditor agreement. The documentation will provide for class voting on changes affecting the first-out structure such as an increase in the RCF, and control on enforcement. Revolving lenders' ability to control enforcement remedies, as well as their rights in a bankruptcy, are often highly negotiated and frequently depends on their leverage in any particular deal. Super senior RCFs ("SSRCFs") continue to be popular in Europe as the European borrowers continue to access the secured senior bond market. The SSRCF has super priority with respect to recoveries from security or distressed disposals of collateral and related claim releases. However instructions of the bondholders with respect to enforcement will trump those of the SSRCF lenders for a certain period (usually six months) following an event of default if the SSRCF has not been discharged in full and in other specified circumstances such as insolvency of the debtor. The SSRCF usually only has one or two financial covenants such as an interest and/or a leverage financial covenant and has negative covenants mirroring those in the bond. Financial covenants may only be tested when the RCF is drawn or before it is drawn.

12. Portability

2013 saw a limited number of US facilities with a "pre-cap" or "portability" feature. These provisions permit a change of control to occur (and, therefore, no mandatory prepayment will be required and no event of default will occur) if the company is sold to an eligible sponsor or company with a similar business and subject to meeting certain conditions; e.g., these conditions usually define, among other things, acceptable buyers, time constraints, minimum equity contributions and *pro forma* leverage tests to be satisfied. For example, the purchaser must be over a certain size/credit rating and the transaction must occur within a maximum of 18 months and is subject to a minimum equity contribution requirement and maximum debt incurrence test. The precap deal may also include a modest step-up in interest margins following the transaction or the payment of a fee in connection with it. This structure is beneficial for private equity buyers and sellers who are able to avoid a costly refinancing. This feature is less popular with investors who are wary of losing control over those to whom they are lending. Investor reservations mean that only top companies in a strong market and in a very strong transaction usually qualify for a pre-cap. Even though some sponsors tried in 2013 to make this a permanent feature of the market, US bankers do not see pre-cap becoming a widespread market norm (in contrast to cov-lite loans); rather it will likely remain an exceptional provision to be used only in specific circumstances and subject to significant market testing prior to deal launch.

While portability features are seen in high yield bonds issued by European investors, the portability feature has not taken off in the European or Asian loan markets. It may also present regulatory challenges.

13. Unitranche Facilities

Unitranche facilities remained popular in 2013 in both the European and US mid-market and the trend was in increasing deal size in both markets. Unitranche facilities, which combine the senior and junior tranches into one unified layer of debt under a single credit facility, are often provided by alternative lenders such as credit funds and private equity funds. They fall between senior and mezzanine debt in terms of leverage pricing and risk. While unitranche facilities are often fully "bought" deals (e.g., thereby carrying no market syndication risk for the borrower), they do present additional complexity for borrowers as a result of the intercreditor agreement among the tranches (the so-called agreement among lenders (AAL)). The borrower is not a party to an AAL so, unless otherwise regulated by other credit documents, the borrower will often not be aware of significant matters that may affect the credit (e.g., voting arrangements that may be decisive in a workout). However, with fewer lenders (and, often, a single lender) providing the debt in connection with a unitranche structure, a borrower benefits from more streamlined negotiations and much greater flexibility on terms. One material disadvantage is the uncertainty as to how courts will treat this structure in a bankruptcy scenario – unitranches have not yet been meaningfully tested in bankruptcy courts (that being said, the absence of extensive caselaw suggests that few sophisticated investors have been willing to invest the resources to test the efficacy of the structure).

Unitranche facilities can be highly bespoke. They may have a bullet repayment, cash and PIK interest, call protection and incurrence and maintenance covenants (or a mix of the two). Typical unitranche lenders cannot usually provide working capital or hedging facilities, so one or more banks usually have to provide these and they will generally rank as super senior creditors being paid out first from recoveries but with no rights to block payments on the unitranche facilities. Unlike in a super senior RCF in a bank bond structure, the senior lenders do not have separate voting rights but will vote with the junior lender. However, it is common for the unitranche structure to include certain additions to the list of matters

requiring unanimous lender consent so that the senior lenders cannot be outvoted on these matters. The senior lenders may also have an independent right to enforce on the occurrence of certain events of default after an agreed period or can take over enforcement after 6-9 months.

14. Syndicate Control

Given the wider variety of possible investors, 2013 saw sponsors and significant corporate borrowers continuing to seek more control over the identity of potential lenders including imposing white lists/black lists and enhanced consent rights. This reflects a trend that certain investors have become more activist.

In the context of assignments, disqualified lender provisions continued to be heavily negotiated in 2013, and sponsors came out of the gate recently asking for a blanket prohibition against assignments to "competitors" (typically undefined and therefore very broad in application) and certain affiliates thereof. Arrangers have generally been successful in limiting the competitor concept, in many cases getting sponsors to agree that all disqualified institutions, including competitors and competitor affiliates, must be expressly identified to the arrangers prior to the execution of the commitment letter.

15. ABL Deals

In 2013, ABL facilities allowed borrowers to obtain higher leverage at a lower cost compared to cash-flow-based term debt, while also providing certainty of execution and a flexible covenant package. ABL deal flow was relatively weak in 2013 (e.g., approximately 320 deals with a value of USD 75 billion; many of which were renewals or upsizings). Asset-based lenders remained mired in a market burdened by limited deal flow and few signs of any near-term pickup.

Syndicated ABL tranches as part of leveraged deals were rare in cross-border deals in Europe and Asia as more complex structuring considerations arise; e.g., these deals often involve a sale of receivables to an SPV to ensure satisfactory recoveries on a bankruptcy under the less creditor-friendly bankruptcy laws in certain European and Asian jurisdictions. These structures remain, generally, more expensive and time consuming to implement than US ABL structures. Conversely, US ABL structures, which often involve lending to opcos with monitored strictly defined borrowing bases and cash dominion mechanisms, demonstrated very robust to total recoveries upon bankruptcy, according to a 2013 Fitch Ratings report.

16. Equity Cures

In both the US and European markets, 2013 continued to see a widespread acceptance of equity cure rights, but with continued discussions around permitted amounts, use in consecutive fiscal quarters and the application of equity cure proceeds to repay debt. An equity cure right allows an injection of capital into the borrower group to stave off or 'cure' a financial covenant default. When lenders agree to include such provisions, they generally take comfort from the fact that, in exercising them, sponsors will inject further equity or subordinated debt into the group, providing both additional funds and a show of commitment.

17. Regulatory and Political Overhang

Globally, the strong flow in the leveraged finance pipeline in 2013 occurred in an uncertain regulatory environment that cast a long shadow on both lender and issuer behaviour. In the United States, Federal Reserve actions around interest rates and QE tapering at the end of 2013 contributed to heightened volatility in the high yield bond market and periods of intermittent bond outflows. Risk retention, the yet-to-be finalised Basel III requirements, Federal Deposit Insurance Corp. assessments, the Volcker Rule and the Leveraged Guidance are among current and pending regulatory rules with which banks are now faced.

On a positive note, 2013 ended with the passage by the US House of Representatives of a bipartisan, two-year budget agreement, indicating that more shutdowns or standoffs are unlikely. This is a sign that perhaps 2014 will bring more economic visibility and certainty for corporate borrowers and investors alike, hopefully alleviating some of the near-term political uncertainty that global financial markets have had to endure.

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Recent Trends in U.S. Term Loan B

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There has been much discussion recently in the United States financial markets about the convergence of terms and features in term loan B ("***TLB***") with those typically found in high yield bonds ("***HY Bond***"). Though typically described as a "convergence", the changes are relatively one-sided, with the TLB gravitating toward features long familiar to issuers and buyers of HY Bonds. This phenomenon has been with us for years, but has accelerated recently. In 2013, a year dominated by strong investor demand and "best efforts" refinancings and dividend recapitalisations, borrowers and sponsors predictably tested the market's appetite for greater flexibility, which frequently meant borrowing even more technology from HY Bond documents. In this article, we consider some of the ways in which U.S. TLB terms have continued to move toward – and in some cases exceed the flexibility found in – HY Bond terms, and examine the market and other forces driving that trend.

Changes in the U.S. TLB Market

The U.S. TLB market has its origins in the commercial bank term loan market. In the traditional bank loan model:

- loans are made on a lend-and-hold basis with the expectation that lenders would have ongoing exposure to, and a close working relationship with, the borrower;
- a highly leveraged borrower is typically expected to deliver over time;
- financial maintenance covenants provide lenders with an important monitoring tool and an early warning that a borrower is experiencing financial difficulty; and
- the lender syndicate is a relatively discrete group of banks, most of which have broader relationships with the borrower and can accommodate unexpected transactions or covenant breaches through amendments, often with a minimal fee.

Accordingly, in this model, upfront covenant flexibility is limited, accommodating appropriate operational flexibility, but not major adjustments in capital structure or significant corporate events not anticipated at closing. Moreover, lenders in that market have traditionally expected to share *pro rata* among themselves in the cash flow of the business and other prepayment events. This was the model many participants and practitioners in the term loan market grew up with, and is the model that continues today in many parts of the U.S. market and in other jurisdictions.

Practitioners active in today's U.S. TLB market will scarcely recognise this paradigm. The U.S. TLB market is now dominated by non-traditional lenders: CLOs, hedge funds and institutional investors. These investors tend to view a term loan to a leveraged borrower as a transaction – a prepayable, senior secured floating rate investment – rather than one part of a broader institutional relationship. They are often equally comfortable investing in HY Bonds, where many of the protections traditionally found in the commercial loan market are absent. Accordingly, these lenders focus on key economic terms, and are not as concerned about, and often are not set up to monitor, financial maintenance covenants. The makeup of this lender base and the absence of the close working relationship that characterises the commercial loan market means that amendments are not as readily available and cannot be credibly promised or relied upon in negotiating loan documentation. These investors are less focused on deleveraging over time and more willing to rely on less protective incurrence tests to guard against overleverage by the borrower and their position in the capital structure. At the same time, financial buyers and other sophisticated borrowers have recognised this change, and have pushed incrementally for greater flexibility in initial terms. TLB covenants and other terms have evolved in response, giving lenders the economics they demand while increasingly providing borrowers greater flexibility. Over time, this dynamic between lender interests and borrower demands has had a profound impact on U.S. TLB terms.

Economic Terms

Yield

TLB are generally floating rate, and the built-in interest rate hedge that this provides is an important distinguishing feature of the asset class compared to (generally) fixed-rate HY Bonds. But it is interesting to note that the advent of LIBOR and base rate "floors" has – during the extremely low interest rate environment of the past several years – caused TLB to be fixed-rate instruments accruing interest at a rate equal to the floor plus the interest rate margin, albeit with significant protection if LIBOR rises in the future. More significantly, during this period, original issue discount ("***OID***"), which has long been a feature of HY Bonds, has become a standard component of TLB pricing. In fact, in both initial syndications and secondary trading (including for purposes of "most-favored-nation" and "repricing" protections for incremental and refinancing provisions), TLB pricing is now thought of in terms of overall "yield" (a terminology previously reserved for bonds), rather than simply a rate consisting of LIBOR plus an interest rate margin.

Call Protection and Prepayments

A second element of economic convergence is the widespread inclusion of "call protection" in TLB. In HY Bonds, call protection

is designed to preserve an investor's income stream, by including a no-call period for the first years following issuance (often half the life of the bond), followed by a "call period" subject to prepayment premiums that decline over time. In contrast, TLB call protection usually takes the form of a "soft call" – a prepayment premium of typically 1% payable in connection with repricings of TLB occurring 6 to 12 months following the closing of the TLB. However, there are examples, particularly in the second lien TLB market, of "hard calls" – a prepayment premium of typically 1% to 3% payable in connection with any voluntary and certain mandatory prepayment of TLB within 1 to 3 years following the closing date, and in some cases these financings have incorporated no-call periods (often with "make-whole" calls permitted). A few TLBs have even provided for special terms permitting prepayments with proceeds of an equity issuance – a so-called "equity claw" – typically the sole province of HY Bonds.

As the market's focus has shifted from deleveraging over time, it has similarly reduced its focus on mandatory prepayment events, including through the elimination of the "equity sweep" and the dilution of the asset sale and excess cash flow ("***ECF***") prepayment requirements. Specifically, asset sale prepayment provisions often exclude a range of dispositions, include per-transaction and/or aggregate materiality thresholds (below which the prepayment requirement does not apply) and are subject to permissive reinvestment rights during 12 to 18 month reinvestment periods. Significantly, as greater flexibility to incur secured indebtedness has been built into loan documentation, asset sale prepayment covenants now often permit the borrower to share asset sale proceeds on a ratable basis with other *pari passu* secured debt. Similarly, the calculation of the excess cash flow that is required to be swept is subject to broad deductions, including for anticipated expenditures and investments, certain restricted payments and prepayment of other indebtedness. Importantly, the ECF sweep will frequently be reduced dollar-for-dollar by voluntary prepayments or repurchases, even if made non-*pro-rata* among the TLB lenders. This is in stark contrast to that traditional pillar of the commercial bank market requiring *pro-rata* treatment across all lenders of a particular class, as it effectively reallocates a borrower's cash flow to particular lenders at the expense of others. Finally, TLB often afford lenders the right to reject mandatory payments, thereby making the prepayment requirement resemble more closely the traditional "offer to repurchase" in a HY Bond.

Covenants

Occasionally a negative covenant package for a TLB will be indistinguishable from a related HY Bond, having been copied directly from a concurrent or recent bond offering. More often, provisions that are the functional equivalent of the HY Bond terms are included in a more traditional-looking TLB package. Even the entities covered by the typical TLB package bear a striking resemblance to the typical HY Bond transaction. For example, a TLB document typically no longer limits a borrower's ability to designate subsidiaries as "unrestricted subsidiaries" (thereby excluding such subsidiaries from the covenants, collateral package and EBITDA calculations under the TLB) to an overall dollar cap. Rather many TLB, akin to the HY Bond structure, limit the ability to so designate subsidiaries solely by reference to the borrower's investment capacity and, in certain instances, *pro forma* compliance with an incurrence ratio, which is actually more borrower friendly than HY Bonds, in which a fixed charge coverage ratio ("***FCCR***") condition typically applies to all such designations. The following are certain other select areas of covenant convergence.

Financial Covenants

Perhaps the most conspicuous example of the "convergence" of TLB toward HY Bonds is the continued presence and even predominance in the U.S. TLB market of "covenant lite" structures. Traditional term loans contained "maintenance" covenants – covenants, such as maximum leverage ratios and minimum coverage ratios – that are tested either at all times or on a specified periodic (typically quarterly) basis. In contrast, HY Bonds were said to have an "incurrence-based" covenant package, because financial covenants were tested only upon, and as a condition to the permissibility of, specified actions (e.g. debt incurrence or making restricted payments). In a covenant-lite TLB, maintenance covenants are replaced with incurrence covenants, which permit borrowers to incur debt, make an investment or restricted payment or take any other applicable action subject to complying with the applicable financial covenant test (and other applicable requirements). The deleveraging over time that financial covenants traditionally mandated has therefore been replaced with a model that permits major corporate transactions to proceed so long as the transaction does not cause the overall leverage to exceed an agreed maximum.

In determining compliance with such "incurrence" covenants, TLB facilities have also adopted a number of other borrower-friendly features from HY Bonds. These include defining "***EBITDA***" – which is the denominator of any leverage ratio and numerator of any coverage ratio – to include broad and often uncapped "add-backs" for items such as restructurings costs and projected cost savings and synergies (including costs savings and synergies relating to initiatives with respect to which actions are only expected to be taken within 12 to 24 months) and determining compliance with such covenants on a "*pro forma*" basis by, for example, calculating EBITDA in connection with an acquisition to include the acquired entity (and its EBITDA) in the borrower's results throughout the relevant test period. In addition, many leverage covenants are now calculated on a "net" basis – reducing the debt in the numerator by the amount of unrestricted cash of the borrower (often without any cap).

Asset Sales

TLB have largely eliminated fixed dollar limitations on a borrower's ability to divest its assets. Instead, assets sales are generally permitted so long as the sale is made at fair market value, 75% of the sale consideration in "cash" (subject to a basket for designated non-cash consideration) and the net proceeds of such sale are applied to prepay outstanding loans (subject to the materiality thresholds, broad reinvestment rights and rejection rights referred to above). In effect, the TLB asset sale covenant has been converted from a negative covenant as it was in traditional credit facilities to the functional equivalent of a requirement to make an offer to prepay the loans if not applied first to other permitted purposes, similar to what one would find in a HY Bond.

Debt Incurrence

The typical 2013 TLB credit facility is crowded with flexibility allowing the borrower to adjust its capital structure and incur incremental indebtedness. This flexibility comes in numerous forms: refinancing facilities, incremental facilities, amend-and-extend provisions, acquisition related debt, permitted ratio debt, basket debt and others, with additional variability among these forms for incurring them on a first-lien, second-lien or unsecured

basis, and inside or outside the credit facility itself. These various types of flexibility have developed independently and in different forms, and the combination of them has resulted, in many cases, in overlapping or inconsistent standards within TLB agreements, and little uniformity across the industry. However, they speak to the ongoing trend of viewing credit facilities as flexible documents designed to survive significant corporate transactions, in this case debt incurrence, subject to maintaining a certain leverage profile. There are three primary instances of flexibility that borrowers have been able to achieve in some transactions that owe their origins to HY Bonds.

First, a limited number of TLB now permit debt incurrence subject to satisfaction of a FCCR or interest coverage ratio (usually of 2.00x or greater). While in a low interest rate environment this creates significant flexibility, there are several mitigants that have survived in the TLB market. First, even where a FCCR test for debt incurrence applies, secured debt is only permitted subject to satisfaction of a leverage ratio. This can be contrasted with secured HY Bonds which frequently contain no ratio test for junior lien debt (although they do for *pari passu* or senior secured debt). Second, TLB typically still include more stringent parameters around the terms of *pari passu*/junior lien debt (including limitations on final maturity, weighted average life, prepayments and, sometimes, more restrictive terms), although it must be noted that many of these requirements are currently under pressure from borrowers.

Second, the ability to "reclassify" debt incurred under fixed dollar baskets to ratio debt baskets is now included in a limited number of TLB. The rationales for resisting this are that a borrower that could not meet the ratio debt test at the time of incurrence should not be "rewarded" for later improving performance. And, that lenders should not be subject to what might be an unrepresentative "high-water mark" of EBITDA performance over the life of the loan as the point for recharacterising basket debt as ratio debt, and resetting the starting point for using such fixed dollar baskets. But to a borrower, these arguments contain echoes of a maintenance-covenant construct: the debt is "stuck" in the basket under which it was incurred. Borrowers argue (with varying degrees of success) that, with the market's new, relatively relaxed attitude toward deleveraging, if borrowers can satisfy the debt incurrence ratio at the time of reclassification, lenders are not harmed by such reclassification.

Third, another concept appearing occasionally in TLB is "contribution indebtedness", which allows the borrower to incur debt equal to 100% (or occasionally up to 200%) of equity proceeds it receives from investors. This originated as a HY Bond concept and is permitted on the theory that if investors are willing to further capitalise an issuer on a 50% or 33% equity basis, bond lenders should be satisfied.

Restricted Payments

TLB covenants still tend to differentiate between investments, equity payments (usually called restricted payments in that market) and prepayments of junior debt, while HY Bonds treat these items as part of a single "restricted payments" covenant. However, as available amount builder baskets and maximum ratio conditions in TLB are increasingly applied across all three classes of payments or transactions, this distinction has become more form than substance, and has been eliminated in a minority of TLB deals.

In HY Bonds, restricted payments may be made in the amount of a builder basket equal to 50% of consolidated net income ("CNI"), 100% of equity proceeds and certain other builder components, subject to compliance with FCCR greater than 2.00x. TLB more often include an "available amount" or "cumulative credit" basket that builds based on excess cash flow and other components and may only be used subject to satisfying certain leverage levels. More recently, however, the TLB cumulative credit concept has trended closer to the HY Bond standard by building based on 50% of CNI (or in a small number of deals, the greater of retained ECF and 50% of CNI) and replacing the leverage ratio condition with a coverage ratio.

Another common feature of TLB deals is that the leverage ratio and/or absence of default conditions to the use of the builder basket is often limited to the making of equity payments (as opposed to investments), with the effect of establishing a more lenient set of conditions than HY Bonds, where the FCCR condition applies to all uses of the builder basket. Relatedly, some recent deals have also seen the advent of an unlimited ability to make restricted payments and investments and prepay junior secured debt, subject to the satisfaction of a leverage ratio. This may be driven, in part, by the desire to hard-wire dividend recapitalisation capacity into TLB as an alternative to a sale given the recent relatively anemic M&A activity.

Finally, in most HY Bond issuances, the issuer is not limited in the amount of investments it can make in restricted subsidiaries (whether or not guarantors), whereas TLB typically limit investments by the borrower and guarantors in non-guarantor subsidiaries. However, in recent months, a few TLB deals have eliminated even this distinction, particularly where a U.S. borrower has significant non-U.S. operations or a non-U.S. growth strategy. This change has a number of important implications, including greatly facilitating acquisitions of entities that cannot or do not intend to become guarantors of the credit. From the borrower's perspective, these features may seem essential to the realization of international strategies and increasingly complex global corporate structures that may evolve during the life of the loan. Limitations on cross-border transfers that are second-nature to a creditor may seem unduly constricting to a borrower.

Flexibility to Make Acquisitions

One useful case study in the continuing march towards maximum flexibility in loan documentations is the trends in 2013 relating to borrowers' ability to make acquisitions. This is particularly driven by sponsors who frequently view their portfolio companies if not as an acquisition platform, at least as a business that should be positioned to grow opportunistically over time. This manifests itself in several ways. First, it is now common to allow incremental facilities to be utilised on a "funds certain" basis. Though it takes a number of forms, some more aggressive than others, the theme is consistent: if an incremental facility will be utilised to finance an acquisition, then the conditions precedent to incurring such incremental indebtedness should match as closely as possible the conditions precedent to a limited "SunGard" conditionality. Second, negative covenants frequently permit indebtedness to be incurred to finance an acquisition subject to either satisfaction of an agreed ratio or – borrowing from HY Bonds again – if the leverage ratio giving *pro forma* effect to the acquisition is not worse than it was immediately before. Third, call protection in TLB now often have an exception for material acquisitions, with the result that if the borrower is forced to refinance its existing debt in order to consummate an acquisition, it will not be penalised by having to pay a prepayment premium to the existing lenders. HY Bonds are not so generous. Finally, permitted acquisition baskets are typically not only uncapped (except with respect to acquisitions of non-guarantor entities) but also not subject to *pro forma* compliance with a leverage ratio. Taken together with negative covenant

baskets that grow as total assets or EBITDA grow and expansive *pro forma* adjustments, these provisions ensure that borrowers can enter into strategic transactions without seeking the consent of their bank group, or refinancing their existing debt, and without incurring the associated costs of doing so.

Relationships among Lenders

In many respects, the changing makeup of the investors in TLB has been reflected in provisions that alter, in sometimes dramatic ways, the relationships between lenders and the "exit rights" that such lenders view as important to their investment decision.

Assignments and "Secondary" Market

One of the clearest remaining distinctions between the TLB and HY Bond markets is that a borrower's consent to assignments is still required in TLB. In contrast, free transferability is a hallmark of HY Bonds, subject to applicable securities law restrictions. It should be noted, however, that a borrower's consent in TLB is usually subject to a "deemed consent" if the borrower fails to respond within a specified period, which highlights the focus on liquidity of TLB.

Bilateral Changes

The rights of lenders to deal individually with borrowers has continued to expand, akin to the "affected holder" standard in HY Bonds. In today's TLB, individual lenders frequently may modify their economic rights (e.g., pricing and maturity) without majority lender approval. Borrowers may also incur additional tranches of debt or fungible incremental debt under TLB. In addition, borrower buybacks are often permitted on an "open market" basis – non-*pro-rata* and without offering to all lenders – as has always been true of HY Bonds.

Affiliated Lenders

In another change conforming to HY Bonds, affiliates of borrowers outside the consolidated group may buy TLB on the open market. This development arose following the financial crisis, as many borrowers realised that, unlike HY Bonds, their TLB did not contemplate, and in many cases did not easily permit, them to take advantage of depressed secondary trading prices to restructure their balance sheet. Borrower and affiliates buyback provisions have now become standard in TLB transactions, though they have evolved in a way that is not identical to HY Bonds. There is usually a cap on the aggregate holdings of such affiliates of 20-30% of the TLB and voting rights are limited to core economic issues directly affecting their interests as lenders, with restrictions on receiving lender-only information and attending lender-only meetings. "Debt fund affiliates" of borrowers are typically not subject to the foregoing limits and may purchase loans in excess of the cap (but are limited to constituting not more than 49.9% of lenders for purposes of voting). In HY Bonds, affiliates of an issuer may purchase notes without cap, but the Trust Indenture Act ("***TIA***") and the terms of most HY Bonds even if not TIA-governed, provide that such affiliates have no voting rights. Thus, this is another area where the evolution of the TLB market has gone past the traditional flexibility of HY Bonds, as affiliated lenders now have a greater voice than affiliated noteholders.

Conclusion

As noted above, a principal driver of the evolution of the TLB market toward that of HY Bonds has been the changes in the relevant lender base. While commercial banks and other private-side institutional investors were historically the principal holders of bank loans, the TLB market is today largely driven by debt funds and other public-side investors. As a result, there has been a shift in the TLB origination process from a "lend-and-hold" model, in which the arranging commercial banks made and held the bank loans to maturity, to an "originate to sell" model, in which arranging banks syndicate the TLB to public-side investors and do not expect to hold those loans. Arranging banks have been under pressure, particularly in the context of best efforts transactions which dominated the market in the last 12-to-18 months, to arrange loans that provide maximum flexibility to the borrower while being attractive to public-side investors. Given that these institutions have long been comfortable with the covenant package and other issuer-friendly features included in HY Bonds, it is no surprise that these terms have increasingly found acceptance in the TLB they are willing to buy.

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Yankee Loans – Structural Considerations and Familiar Differences from Across the Pond to Consider

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Introduction

The depth and liquidity of the investor base in the US institutional term loan market provides an attractive alternative for European borrowers in the leveraged finance market and has been a key source of financing liquidity, particularly in the last few years as European markets have suffered from macroeconomic uncertainty and regulatory constraints. The comparatively lower pricing of US dollar leveraged loans available in the US compared to that of leveraged loans in the European market has also been an attraction for European borrowers, even once the cost of currency hedging has been factored in.

There are, however, a number of issues to consider in structuring so called "Yankee Loans" (US institutional term loans provided to European borrower groups governed by New York law credit documentation). These are driven primarily by differences in restructuring regimes in the US and Europe, and also by the needs (and expectations) of US institutional term loan investors.

There are also a number of features typical for the European leveraged loan market which, while familiar in the US leveraged loan market, are treated in very different ways in New York law governed deals. In the context of Yankee Loans, many of these differing features or familiar differences need to be considered more carefully and amount to much more than e.g. a mere difference between English and American spelling. This article considers firstly some of the key structuring considerations for Yankee Loans and then goes on to discuss some key familiar differences between the US and European leveraged finance markets, to be considered more carefully in the context of Yankee Loans.

Structuring Considerations

(Re)structuring is key

The primary focus of senior lenders in any leveraged finance transaction is the ability to recover their investment in a default or restructuring scenario. The optimal capital structure minimises enforcement risk by ensuring the senior lenders have the ability to control the restructuring process, which is achieved differently in the US and Europe. In the US, a typical restructuring is a creature of statute and is usually accomplished through a Chapter 11 case under the US Bankruptcy code, where senior lenders' status as such is protected by well-established rights and processes. By contrast, in Europe, an effective restructuring for senior lenders in a leveraged finance transaction is typically a creature of contract – typically the intercreditor agreement – this is because placing a company into formal European insolvency proceedings is often seen as the option of last resort as it limits the restructuring options (and likely value recovery) available to the senior lenders. Due to this difference in expectation around how a restructuring is expected to take place, the US and European leveraged finance markets start from very different places when it comes to structuring leveraged finance transactions. In the US, structures typically assume a US Bankruptcy process, and in Europe structures typically assume a restructuring outside of a formal insolvency process, relying on contractual rights in an intercreditor agreement.

In the US, a restructuring implemented under Chapter 11 of the US Bankruptcy Code is a uniform, typically group-wide, court-led process where the aim is to obtain the greatest return by delivering the restructured business out of bankruptcy as a going concern. Bankruptcy petitions filed under Chapter 11 invoke an automatic stay prohibiting any creditor (importantly this includes trade creditors) from taking enforcement action which in terms of practical effect has global application, as a violation of the stay may lead to an order of contempt from the applicable US Bankruptcy Court. The automatic stay protects the reorganisation process by preventing any creditor from taking enforcement action that could lead to a diminution in the value of the business. It is important to note that a Chapter 11 case binds all creditors of the given debtor (or group of debtors). US lenders retain control through this process as a result of their status as senior secured creditors holding senior secured claims on all (or substantially all) of the assets of a US borrower group.

By contrast, in Europe senior lenders traditionally rely on contractual tools contained in an intercreditor agreement to retain control of a restructuring process. These contractual tools found in a European intercreditor agreement include standstills applicable to junior creditors party to the intercreditor agreement and release provisions applicable upon a distressed disposal of the borrower group. These allow for the group to be sold as a going concern (typically following the enforcement of a share pledge at a holding company level) and released from the claims of the creditors party to the intercreditor agreement following the application of the proceeds from such sale pursuant to an agreed waterfall. This practice has developed because, unlike the US Chapter 11 framework, there is no equivalent single insolvency regime that may be implemented across Europe. While the EC Regulation on Insolvency Proceedings provides a set of laws that promote the orderly administration of a European debtor with assets and operations in multiple EU jurisdictions, such laws do not include a concept of a "group" insolvency filing and most European insolvency regimes (with limited exceptions) do not provide for a

stay on enforcement applicable to all creditors. Worth noting, however, is that while a Chapter 11 proceeding binds all of the borrower's creditors, the provisions of the intercreditor agreement are only binding on the parties thereto. Typically these would be the primary creditors to the group (such as senior bank lenders, mezzanine lenders and/or high yield bondholders), but would not include trade and other non-finance creditors, nor (unless execution of an intercreditor agreement is required as a condition to such debt being permitted) third party creditors of permitted debt.

In addition to the challenges arising as a result of multiple different European restructuring and insolvency laws, placing a company into formal insolvency proceedings in many European jurisdictions is largely seen as the last option, as it will often impact the lenders' ability to sell the business as a going concern and therefore will in most instances reduce the value recovered (attitudes in Europe towards filing for formal insolvency proceedings are generally negative, with vendors and customers typically viewing it as a precursor to the corporate collapse of the business).

Therefore, in order to obtain strategic control in an out-of-court restructuring of a European borrower, it is important that senior lenders are able to use their contractual rights to not only control the reorganisation of the borrower's obligations (either by taking enforcement action, typically pursuant to a share pledge over the equity interests in a holding company of the borrower group, or by leveraging those rights to renegotiate the terms of the financing) but also to prevent other creditors from pushing the borrower into a formal insolvency process.

Historically, deals syndicated in the US leveraged loan market were those where the business or assets of the borrower's group were mainly in the US, albeit that some of the group may have been located in Europe or elsewhere, and these deals traditionally adopted the US approach to structuring: the loan documentation was typically New York law governed and assumed any restructuring would be effected in the US. Similarly, deals syndicated in the European leveraged loan market were historically those where the business or assets of the group were mainly in Europe, and these deals traditionally adopted a European approach to structuring: the loan documentation was typically English law governed, based on the LMA form of senior facilities agreement, and provided contractual tools for an out-of-court restructuring in an intercreditor agreement (typically based on an LMA form).

US institutional term loan investors are most familiar with, and typically expect, NY law and market-style documentation. Therefore, most Yankee Loans are done using NY documentation, which includes provisions in contemplation of a US Bankruptcy in the event of a reorganisation (including, for example, an automatic acceleration of loans and cancellation of commitments upon a US Bankruptcy filing due to the automatic stay applicable upon a US Bankruptcy filing). However, while a European borrower group could elect to reorganise itself pursuant to a US Bankruptcy proceeding (which would require only a minimum nexus with the US), most European borrower group restructurings have traditionally occurred outside of a formal insolvency process, as described above.

It is therefore important that US lenders ensure that the structure and documentation of the financing for a European borrower group provide the contractual tools necessary to allow the senior lenders to have control of the restructuring process before the borrower may be required to initiate a local insolvency filing (which in some jurisdictions is an obligation binding on directors) or other creditors take enforcement actions which may trigger a formal insolvency.

To ensure senior lenders' ability to drive the process in Europe and protect their recoveries against competing creditors, a Yankee Loan done under NY documentation should include the contractual "restructuring tools" typically found in a European-style intercreditor agreement, most notably a release or transfer of claims upon a distressed disposal, and consideration should be given as to whether to include a standstill on enforcement actions applicable to junior creditors (which in many ways can be seen as a parallel to the automatic stay under the US Bankruptcy Code) to protect against a European borrower's junior creditors accelerating their loans and forcing the borrower into insolvency. If that were to occur, the likelihood of an effective restructuring of the business would be reduced as, not only would the senior creditors lose the ability to effectively control enforcement of their security (for example, arranging a pre-packaged sale of the business), but also, the equity holders would lose the ability to negotiate exclusively with the senior creditors for a period of time.

Who/Where is your borrower and your guarantors?

Legal/structuring considerations

In US leveraged loan transactions, the most common US state of organisation of the borrower is Delaware, but the borrower could be organised in any state in the US without giving rise to material concerns to senior lenders. In Europe, however, there are a number of considerations which are of material importance to senior lenders when evaluating in which European jurisdiction a borrower should be organised. First, many European jurisdictions have regulatory licensing requirements for lenders to borrowers organised in that jurisdiction. Second, withholding tax is payable in respect of payments made by borrowers organised in many European jurisdictions to lenders located outside of the same jurisdiction. Finally, some European jurisdictions may impose limits on the number of creditors of a particular nature a borrower organised in that jurisdiction may have.

Similarly, the value of collateral and guarantees from US borrower group members in US leveraged loan transactions is generally not a source of material concern for senior lenders. The UCC provides for a relatively simple and inexpensive means of taking security over substantially all of the non-real property assets of a US entity and, save for well understood fraudulent conveyance risks, upstream, cross stream and downstream guaranties from US entities do not give rise to material concerns for senior lenders.

However, the value of upstream and cross stream guarantees given by companies in many European jurisdictions is frequently limited as a matter of law. These limits can often mean that lenders do not get the benefit of a guarantee for either the full amount of their debt or the full value of the assets of the relevant guarantor. There are also very few European jurisdictions in which fully perfected security interests can be taken over substantially all of a company's non-real property assets with the ease or relative lack of expense afforded by the UCC. In many jurisdictions it is not practically possible to take security over certain types of assets, especially in favour of a syndicate of lenders which may change from time to time (if not from day-to-day).

As a result, in structuring a Yankee Loan, significant consideration should be given to the jurisdiction of the borrower, and guarantors within the group, in light of a number of issues that are not typically relevant for a US leveraged loan transaction. In addition, as discussed in more detail below, consideration should be given to the fact that due to the limitations on upstream and cross stream guarantees and the ability to include substantially all of an entity's assets as collateral, third party debt incurred at a subsidiary guarantor level may have claims that are *pari passu* with, or senior to, the claims of the senior secured lenders who have lent to a

holding company of the guarantor, even if such third party debt is unsecured.

In addition, to ensure that a European restructuring may be accomplished through the use of the relevant intercreditor provisions, consideration should be given to determine an appropriate "enforcement point" in the group structure where a share pledge could be enforced to effect a sale of the group. The ease with which such share pledge may be enforced (given the governing law of the share pledge and the jurisdiction of the relevant entity whose shares are to be sold) should also be considered to ensure that the distressed disposal provisions in a European intercreditor agreement may be fully taken advantage of if needed.

Investor considerations

Many institutional investors in the US leveraged loan market (CLOs in particular) have investment criteria which governs the loans that they may participate in. These criteria usually include the jurisdiction of the borrower of the relevant loans, with larger availability or "baskets" for US borrower loans, and smaller "baskets" for non-US borrower loans. As a result, many recent Yankee Loans have included US co-borrowers in an effort to ensure that a maximum number of US institutional leveraged term loan investors could participate in the financing. The addition of a US co-borrower in any financing structure merits careful consideration of many of the issues noted above if the other co-borrower is European. For example, the non US co-borrower may not legally be able to be fully liable for its US co-borrower's obligations due to cross-guarantee limitations. In addition, a US co-borrower may raise a number of tax structuring considerations, including a potential impact on the deductibility of interest, which should be carefully considered.

Familiar Differences

Covenant flexibility

In addition to the well-known (if not fully understood or appreciated) difference in drafting style between NY leveraged loan credit agreements and European LMA facility agreements, the substantive terms of loan documentation in the US and European markets have traditionally differed as well, with certain concepts moving across the Atlantic in either direction over time. Most recently, we have seen increased flexibility for borrowers in a variety of forms moving slowly from the US market to Europe, but many common US provisions have yet to gain broad market acceptance in the current European market, which adds to the attractiveness of Yankee Loans for European borrowers.

One aspect of the terms for US leveraged loan transactions which has not readily emerged on the European side of the Atlantic has been the trend in the US for "covenant-lite" facilities, in which typically only the revolving facility benefits from a financial covenant (but not the term facilities). Financial covenants in US leveraged deals (whether or not "covenant-lite") also routinely include "equity cure" provisions which allow for an "EBITDA cure", pursuant to which an equity contribution may be made to "cure" a financial covenant breach, with the cure amount being deemed to be contributed to the EBITDA side of the leverage ratio (i.e. the ratio of debt to EBITDA), rather than reducing debt (either through a deemed reduction or an actual repayment), as is typically seen in European "equity cure" provisions.

The negative covenant package for "covenant-lite" facilities in the US also typically contains incurrence ratio baskets similar to what would commonly be found in a high yield bond covenant package, which provide permissions (for example to incur additional debt) subject to compliance with a specific financial covenant ratio which is tested at the time of the specific event, rather than a maintenance covenant which would require continual compliance at all times, which traditionally has been required in bank loan covenants.

All of these features of the current US institutional term loan market provide attractive flexibility for European borrowers, and are frequently included in Yankee Loans, which adds to their appeal for European borrowers. Senior lenders should however consider these features carefully, as they may have different impacts in a Yankee Loan provided to a European group compared to a loan made to a US group.

Debt incurrence covenants in particular should be carefully considered in the context of a Yankee Loan. As noted above, guarantees provided by European group members may be subject to material legal limitations and the collateral provided by European guarantors may be subject to material legal and/or practical limitations resulting in security over much less than "all assets" of the relevant guarantor. This may lead to an unexpected result for senior lenders accustomed to guarantees and collateral provided by US entities in the event of a restructuring consummated by means of a Chapter 11 process. If permitted incremental or ratio debt is incurred by a borrower that is also a guarantor of the main credit facilities and such guarantee or collateral is subject to material limitations, the claims of the creditors of such incremental or ratio debt, even if unsecured, may be *pari passu*, or even effectively senior to the guarantee claims of the senior secured lenders of the main credit facilities at that guarantor. In a Chapter 11 proceeding involving such a guarantor, the senior lenders will only have a senior secured claim against that guarantor to the extent of their guarantee claim and the value of any collateral provided by that guarantor.

In addition, in the event of a restructuring accomplished by means of a distressed disposal and release of claims utilising the contractual provisions from a European intercreditor agreement, the providers of incremental or ratio debt may not be subject to the terms of the intercreditor agreement if they are not a party thereto. As a result, they will not be subject to any standstills on enforcement actions, or subject to any release provisions upon a distressed disposal, even if such debt is junior secured or unsecured in nature. This again may be an unexpected result for senior lenders. While the contractual provisions in a European intercreditor agreement in many ways emulate two of the key features of a Chapter 11 proceeding – a standstill on enforcement applicable to junior creditors, which is comparable to the Chapter 11 automatic stay and the release of claims upon a distressed disposal, which is comparable to the release of claims which may be effected upon a US Bankruptcy Court confirming a plan of reorganisation, these features only apply to creditors that are party to the intercreditor agreement (as opposed to a Chapter 11 proceeding, which generally binds all creditors to a given debtor). It should be noted that these concerns apply to all third party debt incurred by guarantors with limited guarantees and/or collateral pursuant to general baskets or in respect of trade credit, but the risk is heightened in relation to incremental or ratio debt that may be incurred pursuant to incurrence ratio baskets.

Conditionality

Documentation Principles vs. Interim Facilities and "Full Docs"

In acquisition financing, the risk that the purchaser in a leveraged buyout will not reach agreement with its lenders prior to the closing of the acquisition (sometimes referred to as "documentation risk") is generally not a material concern (or at least is a well understood and seen to be manageable concern) of sellers in private US

transactions. Under New York law, there is a general duty to negotiate the terms of definitive documentation in good faith and US leveraged finance commitment documents also typically provide that the documents from an identified precedent transaction will be used as the basis for documenting the definitive credit documentation, with changes specified in the agreed term sheet, together with other specified parameters. These agreed criteria are generally referred to as "documentation principles" and give additional comfort to sellers in US transactions that the documentation risk is minimal.

In European deals, there is generally a much greater concern of sellers relating to documentation risk. This can be explained in part by the fact that there is no similar duty imposed to negotiate in good faith under English law, the typical governing law for European leveraged financings (and under English law, an agreement to agree is unenforceable). Therefore, to address seller concerns about documentation risk in European deals, lenders typically agree with purchasers to enter into fully negotiated definitive credit documentation prior to the submission of bids, or to execute a short-form interim facility agreement under which funding is guaranteed to take place in the event that the lenders and the sponsor are unable to agree on definitive credit documentation in time for closing, with the form of the interim facility pre-agreed and attached as an appendix to the commitment documents.

In some recent Yankee Loans, sellers (or buyers sensitive to European sellers' concerns) have been pressing that the European approach to solving documentation risk be followed, notwithstanding that the finance documentation will be governed by New York law provided by US market investors.

Putting aside the difference in drafting style between NY leveraged loan agreements and European LMA facility agreements, and the resultant impact on transaction costs and timing, which itself would tend to support following US practice of commitment documents containing documentation principles, the need to carefully consider the structuring considerations discussed above would seem to support the use of commitment documents containing documentation principles *in lieu* of full credit documentation or interim facility agreements in connection with bids where Yankee Loans provided under NY law will finance the acquisition.

With time, we would expect European sellers (and their advisors) to become comfortable with the use of documentation principles for New York law financings (as is customary for US sellers), given that the governing law of the finance documents, not the jurisdiction of the seller, is the key factor in evaluating documentation risk. However, until then consideration will need to be given to the appropriate form of financing documentation and the potential timing and cost implications resulting therefrom.

SunGard vs. Certain Funds

Certainty of funding for leveraged acquisitions is a familiar topic on both sides of the Atlantic. It is customary for financing of private companies in Europe to be provided on a private "certain funds" basis, which limits the conditions to funding or "draw stops" that lenders may benefit from as conditions to the initial funding for the acquisition. Bidders and sellers alike want to ensure that, aside from documentation risk, there are minimal (and manageable) conditions precedent to funding at closing (with varying degrees of focus by the bidder or seller dependent on whether the acquisition agreement provides a "financing out" for the bidder – an ability to terminate the acquisition if the financing is not provided to the bidder).

Similar concerns exist in the US market, which has developed a comparable, although slightly different approach to "certain funds". In the US market, these provisions are frequently referred to as "SunGard" provisions, named after the deal in which they first appeared. In both cases, the guiding principle is that the conditions to the initial funding should be limited to those which are in the control of the bidder/borrower, but as expected there are some familiar differences which are relevant to consider in the context of a Yankee Loan.

The first key difference is that in the US, market lenders typically benefit from a condition that no material adverse effect with respect to the target group has occurred. However, the test for whether a material adverse effect has occurred must match exactly to that contained in the acquisition agreement. With this construct, the lenders' condition is the same as that of the buyer, however if the buyer did want to waive a breach of this condition the lenders would typically need to consent to this. In European certain funds, the lenders typically have no material adverse effect condition protection, although they usually would benefit from a consent right to any material changes or waivers with respect to the acquisition agreement (as would also be present in SunGard conditionality). Therefore, if a European buyer wished to waive a material adverse effect condition that it had the benefit of in an acquisition agreement, it is likely that this would be an action that European "certain funds" lenders would need to consent to.

The second key difference is that in the US, market lenders typically benefit from a condition that certain key "specified representations" made with respect to the target are true and correct (usually in all material respects). However, these must be consistent with the representations made by the target in the acquisition agreement and this condition is only violated if a breach of such specified representations would give the buyer the ability to walk away from the transaction. In the European market, no representations with respect to the target group generally need to be true and correct as a condition to the lenders' initial funding. The only representations which may provide a draw stop to the initial funding are typically core representations with respect to the bidder. Similar to the material adverse effect condition, while these appear different on their surface, in most European transactions if a representation made with respect to the target group in the acquisition agreement was not correct, and as a result the buyer had the ability to walk away from the transaction, this would likely trigger a consent right for the lenders under a European certain funds deal.

Much like documentation principles compared to full documents (or an interim facility), SunGard conditionality compared to European "certain funds" show differing approaches to an issue taken on each side of the Atlantic which result in similar substantive outcomes. Thus far, Yankee Loans have approached these issues on a case-by-case basis, although with at least a slight majority favouring the US approach to these issues.

Diligence – reliance or non-reliance

Lenders in US leveraged finance transactions will be accustomed to performing their own primary diligence with respect to a target group, and their counsel will perform primary legal diligence with respect to the target group. Frequently this may include the review of diligence reports prepared by the bidder's advisors and/or the seller's advisors, which will be provided on a non-reliance basis and primary review of information available in a data room or a data site.

Lenders in European leveraged finance transactions will also be accustomed to performing their own diligence with respect to a target group with the assistance of their counsel, which will also frequently include the review of diligence reports prepared by advisors to the bidder and/or the seller. However, European lenders typically are provided with explicit reliance on these reports, which is also extended to lenders which become party to the financing in syndication.

In the context of a Yankee Loan, while the advisors to the bidder and/or seller may be willing to provide reliance on their reports for lenders, consideration will need to be given as to whether this is needed and/or desired. Lenders' expectations may also diverge in the context of a Yankee Loan which includes a revolving credit facility provided by European banks (likely relationship banks to the borrower or target group) as opposed to the US banks initially providing the term loan facilities.

Conclusion

We expect Yankee Loans to be of continuing importance, at least in the near term. Ultimately, Yankee Loans can be seen as simply US institutional term loan tranches provided to European groups. However, while one may reasonably expect that many of the "familiar differences" between the US and European leveraged loan markets would (and perhaps should) follow a US approach for what is ultimately a US product with US market investors, there are fundamental differences to restructurings of US and European leveraged groups, as outlined above, which should be considered during the structuring of a Yankee Loan.

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Chapter 8

Issues and Challenges in Structuring Asian Cross-Border Transactions – An Introduction

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An estimated US$758.9 billion of syndicated loans were reported in the Asia Pacific market in 2013, up from US$747.9 billion in 2012. This estimate excludes bilateral lending which, in some jurisdictions such as the PRC, remains the predominant form of lending. There are significant loan capital inflows into Asia Pacific from Europe and the US as well as intra-regionally, in the form of a vibrant cross-border syndicated loans market hubbed in Hong Kong and Singapore, some recent big ticket multi-agency-led project financings (for example, the US$20 billion limited-recourse financing for the Ichthys LNG project in Australia and the US$5 billion financing for the Nghi Son refinery project in Vietnam) and a number of domestic markets with deep pools of liquidity, such as South Korea, Japan, Taiwan, the PRC, Malaysia, the Philippines and Australia.

There are legal and structural complexities in lending in the Asia Pacific region. The jurisdictions in the region are derived from a wide range of legal traditions and jurisprudence, which prescribe for relationships between creditors and debtors, ownership of assets and rights (and how they may be secured), insolvency and capital movement differently and with varying degrees of legal certainty.

This article investigates some of the legal issues that arise in cross-border financings in the region and how they may be dealt with. The brevity of this article requires that we consider these many and complex issues by way of examples; we do not attempt to carry out a survey across jurisdictions on each of the categories of issues we highlight below.

1. Diversity in the Region, and Factors to Consider

While Hong Kong, Singapore, Malaysia, Australia and New Zealand are common law jurisdictions, the balance of the economies in the region follow codified, civil law traditions. Some, such as the PRC and Vietnam, have socialist approaches in relation to, for example, ownership of land. The use of holding vehicles domiciled in offshore jurisdictions such as the British Virgin Islands, the Cayman Islands and Bermuda is common throughout the region, with some specific affinities between, for example, Mauritian vehicles and Indian corporates, and Labuan vehicles and Indonesian corporates. Some of the countries in the region also impose varying degrees of capital and foreign exchange control.

In structuring their cross-border lending in the region, lenders therefore need to consider, amongst other things:

- the most appropriate governing law for their facility agreements – preferably one that allows the parties to be able to enforce the terms of the negotiated documents as they are presented;
- whether the allocation of risks and general loan terms should follow those in Europe, the US or somewhere else (this is not necessarily dictated by, but has a strong correlation to, the governing law of the documents);
- how their security may be enforced and impediments that may stand in their way; and
- any fetters on the borrower's ability to service its debt.

2. Documentation

2.1 APLMA and LMA forms/governing law

APLMA and LMA form and style loan agreements are widely used for English law loan transactions in Asia. The APLMA also publishes template loan agreements governed by Hong Kong law, Singapore law and Australian law. Cross-border loan transactions for Hong Kong, Singapore and Australian corporates, in particular where such transactions are arranged by local lenders, are commonly governed by the respective local law, each of which is well accepted in the market given the common law basis of the jurisdictions and similarity to English law. Domestic loan transactions in jurisdictions where there are pools of large domestic liquidity (for example, Malaysia, South Korea, and Taiwan) are commonly governed by domestic law.

Certain market practice points are worth noting:

- the threshold for majority lenders is usually set at 662/3 per cent of lenders' commitments and/or participations;
- representations are repeated on new extensions of credit and on interest payment dates;
- there is generally no automatic acceleration of loans upon insolvency;
- it is not uncommon for lenders to be able to rely on legal or other due diligence reports issued by the borrower's counsel or other advisers; and
- legal opinions in relation to enforceability of finance documents and capacity and authority of obligors to enter into finance documents are generally delivered by lenders' counsel.

New York law transactions would, as expected, follow US style documentation. Historically, some Indonesian and Philippines project financings, and some financings by US corporates or sponsors in the region, have been documented under New York law.

2.2 US influence

Notwithstanding the above, some aspects of US financing

technology feature in some financings in Asia – especially if it is hoped to syndicate a portion in the US (through a TLB or otherwise) or where strong US-based sponsors are borrowing. In addition, a number of Asian borrowers (particularly listed PRC real estate companies) have issued high yield bonds using standard New York law style documentation. It is common for lenders and bondholders to be treated on a *pari passu* basis and such borrowers are requesting that terms between the bonds and loans be aligned. This has caused certain US style provisions to be included in Asian loan transactions, resulting in some hybrid forms of documentation.

US regulations also have increasing influence on documentation requirements in certain Asian financing, for example:

- FATCA: Financial institutions generally require FATCA provisions to be included in finance documents. This is particularly relevant to Asian lenders based in jurisdictions where the relevant governments have not entered into arrangements with the US and therefore are not FATCA compliant. Provisions are based on LMA suggested wording. There is no market standard on allocation of FATCA risk although this is currently developing in line with the US approach and strong borrowers will ensure that the risk is allocated to lenders.
- Sanctions/Anti-corruption provisions: Financial institutions, in particular those headquartered or with a significant presence in the US, increasingly require such provisions to be included in finance documents.

3. Governing Law And Enforcement

3.1 Governing law of finance documents

The governing law of finance documents (and in particular the loan agreement) is important as questions of legal validity and interpretation are determined by principles of the governing law. As noted, English law (and in some cases New York law) is favoured as the governing law for cross-border loan transactions, with the laws of certain common law based jurisdictions such as Hong Kong, Singapore and Australia also widely used and accepted.

3.2 Dispute resolution

Typically, disputes in loan transactions would be settled by the courts of the jurisdiction of the governing law of the underlying finance documents, although the lenders would generally have the right to commence proceedings in other jurisdictions.

It is less common for disputes in loan transactions to be settled through arbitration, which is generally seen to be less efficient and potentially more costly for claims for recovery of debt under loan agreements (which are usually viewed to be relatively straightforward).

In a cross-border lending transaction where the governing law of the loan agreement is English or New York law, and the English or New York courts have exclusive jurisdiction over disputes, the lenders would in a default scenario obtain a judgment in the English or New York courts and seek to enforce such judgment against an obligor in its jurisdiction of incorporation and/or jurisdictions in which it has assets. This is generally not a significant issue of concern where obligors and security assets are located in common law based jurisdictions such as Hong Kong, Singapore and Australia, as such jurisdictions have established laws and procedures pursuant to which the local courts may recognise and enforce such judgments without re-examining the merits of the original judgment.

However, the position is different in a number of other Asian jurisdictions. For example, in the PRC, it is practically impossible to enforce a foreign judgment in the absence of a bilateral treaty on recognition and enforcement of judgments or without being able to establish the reciprocity principle (while the PRC has entered into bilateral treaties with a number of jurisdictions, it has not yet entered into any such treaties with either the UK or the US). The position is similar in Vietnam and Thailand. In Indonesia, there are no procedures for direct recognition and enforcement of foreign judgments and a judgment creditor must commence a new action in the Indonesian courts, although the original judgment may serve as evidence of the relevant foreign law and underlying facts. Where a foreign judgment cannot be enforced easily in the jurisdiction of incorporation of an Asian obligor or where its assets are located, lenders should consider whether arbitration would be a viable alternative to litigation.

That decision is often driven by whether or not the relevant jurisdiction is a signatory to the New York Convention, which (among other things) requires courts of signatory states to recognise and enforce arbitration awards made in other signatory states, subject to public policy and certain other limited exceptions. Australia, England, the PRC (and by extension Hong Kong), Indonesia, Japan, Singapore, Thailand, the US, Vietnam and India are all signatories to the New York Convention. It is therefore not uncommon for lenders to require disputes under cross-border loan transactions in Asia to be subject to arbitration, usually seated in Hong Kong, Singapore, London or New York.

It is also possible for parties to provide for an optional dispute resolution clause where, for example, disputes may be submitted to arbitration but one party (usually the lender) retains an option to litigate, or *vice versa*. However, local law advice should be taken to ascertain whether the use of such option clauses may, in the local jurisdiction, jeopardise the enforceability of an arbitral award (for example, certain local jurisdictions would require a clear agreement between parties to resolve disputes by way of arbitration, which may be compromised by optionality).

3.3 Local law for local security

Based on the general doctrine of *lex situs*, security over certain assets (for example, land) should be taken using local law to avoid conflicts of laws issues on enforcement of security. In addition, local laws in certain jurisdictions may require that security may only be taken over assets located in that jurisdiction using local law, and this should be determined at an early stage in the transaction.

4. How Security is Held

A loan syndicate would generally expect that, where possible, security assets are held by a security agent or trustee on behalf of lenders, and (where registration is required) be registered in favour of the security agent or trustee. The agency or trust structure enables the security agent or trustee to enforce on behalf of the lenders as a group, including any new lenders who have joined the syndicate by transfer or assignment, especially if the transfer may be deemed under relevant law to be a discharge of the borrower's obligations towards the exiting lender.

Whether a security trust or agency is recognised in the jurisdiction of incorporation of the security grantor and where the security will need to be enforced and, where recognised, the degree of certainty as to which of these concepts are enforceable, are therefore important questions.

The security trust is recognised in the common law jurisdictions in the region and other relevant common law jurisdictions such as the BVI and Cayman Islands. While the PRC has implemented trust laws to recognise trusts, these are recently enacted laws and have not been rigorously tested in the relevant courts. As a result, security in a syndicated loan in the PRC is more usually held by a security agent as agent of the lenders. However, although this is common practice in the PRC, we have come across instances where local registration authorities have refused to register the security agent as beneficiary and, instead, require that each lender is registered as the beneficiary of the security and each new lender is also registered.

Security over assets in Thailand is granted to the lenders and any other finance parties (e.g. the security agent) and perfected in favour of (in respect of a mortgage) each finance party separately or (in respect of a pledge) the security agent for and on behalf of the finance parties. It is also market practice for the finance parties to appoint a security agent to act as agent of the lenders, to hold title deeds and to act on enforcement.

In Vietnam, a security agency could be used in certain circumstances. For example, the government may allow an onshore or offshore security agent to hold security over assets in Vietnam in a BOT project. To avoid uncertainty relating to the use of a security agent in Vietnam, each lender should be registered as a secured creditor in Vietnam. In a syndicated loan with onshore lenders in Vietnam, an onshore security agent must be a bank licensed to operate in Vietnam.

5. Foreign Exchange Controls (and a PRC Example)

5.1 General

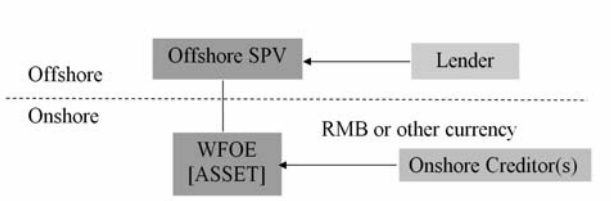
A number of Asian jurisdictions operate foreign exchange controls to regulate and monitor the flow of cross-border funds and currency conversion. This could have an impact on structuring cross-border loan transactions, and in many situations is the underlying driver behind how cross-border loan transactions are structured. The impact can be illustrated by reference to PRC foreign exchange controls and how it impacts the structuring of PRC cross-border loan transactions.

Broadly speaking, PRC-incorporated entities can incur indebtedness from non-PRC persons (such indebtedness herein referred to as **foreign debt**). However, where the direct shareholders of the PRC-incorporated entity include one or more non-PRC persons (foreign invested enterprise or **FIE**), there are limits as to the level of foreign debt it may incur. "Domestic companies", which refers to companies established under the laws of the PRC, the shareholders of which are PRC persons (and FIEs where the shareholding of non-PRC persons is less than 25 per cent.), may only borrow loans from non-PRC persons if approval from the State Administration of Foreign Exchange (**SAFE**) is obtained.

Lending directly to an FIE or a domestic company on the basis above has one major advantage, in that the FIE or domestic company would not be prohibited by PRC exchange control regulations from granting security over certain of its assets to secure its own foreign debt.

5.2 The offshore holding vehicle structure

In practice, these issues create substantial constraints and obstacles for PRC entities borrowing on a cross-border basis. Cross-border loan structures using an offshore company (often a special purpose vehicle) as the borrower have become prevalent.



A loan will be made to the offshore borrower which will in turn downstream the loan proceeds to the FIE either by way of a shareholder loan (which would remain subject to the foreign debt headroom) or equity injection.

The offshore lenders would generally take security over all assets situated offshore, as well as equity in the FIE. This includes share security over the shares in the offshore borrower. In a default scenario, this would allow the offshore lenders to enforce the share security to either sell the offshore borrower as a going concern and apply the proceeds towards repayment of the loan, or force a replacement of management.

PRC foreign exchange control regulations do not allow PRC entities (whether an FIE or a domestic entity) to grant security in favour of offshore lenders to secure debts owed by its offshore parent (in this case, the offshore borrower) to offshore lenders. This means that the offshore lenders' claims under the offshore loan would be structurally subordinated to the claims of creditors of onshore members of the group. However, there are various ways to enhance the credit of such structures, including the following:

- Personal guarantee: It is not uncommon for offshore lenders to require the founder or majority shareholder to provide a personal guarantee to guarantee offshore loan transactions of the group. There are potential drawbacks to this – in particular, if the founder or majority shareholder is a PRC individual, there could be potential issues with enforcing such guarantee against the individual in the PRC and with repatriating any enforcement proceeds offshore. Notwithstanding this limitation, there is still merit from the offshore lenders' perspective to obtain a guarantee from such individuals, who may have assets offshore. Even if such individuals do not have assets offshore, the offshore lenders' ability in most cases to initiate bankruptcy proceedings against the individual has proven to be an effective lever for offshore lenders when negotiating with PRC enterprises in a default or restructuring situation.
- Bank guarantees/*Nei Bao Wai Dai* structures: If a PRC enterprise has substantial unsecured assets onshore, it may consider enhancing the credit of an offshore loan made to the offshore borrower by arranging for a PRC bank to issue a guarantee to the offshore lenders, which will become payable on demand by the offshore lenders (usually after occurrence of a default and/or acceleration of the loan). In consideration for the PRC bank's agreement to issue such guarantee, an onshore subsidiary will provide an indemnity to the PRC bank and, if required, security for such indemnity. The offshore lenders are therefore relying on the credit of PRC bank. This structure is commonly known as "*Nei Bao Wai Dai*" (which translates to an onshore guarantee for an offshore loan), and is quite commonly seen as a structuring tool.

A number of other issues must also be considered when structuring such cross-border loans, including:

- Use of proceeds: It is important to ascertain how the proceeds of the financing will be used, as PRC regulations

could provide obstacles to any repatriation of funds back to the PRC and/or conversion of any foreign currency into local currency on repatriation. For example, under the existing SAFE regime, it is not permissible to convert a cross-border USD loan into RMB for the purpose of refinancing RMB debt onshore.

- Debt service: The offshore borrower's ability to service the loan will be dependent on the ability of the group to repatriate cash outside of the PRC. Cash may be up-streamed by PRC subsidiaries to their offshore parent companies either through repayment of shareholder loans or dividend payments, although each of these avenues is subject to specific regulations.

5.3 Others

Another example of a jurisdiction with foreign exchange restrictions is Thailand where, in general, all outward remittances of foreign currency must either, depending on the type of transaction, be transacted through authorised local banks or approved by the Bank of Thailand (the **BOT**). Local banks are authorised to transact without prior BOT approval (a **permitted transaction**), provided that all necessary documents are submitted to the local bank. This includes the repayment of offshore loans and the payment of interest on them, but excludes the outward remittance of proceeds from the enforcement of security outside the court proceedings or payments under a guarantee.

For a non-permitted transaction, although the BOT approval is not required until the payment is made, it has become increasingly common for lenders in larger transactions to require an "in-principle" approval from the BOT for the outward remittance of enforcement proceeds by the security provider in the event that security is enforced or a guarantee is called. This in-principle approval provides some comfort to the lenders by reducing the uncertainty normally associated with the obtaining of a government approval and, if granted, it will also usually reduce the time the BOT will take to consider the actual application. Note, however, that BOT approval will not be given in all cases.

6. Security – What is Available, and Other Issues to Look Out For

6.1 Security over specific assets – availability and specific requirements

Security over certain types of assets may not be available in certain Asian jurisdictions. For example, Thai law does not recognise any security interest over (among other things) bank accounts, receivables and insurances (although it is not uncommon for lenders to take collateral through absolute assignments (usually just for payment streams) and conditional assignments). Foreign lenders may not take security interests over land use rights and assets attached to land in Vietnam, as all land in Vietnam is owned by the state (although onshore lenders (including foreign banks in Vietnam) may take security interests over land use rights).

Where security over specific assets is available, it is important for lenders to obtain local law advice to ascertain at the outset whether there are any specific requirements in respect of taking such security. These would usually include specific approvals from, and/or registration with, specific authorities. It is also important to ascertain whether there are any restrictions in respect of taking security over specific assets. For example, certain jurisdictions may have laws or regulations which would restrict the taking of security over assets in regulated industries.

A number of jurisdictions require local law security documents to be in the local language (in certain jurisdictions, there is no hard rule that agreements must be in the local language but, in practice, only local language agreements will be accepted for registration). For example, PRC law governed pledges over equity in a PRC wholly foreign-owned enterprise must be in the Chinese language; English versions are sometimes signed concurrently but the Chinese versions would generally prevail. Certain jurisdictions may allow English versions to prevail or have equal standing.

6.2 Floating charges and general security interests

The universal floating charge over all assets, which is generally recognised in common law jurisdictions, is generally not available in civil law based jurisdictions in Asia. However, in certain jurisdictions, certain techniques may be used to achieve a similar result.

In Indonesia for example, in a document creating security over a specific asset, there will be provisions that allow the object of the security to be updated in order to capture future assets of the same kind.

In Vietnam, Vietnamese law allows the creation of security over all existing and future assets with a general description of those assets, registrable in Vietnam. However, registration of security must be updated when a future asset comes into existence or when the construction of a building is completed or acquired. An update of security is not required for security over stocks in trade and it is possible to take security over all goods stored in a warehouse.

6.3 Grace period prior to enforcement/methods of enforcement

It is not always possible for lenders to enforce security immediately on the occurrence of an event of default by a borrower. For example, in Indonesia and Thailand, lenders must generally serve demand letters before taking enforcement action.

Other jurisdictional differences affect the timing and procedures for the enforcement of remedies. Whilst the laws of common law jurisdictions would generally allow for out-of-court enforcement remedies, the laws of certain jurisdictions may require that security is enforced through the local courts.

For example, in Thailand, enforcement of a mortgage generally requires a judicial order and sale by public auction, while enforcement of a pledge does not require a judicial order but the sale must be made by public auction or, in the case of publicly listed shares, via the Stock Exchange of Thailand.

In our experience with enforcement of security in Indonesia, notwithstanding the agreement of the parties in the security documents, a court order or decision may be required for the enforcement of a security interest created under such documents. A law passed several years ago requires agreements involving Indonesian entities to be made in the Indonesia language. There are many uncertainties surrounding this law and further clarification, by implementation of regulations, is needed.

Vietnamese law allows the enforcement of security without being subject to any court hearing. However, the absence of an effective enforcement mechanism allows the grantor of security to frustrate the enforcement by refusing to physically hand over assets in its possession, resulting in a potential delay of several months as the secured creditor goes to a Vietnamese court to sue for possession.

7. Final Words

While there is much opportunity for cross-border lending within Asia, and an active and growing market in many jurisdictions, it is not as unified a market as it may seem from the outside. While some jurisdictions have a well-developed domestic syndicated market with well-recognised structuring and documentation conventions, cross-border deals often require careful structuring to achieve the allocation and mitigation of risks in a manner which is familiar to participants in the North American and European markets.

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Acquisition Financing in the United States: Outlook and Overview

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2014 Expected to be a Stronger Year for Mergers and Acquisitions in the United States

In 2014, the United States is expected to see an increased level of mergers and acquisitions activity, especially in the middle market. The market for M&A activity is an important consideration for participants in acquisition financings because the relative volatility or stability of the market can impact the terms of the financing and dictate whether the terms are more favourable to lenders or borrowers.

Although M&A activity in 2013 did not live up to predictions, total dollar value of M&A deals was up, largely because of a few "mega deals", including the $28 billion buyout of Heinz by Berkshire Hathaway, the $25 billion buyout of Dell, Verizon's $130 billion agreement to buy Vodafone, and the $20 billion purchase by Japan's Softbank of 70% of Sprint. The technology sector saw the largest volume of deals in 2013, which in the U.S. included Cisco's $2.7 billion acquisition of Sourcefire and the acquisition of BMC Software for $6.9 billion by a private equity consortium. The momentum in technology M&A continued at the start of 2014 with the announcement of Lenovo's purchase of IBM's server business and Motorola Mobility from Google, for a combined $5.21 billion, as well as Google's $3.2 billion purchase of Nest and VMWare's $1.175 billion acquisition of AirWatch.

M&A activity in 2014 is also expected to heat up in health care, biotechnology and life sciences. In January, GE announced the $1.06 billion purchase of a medical equipment business from Thermo Fisher Scientific and Forest Laboratories announced the purchase of Aptalis Pharma for $2.9 billion. These deals, among others, are indicative of a strong start to the year for M&A activity, albeit non-leveraged.

The middle market is expected to dominate M&A activity in 2014. In a recent survey by KPMG, 77% of U.S. CEOs responded that they expect to close M&A deals this year under $250 million, followed by 12% who expect deals between $250 and $499 million, and 5% who expect to close deals of between $500 and $999 million.

The increase may be for a variety of reasons, including pent-up demand and continued low interest rates. In addition, many corporate balance sheets continue to be flush with cash and private equity funds have both deep pockets of uncalled capital and the need to sell portfolio companies that, but for the financial crisis and long recovery, would have been sold earlier. Parties are poised to pursue the pipeline of deals that did not close in previous years.

A 2013 change in Delaware corporate law may also fuel the increase in M&A activity. Since Delaware is one of the most common U.S. jurisdictions of corporate organisation, changes in Delaware corporate law can have a wide impact on M&A transactions. New Section 251(h) of the Delaware General Corporation Law (DGCL) allows, in certain circumstances, for the parties to a two-step acquisition to agree that the back-end merger can be closed without shareholder approval if the purchaser acquires a sufficient number of outstanding shares in the tender offer to approve the back-end merger. This is often a simple majority of shares unless the certificate of incorporation requires a super-majority. Previously, a purchaser was required to obtain at least 90% of the outstanding shares before it could complete a merger without shareholder vote. New Section 251(h) will streamline third party acquisition financings for two-step acquisitions because the tender offer and the back-end merger can be closed at virtually the same time, eliminating the risks that lenders face with extended periods of time between the closing of the two transactions. Given that Section 251(h) is in its infancy, it remains to be seen whether this form of merger will be a preferred structure and, when used, whether the financings will reflect reduced fees or other changes to standard terms because of the associated efficiencies.

As M&A activity increases in 2014, so will the need for acquisition financing. It is important to review the fundamentals of U.S. acquisition financing using secured loans and monitor trends in this regularly changing area of loan financing.

The Commitment Letter is Key

The commitment letter for a financing sets forth the material terms of the lenders' obligations to fund the loans and the conditions precedent to such obligations. Obtaining a suitable commitment letter from one or more lenders is of particular importance to acquisition financing and can be the deciding factor as to whether a seller will sign an acquisition agreement with a particular buyer where the buyer cannot otherwise prove itself able to fund the acquisition from its own funds. As in all committed financings, the borrower wants an enforceable commitment from its lenders which obligates the lenders to extend the loans, subject to certain conditions that have been mutually agreed upon. In acquisition financing, where the proceeds of the loans will be used by the borrower to pay the purchase price for the target company, in whole or in part, the seller will also be concerned that the buyer has strong funding commitments from its lenders. If the buyer's lenders do not fund the loans, a failed acquisition could result.

In a typical timeline of an acquisition, especially one involving public companies, the buyer and seller execute the definitive agreement for the acquisition weeks, if not months, in advance of the acquisition. Following execution, the buyer and seller work to

obtain regulatory approvals and other third-party consents that may be needed to consummate the acquisition, execute a tender offer if required, complete remaining due diligence, finalise the financing documentation and take other required actions. Signing an acquisition agreement often results in the seller not pursuing other potential buyers for a period of time while the parties work to complete the items noted in the prior sentence. For example, acquisition agreements often contain covenants forbidding the seller from soliciting or otherwise facilitating other bids and requiring the parties to work diligently towards closing. Further, many acquisition agreements either do not give the buyer a right to terminate the agreement if its financing falls through (known as a "financing-out" provision), or require a substantial penalty payment to be made by the buyer if the transaction fails to proceed, including as a result of the financing falling through (known as a "break-up fee"). Accordingly, at the signing of the acquisition agreement, and as consideration for the buyer's efforts and costs to close the acquisition, the buyer will want the lenders to have strong contractual obligations to fund the loans needed to close the acquisition.

Who Drafts the Commitment Letter?

Private equity funds (also known as sponsors) are some of the most active participants in M&A transactions and related financings. With their sizable volumes of business that can be offered to banks, sponsors often have greater leverage in negotiations with lenders than non-sponsor-owned companies. Sponsors and their advisors monitor acquisition financings in the market and insist that their deals have the same, if not better, terms. As economic tides shift, the sponsors' ability to leverage their large books of banking business grows and wanes, and the favourability for sponsors of acquisition financing terms shift as well.

Who drafts the commitment papers is one area where sponsors are often treated more favourably than other borrowers. While lenders in most cases want to draft commitment papers, the larger sponsors are now regularly preparing their own forms of commitment papers and requiring the lenders to use them. From the sponsors' perspective, controlling the drafts can result in standardised commitment letters across deals and a more efficient and quick process to finalise commitment letters. To get the best terms, the sponsors often simultaneously negotiate with separate potential lenders and then award the lead role in an acquisition financing to the lender willing to accept the most sponsor-favourable terms.

Conditionality

The buyer's need for certainty of funds to pay the purchase price puts sharp focus on the conditions that must be met before the lenders are contractually obligated to fund the loans. As a result, a buyer has a strong preference to limit the number of conditions precedent in a commitment letter, and to make sure that the commitment letter is explicit as to the included conditions, in order to lessen funding uncertainty. The buyer and seller want to avoid a scenario where the conditions precedent to the buyer's obligation to close the acquisition has been met but the lenders' obligation to fund the loans has not. Particularly in the scenario where no financing-out clause is included in the acquisition agreement, if the acquisition financing falls through because the buyer cannot satisfy the conditions in the commitment letter, the buyer may not be able to close the acquisition and could be required to pay the seller sizable contractual breakup fees and be subject to lawsuits from the seller. Certain conditions discussed below are commonly subject to heavy negotiation in an acquisition financing.

Documentation Conditions

Commitment letters for general financings often contain vague and partial lists of documents and conditions that the lenders will require before funding the loans. Phrases like "customary conditions precedent" are often seen. In contrast, a commitment letter for an acquisition financing typically has an explicit, detailed and often lengthy list of conditions.

If the lenders are permitted to require satisfaction of conditions precedent to funding that are not expressly set forth in the signed commitment letter (whether customary conditions or not), this increases the risk to the borrower that these additional conditions cannot be met. It is common in an acquisition financing to see an express statement from the lenders that the list of conditions precedent in the commitment letter are the only conditions that will be required for funding. In some cases the list of conditions precedent in commitment letters for acquisition finance are so detailed that they are copied directly into the final forms of loan agreements.

Similarly, vague references to "customary covenants" and "customary events of default" in a commitment letter add risk that the lenders will require that the loan agreement include unreasonable provisions which could not be met by the borrower. To limit this risk, commitment letters for acquisition financings often include fully negotiated covenant and default packages (which may include pages of detailed definitions to be used in calculation of any financial covenants).

Some sponsors even require that the form of the loan agreement be consistent with "sponsor precedent", meaning that the loan documentation from the sponsor's prior acquisition financing will be used as a model for the new financing. Agreeing to use or be guided by "sponsor precedent" limits the risk to the sponsor that the financing will be delayed or not close because the lender and its counsel produce a draft loan agreement with unexpected terms and provisions.

Representations and Warranties

Loan agreements typically require that the included representations and warranties be accurate as a condition of the funding. Lenders financing the acquisition also want the representations with respect to the target in the acquisition agreement to be accurate. This is reasonable because after consummation of the acquisition, the target is likely to be obligated on the loans (either as the borrower or a guarantor) and thus part of the credit against which the lenders are funding.

"SunGard" (named for an acquisition financing that included these terms) or "certain funds" provisions are now common in commitment letters for acquisition financings. These clauses are relevant to several provisions in a typical commitment letter. With respect to representations and warranties, these clauses provide that on the closing date of the loan, as a condition of the lenders' funding obligations, only certain representations need to be accurate. Strong sponsors even negotiate the precise meaning of the term "accurate". The representations required to be accurate as a condition of the lenders' funding obligation in a typical SunGard clause include the following:

- Only those representations in the acquisition agreement relating to the target that, were they untrue, would be material to the lenders and for which the buyer has a right under the acquisition agreement to decline to close the acquisition must be accurate. While providing certainty of funding, this standard avoids a scenario where the loan agreement has different representations with respect to the target from the acquisition agreement.

- Only certain representations with respect to the borrower set forth in the loan agreement must be accurate (the "specified representations"). These can include those with respect to corporate existence, power and authority to enter into the financing, enforceability of the loan documents, margin regulations, no conflicts with law or other contracts, solvency, status of liens (but see below regarding this topic) and certain anti-terrorism and money laundering laws. A financial covenant could also be included as a specified representation in some deals. What are included as specified representations change with changing economic conditions and relative bargaining strength of companies and sponsors. As financial markets have improved and the leverage of sponsors has increased, the typical list of specified representations has shrunk and may well continue to weaken, benefiting sponsors.

These are the only representations applicable as conditions precedent to the initial funding of the loans. Even if the other representations in the loan agreement could not be truthfully made at the time of the initial funding, the lenders nonetheless are contractually obligated to fund the loans.

Company MAC

Company material adverse change (MAC) is a type of representation included in some acquisition agreements and loan agreements. This is a representation that no material adverse change in the business of the target has occurred. Inability to make the representations in the acquisition agreement typically permits the buyer to terminate the acquisition agreement and in the loan agreement it excuses the lenders from their funding obligations. A customary MAC definition in an acquisition agreement differs from that in a loan agreement. Acquisition agreement MAC clauses are often more limited in scope and time frame covered, and have more exceptions (including for general market and economic conditions impacting the target). Like other representations, buyers and sellers often require that the MAC definition in loan agreements mirror the definition in acquisition agreements, but solely for purposes of the initial funding of the acquisition loans (and not for ongoing draws under a working capital revolver, for instance).

Market MAC and Flex

Market MAC is another type of MAC representation in some commitment letters. Seen more in economic down-cycles, these clauses allow the lenders to terminate their commitments if there has been a material adverse change in the loan and syndication markets generally. Strong borrowers and sponsors have had success negotiating these clauses out of their commitment letters over the last several years as the economy has continued to improve.

As discussed above, the time between signing the commitment letter, on one hand, and closing the acquisition and funding the loans, on the other, is often a significant period. Lenders whose commitment letters do not have a market MAC, especially those lenders who fully underwrite the commitments, are subject to deteriorating financial markets during the syndication of the commitments and the risk that they will not be able to sell down the commitments to other lenders. "Flex" provisions limit this risk and allow for amendments to the terms of the financing without the borrower's consent when necessary to allow the lenders arranging the loan to sell down their commitments.

If during syndication there is no market for the loans at a certain price or with certain terms, the committed lenders are permitted to exercise these flex clauses and increase the pricing (with respect to either interest rate, fees or both) within pre-agreed limits or make other pre-agreed changes to the structure of the loans (such as call protections, shorter maturities, etc.). While these changes provide some comfort to committed lenders in gradually deteriorating financial markets, they may not be as helpful in a dramatic downturn where there is little to no market for loans on any terms.

Just after the financial crisis, not surprisingly, flex clauses often became broader in scope and gave lenders greater flexibility to change key terms of a financing. The types of provisions that can be subject to flex include interest margin, negative covenant baskets, financial covenant ratios, the allocation of credit between first lien, second lien and high yield bonds and the amount and type of fees. As markets continue to improve, sponsors are using their leverage to limit flex provisions, including the financing terms subject to the flex provisions, and to require greater limits on the scope of the changes that can be made without their consent.

Some sponsors have even turned the tables on their lenders and required "reverse flex" arrangements. These require the lenders to amend the financing terms under the commitment letters to be more favourable to the borrower if syndication of the loans is so successful that there are more potential lenders than available loans.

Perfection of Liens

As in all secured financings, lenders in an acquisition financing need evidence that their liens on the borrower's assets are perfected and enforceable, preferably as a condition precedent to the initial funding under the loan agreement. However, ensuring perfection of the liens is often highly technical and can be a time-consuming process depending on the nature and location of the borrower's assets and the specific legal requirements for perfection. The technical nature of lien perfection raises the risk that lenders will withhold funding for the loans because insufficient steps were taken to perfect the liens, and in an acquisition financing timing and certainty are at a premium.

Typical SunGard provisions limit this risk by requiring delivery at funding of only (i) Uniform Commercial Code financing statements which perfect a security interest in personal property that can be perfected by filing, and (ii) original stock certificates for any pledged shares. Perfecting a security interest in other asset classes is required on a post-funding basis by a covenant detailing what perfection steps are required. The sorts of collateral perfected on a post-closing basis can include real estate, deposit and securities accounts, intellectual property, foreign assets and other more esoteric collateral requiring more complicated efforts.

As financial markets continue to improve, sponsors are likely to continue pushing lenders to increase the time frames to complete post-closing collateral deliverables, give the administrative agent greater flexibility to extend these time frames without lender consent and limit efforts by lenders to increase the collateral deliverables required at closing.

The Acquisition Agreement Matters

Delivery of the executed acquisition agreement is a condition precedent to the lenders' obligation to fund the loans. As discussed in more detail below, as a fallback, lenders sometimes accept a near final draft of the acquisition agreement, coupled with a covenant from the buyer that there will be no material changes. The terms of the acquisition agreement are important to lenders in a number of respects beyond understanding the structure and business of the borrower after consummation of the acquisition. Lenders also regularly require inclusion of certain provisions in acquisition agreements.

Structure of the Acquisition

The structure of the acquisition is important to the lenders as it will dictate a number of issues for the financing, including collateral perfection, identity of the guarantors and borrowers and timing of the acquisition (i.e., how long the lenders need to have their commitments outstanding). There are a number of common acquisition structures. While the specifics of those structures are beyond the scope of this chapter, these include stock purchases (with or without a tender offer), mergers (including forward, forward triangular and reverse triangular mergers) and asset purchases. Each has its own unique structuring issues for the lenders.

Representations and Company MAC

As described above, the lenders often rely on the representations and warranties in the acquisition agreement, including the definition of material adverse change, and incorporate those terms into the loan agreement.

Obligation to Continue Operating

Lenders often review whether the seller is contractually obligated in the acquisition agreement to continue operating the business in the ordinary course and not to make material changes to the business. Again, the target is a part of the lenders' credit and the lenders do not want to discover after consummation of the acquisition that the target has been restructured in a way that results in its business being different from the lenders' understanding.

Indemnity

Lenders also typically consider the indemnities provided by the seller in the acquisition agreement. If, after the acquisition is consummated, it is discovered that the seller made a misrepresentation or, worse, committed fraud or other wrongdoing as part of the acquisition, those indemnities could affect the buyer's ability to recover against the seller. If the misrepresentation or wrongdoing results in the lenders foreclosing on the assets of the borrower, the indemnities could be inherited by the lenders if the rights of the borrower under the acquisition agreement are part of the collateral. Acquisition agreements typically contain anti-assignment and transfer provisions. It is important that those provisions expressly permit the lenders to take a lien on the acquisition agreement.

Purchase Price Adjustments and Earn-Outs

Any payments to be made to the seller by the buyer after consummation of the acquisition are important to the lenders. Many loan agreements define these payments, whether based on performance of the target or other factors, as debt and their payment needs to be specifically permitted by the loan agreement. Beyond technically drafting the loan agreement to permit payment of these amounts, these payments should be viewed as assets of the buyer that are not available to the lenders to repay the loans and this may impact the credit review of the loan facility.

Xerox Provisions

When a proposed acquisition terminates, the commitment letters for the acquisition financing typically state that the lenders' commitments also terminate. That is not always the end of the lenders' concerns. Many terminated acquisitions result in accusations of wrongdoing and bad faith by the parties. Litigation is not uncommon. Lenders want to make sure that any litigation brought by the seller does not look to the lenders for damages.

Xerox provisions (named for a financing with Xerox where these clauses were seen) give lenders this protection in the form of an acknowledgment by the seller in the acquisition agreement that the seller's sole remedy against the buyer and its lenders for termination of the acquisition is the breakup fee specified in the acquisition agreement. If the acquisition terminates because the lenders fail to fund their commitments, the lenders may be subject to a breach of contract suit brought by the buyer. But the lenders in any termination scenario often seek to restrict suits brought against them by the seller. Conversely, the sellers' focus on certainty of the financing has caused some sellers to push back on inclusion of these provisions. Some sellers with strong leverage even negotiate for the right to enforce remedies (or cause the buyer to enforce remedies) against the lenders under a commitment letter.

Since the lenders are not party to the acquisition agreement, applicable law creates hurdles for the lenders to enforce the Xerox provisions. To address these hurdles, lenders seek to be expressly named as third-party beneficiaries of the Xerox provisions. In the event the lenders have claims against the seller for breach of the Xerox provisions, lenders will have customary concerns about the venue and forum of any claims brought by the lenders under the acquisition agreement. Like in loan agreements, lenders often seek to have New York as the exclusive location for these suits and seek jury trial waivers in the acquisition agreement.

Efforts to Obtain the Financing

Lenders will consider provisions in the acquisition agreement regarding the buyer's obligations to obtain financing. Typically, buyers agree to use "reasonable best efforts" or "commercially reasonable efforts" to obtain the financing in the commitment letter. These provisions may include a requirement to maintain the commitment letter, not to permit any modification to the terms of commitment letter without the seller's consent (with some exceptions), to give notice to the seller upon the occurrence of certain events under the commitment letter, and obtain alternative financing, if necessary. As noted above, acquisition agreements may also contain provisions obligating the buyer to enforce its rights against the lender under the commitment letter, or even pursue litigation against the lender. Buyers with strong leverage will want to limit provisions in the acquisition agreement requiring specific actions against the lenders.

Cooperation with the Financing

As discussed above, the lenders have an interest in understanding the acquisition and the nature of the target's business. Further, the conditions precedent will require deliverables from the target and the lenders' regulatory, credit and legal requirements demand that they receive certain diligence information about the target and its business. None of this can be accomplished if the seller does not agree to assist the buyer and its lenders. Lenders often require that the acquisition agreement include a clause that the seller will cooperate with the lenders' diligence and other requirements relating to the acquisition financing.

Amendments to the Acquisition Agreement

Lenders usually have the opportunity to review the acquisition

agreement, or at least a near final version, prior to executing their commitment letters. The buyer and seller will want the lenders to acknowledge that the final agreement or draft is acceptable. The lenders, on the other hand, will want to receive notice of any amendments to the acquisition agreement and ensure they do not adversely impact the financing. To avoid the lenders' refusal to fund the loans because of an amendment to the acquisition agreement, buyers and sellers are often careful to ensure that no amendments to the acquisition agreement will be required. Some amendments are unavoidable and commitment letters often contain express provisions as to the nature of those amendments that need lender approval. If lender approval is not needed, then the lenders cannot use the amendment as a reason to refuse funding.

Negotiations of the "no-amendment" condition focus on the materiality of the amendments and whether the change has to be adverse or materially adverse, with some lenders negotiating consent rights for any material change in the acquisition agreement. Lenders often seek to negotiate express provisions that would be deemed material or adverse, including some of the above clauses that were included in the acquisition agreement at the requirement of the lenders. Some lenders with strong negotiating leverage even negotiate for a clause in the acquisition agreement that any amendments will require the lenders' consent.

Conclusion

Leveraged acquisitions in the United States raise unique structuring issues and techniques, only some of which are discussed here. As global financial markets continue to improve, expect to see greater volumes of acquisition financings and sponsors exercising greater leverage over their lenders to loosen acquisition financing terms.

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A Comparative Overview of Transatlantic Intercreditor Agreements

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Introduction

Intercreditor terms, or at least the accepted frameworks applicable to a given financing structure in a particular market, are often fairly settled, but where cultures collide, for example, in a U.S. syndicated bank loan financing for European borrowers, or other financings involving practitioners and business people in different parts of the world, deal parties may have very different expectations as to the key intercreditor terms that ought to apply.

In this article, we will compare and contrast the key terms in U.S. second lien and European mezzanine intercreditors and discuss the blended approach taken in some recent intercreditor agreements for financings of European companies in the U.S. syndicated bank loan markets. Similar dynamics may also be involved when documenting intercreditor agreements involving other non-U.S. jurisdictions, but for ease of reference we will refer to these intercreditor agreements as "Transatlantic Intercreditor Agreements".

Assumptions

U.S. second lien intercreditors are predicated on two key assumptions: *first*, that the business will be reorganised pursuant to Chapter 11 of the United States Bankruptcy Code (Chapter 11); and *second*, that the first lien lenders will receive the benefits of a comprehensive guarantee and collateral package (including shares, cash, receivables and tangible assets) pursuant to secured transactions laws that effectively provide creditors with the ability to take a security interest in "all assets" of the borrower and guarantors. European mezzanine intercreditors, in contrast, assume that (i) in all likelihood, not all assets of the borrower and guarantors will be subject to the liens of the first lien and second lien secured parties, and (ii) it is unlikely that the borrower and guarantors will be reorganised in an orderly court-approved process and more likely, since there is no pan-European insolvency regime (and so there is not a pan-European automatic stay on enforcement of claims), the intercreditor terms will have to work in the context of potentially multiple and disparate insolvency proceedings (and ideally avoid insolvency proceedings altogether). As a result one of the key goals that European mezzanine intercreditors seek to facilitate instead is a swift out-of-court, out-of-bankruptcy, enforcement sale (or "pre-pack") resulting in a financial restructuring where "out of the money" junior creditors' claims are removed from the financing structure by releasing or disposing of the liens and guarantees of the "out of the money" junior creditors.

Overview

The first lien/second lien relationship in the U.S. most closely resembles the senior/mezzanine relationship in Europe, where mezzanine financings are always second lien secured financings (unlike in the U.S. where "mezzanine financing" often connotes a senior unsecured or senior subordinated financing). Although first lien/second lien financings and senior/mezzanine financings are very similar, as highlighted above, the key terms of U.S. second lien and European mezzanine intercreditors have been constructed based on very different assumptions which therefore results in significant differences.

European mezzanine intercreditor agreements typically combine claim subordination, payment blockages, lien subordination, broad enforcement standstill provisions restricting the junior lien creditors' ability to take enforcement action (on debt and guarantee claims as well as collateral) and extensive release mechanics. U.S. second lien intercreditors establish lien subordination, which regulates the rights of the U.S. second lien creditors with respect to collateral only, and includes an enforcement standstill with respect to actions against collateral only. U.S. second lien intercreditors do not generally include payment subordination of the junior facility and they rely heavily on waivers of the junior lien creditors' rights as secured creditors under Chapter 11.

Within regions, the forms of intercreditor agreement can vary significantly. European mezzanine intercreditors are often based on the form promulgated by the Loan Market Association (the "LMA"), but are negotiated on a deal-by-deal basis. By contrast, there is no market standard first lien/second lien intercreditor agreement in the U.S. (The Commercial Finance Committee of the American Bar Association did publish a model form of intercreditor agreement in 2010, but it is not widely used.) As discussed below, recent intercreditors for financings of European companies in the U.S. syndicated bank loan markets vary even more significantly.

Key Terms of U.S. Second Lien Intercreditor Agreements and European Mezzanine Intercreditor Agreements

1. Parties to the Intercreditor Agreement

U.S. second lien intercreditors are generally executed by the first lien agent and the second lien agent and executed or acknowledged by the borrower and, sometimes, the guarantors. Depending on the flexibility negotiated by the borrower in the first lien credit agreement and second lien credit agreement, the intercreditor agreement may also allow for other future classes of first lien and second lien debt permitted by the credit agreements to accede to the intercreditor agreement. U.S. second lien intercreditors also typically allow for refinancings of the first lien and second lien debt.

By contrast, the parties to European mezzanine intercreditors generally include a longer list of signatories. In addition to the first lien agent and lenders, the second lien agent and lenders and the obligors, the obligors' hedge providers, cash management providers, ancillary facility lenders, the lenders of intra-group loans, the lenders of shareholder loans and the security agent will execute a European-style intercreditor agreement. The longer list of parties to European mezzanine intercreditors is largely driven by the senior creditors' need to ensure that after giving effect to the senior lenders' enforcement, the borrower group is free and clear of all claims (both secured and unsecured) against the borrower and guarantors and a desire to ensure that any enforcement action by creditors is choreographed in a manner which maximises recoveries for the senior secured creditors (and thus indirectly for all creditors). European mezzanine intercreditors do not typically expressly permit refinancings and traditionally did not include additional classes of first lien or second lien debt. (The LMA form of senior/mezzanine intercreditor agreement now includes a concept of "Qualifying Senior Facilities Refinancings", but this option in the form is not currently selected frequently because its utility is limited by the mezzanine facility's maturity date, typically expiring 12 months after the maturity date of the senior credit facilities. This maturity date effectively limits the maturity date of the new senior credit facilities, thereby necessitating the consent of the mezzanine creditors to refinance the senior facility.)

Hedge obligations are generally included as first lien obligations (and sometimes also as second lien obligations) under U.S. second lien intercreditors, but hedge counterparties are not directly party to U.S. second lien intercreditors. By accepting the benefits of the first priority lien of the first lien agent, the hedge counterparties receive the benefits of the first priority lien granted to the first lien agent on behalf of all first lien secured parties (including the hedge counterparties) and the hedge counterparties are deemed to agree that the first lien security interests are regulated by the intercreditor agreement and other loan documents. The hedge counterparties under U.S. second lien intercreditors in syndicated bank financings generally do not have the ability to direct enforcement actions and do not have the right to vote their outstanding claims (including any votes in respect of enforcement decisions).

Cash management obligations (e.g., treasury, depository, overdraft, credit or debit card, electronic funds transfer and other cash management arrangements) are often included as first lien obligations under U.S. second lien intercreditors on terms similar to the terms relating to the hedge obligations. By contrast, European mezzanine intercreditors do not typically expressly contemplate cash management obligations. In European financings, the cash management providers would typically provide the cash management services through ancillary facilities – bilateral facilities provided by a lender in place of all or part of that lender's unutilised revolving facility commitment. Ancillary facilities are not a common feature of U.S. credit facilities. The lenders of the ancillary facilities would generally become direct signatories of a European mezzanine intercreditor.

2. Enforcement

a. Enforcement Instructions

The first lien agent under U.S. second lien intercreditors takes instructions from a majority of the loans and unfunded commitments under the senior credit agreement, which follows the standard formulation of required lenders in U.S. senior credit agreements. (Note, however, that the vote required to confirm a plan of reorganisation in a Chapter 11 proceeding is a higher threshold – at least two-thirds in amount and more than one-half in number of the claims voting on the plan.)

The collateral agent under European mezzanine intercreditors, however, takes instructions from 66 2/3% of the sum of (i) the drawn and undrawn amounts under the senior credit agreement, and (ii) any actual exposure (plus any mark to market value if the senior credit agreement has been discharged) under any outstanding hedging arrangements.

b. Enforcement Standstill Periods

U.S. second lien financings involve lien subordination as opposed to payment (also referred to as debt or claim) subordination. The result of lien subordination is that only the proceeds of shared collateral subject to the liens for the benefit of both the first lien secured parties and second lien secured parties are applied to repayment in full of the first lien obligations before the second lien secured parties may receive any distribution on the proceeds of the shared collateral, but the second lien secured parties may receive other payments (such as payments of principal and interest and payments from other sources, e.g., *unencumbered property*) prior to the first lien obligations being paid in full. In the context of U.S. obligors, in practice, it is unlikely that there would be substantial property that is unencumbered since the security granted would likely pick up most assets – in contrast to certain European obligors whose unencumbered assets may be significant due to local law limitations.

Payment subordination requires the junior lien creditors to turnover to the first lien secured parties all proceeds of enforcement received from any source (including the proceeds of any *unencumbered property*) until the first lien obligations are paid in full. Consequently, the difference in recoveries between lien subordination and payment subordination could be significant in a financing where material assets are left unencumbered, as is likely in a financing in which much of the credit support is outside of the U.S.

U.S. second lien intercreditors prevent the second lien agent from exercising any of its rights or remedies with respect to the shared collateral until expiration of the period ending 90 to 180 days after notice delivered by the second lien agent to the first lien agent after a second lien event of default or, in some cases, if earlier, second lien acceleration. The standstill period becomes permanent to the extent the first lien agent is diligently pursuing in good faith an enforcement action against a material portion of the shared collateral. An exercise of collateral remedies generally includes any action (including commencing legal proceedings) to foreclose on the lien of such person in any shared collateral, to take possession of or sell any shared collateral or to exercise any right of setoff with respect to any shared collateral, but the acceleration of credit facility obligations is generally not an exercise of collateral remedies.

European mezzanine intercreditors typically contain a much broader enforcement standstill provision than the U.S. second lien intercreditors. The scope of the enforcement actions is negotiated, but typically prohibits any acceleration of the second lien debt, any enforcement of payment of, or action to collect, the second lien debt, and any commencement or joining in with others to commence any insolvency proceeding, any commencement by the second lien agent or second lien creditors of any judicial enforcement of any of the rights and remedies, whether as a secured or unsecured creditor, under the second lien documents or applicable law. The enforcement standstill period typically runs for (i) a period of 90 days (in most cases) following notice of payment default under the senior credit agreement, (ii) a period of 120 days (in most cases) following notice of financial covenant default under the senior credit agreement, and (iii) a period of 150 days (in most cases) following notice of any other event of default under the senior credit agreement, plus (in some cases) 120 days if the senior

lien agent is taking enforcement action. In European mezzanine intercreditors, the senior creditors firmly control enforcement. In addition, the senior agent can override the junior agent's instructions to the security agent, leaving the mezzanine lenders only able to influence the timing of enforcement action after the standstill period.

Because the enforcement standstill in U.S. second lien intercreditors is limited to enforcement against shared collateral, U.S. second lien lenders, unlike their European counterparts, retain during the standstill period the right to accelerate their second lien loans and to demand payment from the borrower and guarantors. However, in the event any second lien agent or any other second lien creditor becomes a judgment lien creditor in respect of the shared collateral as a result of enforcement of its rights as an unsecured creditor (such as the ability to sue for payment), the judgment lien would typically be subordinated to the liens securing the first lien obligations on the same basis as the other liens securing the second lien obligations under the U.S. second lien intercreditor agreement. This judgment lien provision effectively limits the effectiveness of the junior lien creditors' efforts to sue for payment, since the junior lien creditors ultimately will not be able to enforce against shared collateral, although the junior lien creditors could still obtain rights against any previously unencumbered assets of the borrower and guarantors.

3. Payment Blockages

U.S. second lien intercreditors do not generally subordinate the junior lien obligations in right of payment to the first lien obligations.

European mezzanine intercreditors do subordinate the junior lien obligations in right of payment to the senior lien obligations and include a payment blockage period that is typically permanent during a payment default under the senior credit agreement and 120 days during each year during any other event of default under the senior credit agreement. The mezzanine creditors may negotiate for exceptions to the payment blockage periods, e.g., payment of a pre-agreed amount of expenses related to the restructuring or a valuation of the borrower group (other than expenses related to disputing any aspect of a distressed disposal or sale of liabilities). In addition, separate payment blockage rules typically apply to hedge obligations, shareholder loan obligations and intragroup liabilities in European mezzanine intercreditors.

4. Releases of Collateral and Guarantees

In order to ensure that the junior lien creditors cannot interfere with a sale of the shared collateral, both U.S. second lien intercreditors and European mezzanine intercreditors contain release provisions in which the junior lenders agree that their lien on any shared collateral is automatically released if the first lien creditors release their lien in connection with a disposition permitted under both the first lien credit agreement and the second lien credit agreement and, more importantly, in connection with enforcement by the first lien creditors.

While important in U.S. second lien intercreditors, the release provisions are arguably the most important provision of European mezzanine intercreditors.

U.S. second lien and European intercreditors permit, in the ordinary course, the guarantees and collateral to be released in respect of any asset or any member of the group if the asset sale is permitted under both the first lien credit agreement and second lien credit agreement. However, under European intercreditor agreements, in connection with enforcement by the senior creditors (or a "distressed disposal"), the junior security and debt and guarantee claims can be released (or disposed of) subject to negotiated conditions. Market practice continues to evolve but the fair sale provisions are increasingly common, i.e., public auction/sale process or independent fair value opinion. The LMA form intercreditor agreement requires the security agent to take reasonable care to obtain a fair market price/value and permits the sale of group entities and release of debt and guarantee claims, plus the sale of mezzanine debt claims. Recent changes to the LMA intercreditor agreement provide that the security agent's duties will be discharged when (although this list is not exhaustive): (i) the sale is made under the direction/control of an insolvency officer; (ii) the sale is made pursuant to an auction/competitive sales process (which does not exclude mezzanine creditors from participating unless adverse to the sales process); (iii) the sale is made as part of a court supervised/approved process; or (iv) a "fairness opinion" has been obtained. Any additional parameters/conditions to the above will be hotly negotiated, particularly in deals where specialist mezzanine funds are anchoring the mezzanine facility. Typical points for discussion will be: (i) the circumstances in which/whether the senior creditors can instruct a sale in reliance on a fair sale opinion rather than a public auction; (ii) terms of any public auction (i.e. how conducted, on whose advice, who can participate, who can credit bid); (iii) any cash requirements; and (iv) any information/consultation rights.

In addition to the release provisions, European mezzanine intercreditors typically allow (subject to the fair sale provisions discussed above) the security agent to transfer the junior lien debt, intragroup liabilities and/or shareholder loans to the purchasers of the assets in an enforcement situation. The disposal of liabilities option will be, in many cases, more tax efficient than cancelling the subordinated debt in connection with enforcement.

Many of these conditions with respect to sales of collateral are absent in U.S. second lien intercreditors because meaningful protections are afforded by the Uniform Commercial Code requirement for a sale of collateral to be made in a commercially reasonable manner and, in the case of a 363 sale process, by a court-approved sale in Chapter 11, as discussed more fully below.

In addition, the release provisions in U.S. second lien intercreditors are also premised on the first lien and second lien security interests being separately held by the first lien collateral agent and the second lien collateral agent and documented in separate, but substantially similar, documents that are meant to cover identical pools of collateral. In European mezzanine intercreditors, the release provisions assume that one set of security interests are held by one security agent on behalf of all of the creditors (senior and mezzanine).

5. Limitation on First Lien Obligations

U.S. second lien financings include a "first lien debt cap" to limit the amount of first lien obligations that will be senior to the second lien obligations. The analogous provision in European mezzanine intercreditors is referred to as "senior headroom". Any amounts that exceed the "first lien debt cap" or "senior headroom" do not benefit from the lien priority provisions in the intercreditor agreement. The "cushion" under the first lien debt cap or "headroom" is meant to allow for additional cash needs of the borrower group as part of a loan workout or otherwise.

The "first lien debt cap" in U.S. second lien financings is typically 110% to 120% of the principal amount of loans and commitments under the first lien facilities on the closing date plus 100% to 120%

of the principal amount of any incremental facilities permitted under the first lien credit agreement on the closing date. The first lien debt cap is sometimes reduced by the amounts of certain reductions to the first lien commitments and funded loans (other than refinancings), e.g., mandatory prepayments. The first lien debt cap does not apply to hedging obligations and cash management obligations, which are generally included as first lien priority obligations without limitation. In addition, interest, fees, expenses, premiums and other amounts related to the principal amount of the first lien obligations permitted by the first lien debt cap are first lien priority obligations, but are generally not limited by the cap itself. The trend in U.S. second lien financings is to allow for larger "first lien debt caps"; some borrower-friendly U.S. second lien financings even allow for unlimited first lien obligations (subject of course to any covenants restricting debt in the applicable credit agreements and other debt documents, including the second lien credit agreement). Additional capacity is often also permitted in the case of DIP financings in the U.S. (as discussed below).

"Senior headroom" is typically set at 110% of senior term debt plus revolving commitments in European mezzanine intercreditors. Ancillary facilities that would be provided in European deals *in lieu* of external cash management arrangements would be naturally limited by the amount of the revolving commitments since they are made available by revolving credit facility lenders in place of their revolving commitments. Hedging obligations can be limited (by imposing maximum limits on the notional amounts hedged under the hedging transactions entered into) or otherwise can be left unlimited but naturally constrained to a degree by the fact that most credit agreements will restrict the borrower group from doing speculative trades.

6. Amendment Restrictions

In both U.S. second lien intercreditors and European mezzanine intercreditors, first lien lenders and second lien lenders typically specify in the intercreditor agreement the extent to which certain terms of the first lien credit agreement and second lien credit agreement cannot be amended without the other lien's consent. Amendment restrictions are negotiated on a deal-by-deal basis and may include limitations on increasing pricing, limitations on modifications of maturity date and additions of events of default and covenants. The trend in U.S. second lien intercreditors, in particular in financings of borrowers owned by private equity sponsors, is for few (or no) amendment restrictions; the inclusion of amendment restrictions in European intercreditors is reasonably well-settled at this point.

7. Purchase Options

Both U.S. second lien intercreditors and European mezzanine intercreditors contain similar provisions whereby the second lien creditors can purchase the first lien obligations in full at par, plus accrued interest, unpaid fees, expenses and other amounts owing to the first lien lenders at the time of the purchase. A purchase option gives the second lien creditors a viable alternative to sitting aside during an enforcement action controlled by the first lien creditors by allowing the second lien creditors to purchase the first lien obligations in full and thereby enabling the second lien creditors to control the enforcement proceedings themselves.

The European version of the purchase option includes a buyout of the hedging obligations, which may or may not be included (or clearly included) in U.S. second lien intercreditors.

The triggering events for the purchase option in U.S. intercreditors vary. The trigger events generally include acceleration of the first lien obligations in accordance with the first lien credit agreement and the commencement of an insolvency proceeding. Other potential trigger events include any payment default under the first lien credit agreement that remains uncured or not waived for a period of time and a release of liens in connection with enforcement on common collateral. The triggering event for the European version of the purchase option also varies and may include acceleration/enforcement by the senior, the imposition of a standstill period on mezzanine enforcement action or the imposition of a payment block.

8. Common U.S. Bankruptcy Waivers

First lien secured parties in the U.S. try to ensure that the first lien secured parties control the course of the Chapter 11 proceeding to the maximum extent possible by seeking advanced waivers from the second lien secured parties of their bankruptcy rights as secured creditors (and in some cases, unsecured creditors) that effectively render the second lien secured parties "silent seconds". These waivers are often hotly negotiated. However, U.S. second lien intercreditors routinely contain waivers from the second lien secured parties of rights to object during the course of a Chapter 11 proceeding to a debtor-in-possession facility (or "DIP facility"), a sale by the debtor of its assets free of liens and liabilities outside of the ordinary course of business during Chapter 11 proceedings, with the approval of the bankruptcy court (a section 363 sale) and relief from the automatic stay, which automatically stops substantially all acts and proceedings against the debtor and its property immediately upon filing of the bankruptcy petition.

The enforceability of the non-subordination related provisions in U.S. second lien intercreditors is uncertain because there is little (and conflicting) case law in this area. However, subordination-related provisions are regularly enforced by U.S. bankruptcy courts to the same extent that they are enforceable under applicable non-bankruptcy law pursuant to section 510(a) of the Bankruptcy Code.

The second lien creditors in U.S. second lien intercreditors provide their advanced consent to DIP facilities whereby, subject to certain conditions, the second lien creditors agree not to object to the borrower or any other obligor obtaining financing (including on a priming basis) after the commencement of a Chapter 11 process, whether from the first lien creditors or any other third party financing source, if the first lien agent desires to permit such financing (or to permit the use of cash collateral on which the first lien agent or any other creditor of the borrower or any other obligor has a lien).

In the U.S., second lien claimholders expressly reserve the right to exercise rights and remedies as unsecured creditors against any borrower or guarantor in accordance with the terms of the second lien credit documents and applicable law, except as would otherwise be in contravention of, or inconsistent with, the express terms of the intercreditor agreement. This type of provision, for the reasons articulated above, does not have a counterpart in European mezzanine intercreditors.

9. Non-cash Consideration / Credit Bidding

Recent changes to the LMA intercreditor agreement include explicit provisions dealing with the application of non-cash consideration (or "credit bidding") during the enforcement of security. Credit bidding facilitates debt-for-equity exchanges by allowing the security agent, at the instruction of the senior creditors, to distribute equity to senior creditors as payment of the senior debt or to

consummate a pre-pack where the senior debt is rolled into a newco vehicle.

In the U.S., the term "credit bidding" refers to the right of a secured creditor to offset, or bid, its secured allowed claim against the purchase price in a sale of its collateral under section 363(b) of the Bankruptcy Code, thereby allowing a secured creditor to acquire the assets that are subject to its lien in exchange for a full or partial cancellation of the debt. In U.S. second lien intercreditors, the second lien creditors consent to a sale or other disposition of any shared collateral free and clear of their liens or other claims under section 363 of the Bankruptcy Code if the first lien creditors have consented to such sale or disposition of such assets. However, the second lien creditors often also expressly retain the ability to credit bid their second lien debt for the assets of the borrower and guarantors so long as the sale proceeds are used to repay the first lien obligations in full. In European intercreditor agreements, the second lien creditors would not typically have the right to credit bid their second lien debt.

10. The Holders of Shareholder Obligations and Intragoup Obligations

In addition to direct equity contributions, shareholder loans are often used in European capital structures. Shareholder loans are less common in U.S. capital structures and if present in the capital structure, shareholder loans would likely be subordinated to the credit agreement obligations under a separately documented subordination agreement (i.e., not included as part of the typical U.S. second lien intercreditor agreement). Similarly, holders of intragroup liabilities would also not be included in U.S. second lien intercreditor agreements. However, the treatment of intragroup liabilities is often negotiated by the borrower and arrangers in U.S. syndicated credit agreements and results differ, but often the intragroup liabilities are required to be documented by an intercompany note and subject to an intercompany subordination agreement. The intercompany subordination agreement would subordinate the intragroup liabilities to be paid by the loan parties to the credit facility obligations and would generally include a payment blockage of amounts to be paid by each intragroup payor that is a borrower or guarantor under the credit facilities during the continuation of an event of default.

Blended Approach Taken in Recent Transatlantic Intercreditor Agreements

Recent intercreditor agreements for financings involving primarily non-U.S. companies in U.S. syndicated bank loan financings, and using NY-law governed loan documents, have taken different approaches to the intercreditor terms, which seem to be determined on a deal-by-deal basis depending on several considerations: (1) the portion of the borrower group's business located in the U.S.; (2) the jurisdiction of the organisation of the borrower; (3) the likelihood of the borrower group filing for U.S. bankruptcy protection; and (4) the relative negotiation strength of the junior lien creditors and the borrower, who will be inclined to favour future flexibility and lower upfront legal costs. For these and other reasons, seemingly similar financings have taken very different approaches. Some intercreditor agreements ignore the complexities of restructuring outside of the U.S. and simply use a U.S.-style intercreditor agreement; other similar financings have been documented using the opposite approach – by using a form of intercreditor agreement based on the LMA form of senior/mezzanine intercreditor agreement; and still other similar financings have sought to blend the two approaches or to draft the intercreditor agreement in the alternative by providing for different terms (in particular different release provisions) depending on whether a U.S. or non-U.S. restructuring will be pursued. Given all of these various considerations, Transatlantic Intercreditor Agreements are often quite *à la carte*. We have highlighted below some of the more interesting points:

- the parties typically have included the holders of intra-group liabilities and shareholder loans, following the European approach, and have embedded restrictions on payment of the intra-group liabilities and shareholder loans in certain circumstances;
- the enforcement instructions typically have come from a majority of first lien creditors (*vs* 66 2/3%) in the U.S.-style but the loans and unfunded commitments under the senior credit agreement and the actual exposures of hedge counterparties (plus mark to market positions post-credit agreement discharge) have been taken into account in calculating that majority in the European-style;
- the European-style release provisions discussed above generally have been included either as the primary method of release or as an alternative method in the event that a U.S. bankruptcy process is not pursued;
- in certain deals, enforcement standstill and turnover provisions have been extended to cover all enforcement actions and recoveries (broadly defined), not just relating to collateral enforcement actions;
- payment subordination of the second lien facility typically has not been included; and
- the full suite of U.S. bankruptcy waivers from the second lien creditors generally have been included.

In addition, other provisions appear in Transatlantic Intercreditor Agreements that will not be familiar to those accustomed to the typical U.S. second lien intercreditors, such as parallel debt provisions (a construct necessary in certain non-U.S. jurisdictions in which a security interest cannot be easily granted to a fluctuating group of lenders), agency provisions for the benefit of the security agent and special provisions necessitated by specific local laws to be encountered (or avoided) during the enforcement process (e.g., French *sauvegarde* provisions and compliance with U.S. FATCA regulations).

Conclusion

As the number of financings that touch both sides of the Atlantic continues to rise and the complexity of such financings increases, the intercreditor arrangements for multi-jurisdictional financings will continue to be important and interesting. Although trends are emerging, it is too soon to say that there is a standard or uniform approach to documenting such intercreditor terms. Indeed, as was the case with European mezzanine intercreditor agreements, this is unlikely to occur until the new forms of Transatlantic Intercreditor Agreement are stress tested in cross-border restructurings – which, thankfully, seem a remote prospect at present.

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- Structured financings.
- Asset-based lending and securitisation.

Oil and Gas Reserve-Based Lending

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Relative to other major industries, the oil and gas exploration and production (E&P) industry is a highly capital intensive industry. Not surprisingly, E&P companies utilise various financing tools to satisfy their capital demands, which vary based on numerous factors, including the credit quality of the borrower, the quality and maturity of oil and gas reserves and the physical location of such reserves. These tools include mezzanine debt, second lien term loans, unsecured high-yield bonds and synthetic lending structures, such as volumetric production payments and prepaid forward sales. The most common financing tool utilised by E&P borrowers, however, and the tool that is the subject of this paper, are "reserve-based loans" (RBLs) as understood in the US market.

Reserve-Based Loans and the Borrowing Base

RBLs typically take the form of a borrowing base revolving credit facility whereby lenders extend credit that is secured by liens on oil and gas mineral interests and related assets and rely, primarily, on the cash flow produced by the sale of hydrocarbons and, secondarily, on the sale of the underlying mineral interests for repayment. The most important feature of these facilities is the borrowing base, which represents the amount of credit that lenders will extend based on a subset of the borrower's oil and gas assets, subject to a maximum commitment amount.

What that subset of assets excludes is as important as what that subset includes. For example, an E&P company may have an oil and gas acreage position for which it only has limited geological information. This "raw" acreage may represent a significant investment by the borrower, but will have no "borrowing base" value in a customary RBL, which only gives credit for "proved" reserves. Similarly, oil and gas reserves that are classified as "probable" or "possible" to reflect a diminished likelihood that oil or gas will be economically produced from these reserves are also given no "borrowing base" value. Within the universe of "proved" reserves, the customary RBL will risk adjust the various subcategories of "proved" reserves to limit advance rates, as described below, based on a number of variables assessed on a case-by-case basis. These variables include lease operating costs, reserve life and decline rates, the geographic location and diversity of the reserves and the quality of the hydrocarbon produced. Finally, equipment or personal property typically is given little, if any, borrowing base value.

As a general matter, a lender will assess the "present value" (or PV) of the future net revenue from the borrower's interests in identified oil and gas properties using a 9% or 10% discount rate over the reserve life of such property. Future revenue will be based upon estimates of recoverable reserves, future production rates and future sales prices for the hydrocarbons being produced, net of identified costs of production. Future sales prices will be based on a "bank price deck" that will typically provide for prices for the relevant commodities that are below the then current market forward price curve to mitigate commodity price volatility. Where this price volatility is addressed through commodity price hedging agreements, lenders will use prices established in those hedging agreements in place of this bank price deck with respect to the hedged volumes. The amount of recoverable reserves and production rates will be provided in an engineering report or "reserve report", which is a technical report prepared by a petroleum engineer.

Within the reserve report, proved reserves will be classified as "proved developed producing" reserves (PDP), "proved developed non-producing" reserves (PDNP) and "proved undeveloped" reserves (PUD). The present value of these three categories of proved reserves will then be given varying degrees of credit towards the overall borrowing base. For example, PDPs, the category of reserves with the highest certainty of recoverability, may be given borrowing base credit for 65% of their present value, while PDNPs and PUDs, may only be given borrowing base credit for as little as 25% and 10%, respectively, of their present value. A lender may further impose limitations on the amount of the borrowing base that PDNP and PUD reserves represent so that the concentration of borrowing base value attributable to PDNPs and PUDs is capped. Finally, it should be noted that other factors, such as the existence of other debt and its relative tenor and interest rate, can affect the amounts advanced. Consequently, given the various factors utilised in assessing the loan value of a pool of oil and gas assets, two borrowers with similar PVs but dissimilar assets may have very different borrowing bases. Likewise, two borrowers with similar PVs and similar assets, but different balance sheets, will likely have different borrowing bases.

Some RBLs may also contain an "over-advance", "stretch" or "non-conforming" component to the borrowing base. This component represents an amount that exceeds the borrowing base value of the oil and gas properties that would result from the application of traditional underwriting processes. The stretch component may be justified as a decision to extend credit at a rate higher than ordinarily done on PDNPs or PUDs, provide credit for probable reserves, permit PDNPs or PUDs to constitute a larger share of the borrowing base than is typical or value other factors specific to the borrower such as there being collateral, other than reserves, that has significant value. The stretch component is typically documented as a separate tranche of debt within the RBL (with availability typically terminating within the earlier of (a) an interim period of six to eighteen months, or (b) an agreed upon event, such as the issuance of certain unsecured indebtedness) that is subject to higher

pricing. In any event, it is commonly designed to be interim capital for the borrower, and the borrower is often subject to more restrictions during the period that the non-conforming borrowing base is outstanding.

Finally, certain credit facilities will opt for a more transparent, formula-based calculation that utilises predetermined pricing assumptions promulgated by the SEC or forward price curves based upon NYMEX futures prices. Such formula-based borrowing base calculations are most often seen in the context of term loan facilities with institutional investors who have fewer internal technical and engineering resources and may be more passive than traditional commercial bank lenders.

RBL Collateral and Title Diligence

In the US, state laws treat oil and gas mineral interests in place prior to extraction or severance of the mineral from the ground as real property. And, like any real estate, a mortgage or deed of trust is the instrument that is used to create a state law mortgage lien on such mineral interests. After extraction, the mineral and the related account receivable generated from its sale at the wellhead is transformed into a category of personal property governed by the Uniform Commercial Code (UCC) known as "as extracted collateral". As-extracted collateral is the combination of the hydrocarbon molecule extracted and the account receivable generated by its sale at the wellhead. Analogous to a "fixture", however, while this type of personal property asset falls under the ambit of Article 9, non-possessory security interests attaching to as-extracted collateral must be perfected by filing a UCC-1 financing statement affecting as-extracted collateral in the county where the wellhead is located. A UCC-1 financing statement filed with a Secretary of State of the relevant State (or other appropriate filing office) will not be effective to perfect the security interest created in the as-extracted collateral.

As oil and gas mineral interests are a species of real estate, RBL lending raises title concerns that are analogous to those raised in typical real estate lending. However, where a typical real estate loan may relate to a single property or relatively discreet pool of properties upon which diligence efforts need to be focused, because of the highly concentrated risk of title failure, reserve-based lenders can be more flexible in their diligence efforts depending on the relative concentration of value in their collateral pool and the corresponding effect of such concentration on the risk of title failure. As an example, consider an E&P company that owns a portfolio of oil and gas leases that numbers into the thousands, with no single well or lease representing a statistically significant percentage of the entire portfolio value. Given that title failure is rarely catastrophic (i.e. a total loss), the risk of simultaneous catastrophic title failure across this large portfolio of assets would be low and further mitigated if the assets have been producing without a title dispute for a long period of time. As a result, the cost-benefit analysis of undertaking a review of title of such a large number of properties may not be considered cost-beneficial. Accordingly, the procedure for diligence in lending to such a company might be an "audit" of the borrower's lease or well files for a number of high value assets and some other randomly chosen lesser value ones, recognising that the borrower's interest in ensuring that it has good title are aligned with the lenders' interests. However, where significant concentration of value exists and a higher risk of title failure is presented, reserve-based lenders may require additional diligence in the form of county level title searches and even updated title opinions from an oil and gas title attorney. With respect to oil and gas mineral interests, owner's or mortgagee's title insurance, however, is not commonly available in most states and is rarely required even where available. Finally, surveys of the surface estate related to the mineral estate are typically not relevant to the lender's analysis and are not required.

Another nuance of RBL lending is that, analogous to the turnover of inventory and accounts receivable, a borrower's portfolio of oil and gas assets will be constantly changing, whether by means of acquisitions, divestitures, depletion of old reserves, discovery of new reserves or revised reserve engineering. As a result, a lender will need to assess whether incremental title diligence is warranted on those new assets.

Notable RBL Structural Protections

The dynamic nature of the asset pool in RBLs requires that the lenders take a more active role in managing the loan credit than they might take for other types of facilities. As the portfolio changes, the reserve report and other engineering reports which the lenders initially analysed in making their credit assessment must be updated and re-evaluated at periodic intervals. These periodic reevaluations called "redeterminations" are done on a semi-annual schedule, causing some practitioners to refer to RBLs as "six-month deals". In addition to these scheduled redeterminations, it is also typical for the borrower or the lenders to have the ability to request redeterminations on an interim or "wildcard" basis or in connection with a significant event such as a major acquisition. Occasionally, in cases where a borrower is rapidly acquiring and developing proved reserves, a borrower may also be able to request quarterly redeterminations to reflect its development activities and make incremental capital available more quickly. At least one of the scheduled redeterminations in each annual period will require an independent approved petroleum engineer to prepare or audit the reserve reports. Increases to the borrowing base in connection with a redetermination will require the consent of all or nearly all of the lenders and decreases to, or the maintaining of, the borrowing base traditionally will require the consent of two-thirds of the lenders. A borrowing base may also be "adjusted" (distinguished from a redetermination by the absence of new reserve and other engineering reports) to exclude assets which are sold or which have title deficiencies, or to reflect the monetisation of a favourable commodity price hedging arrangement.

If, at any time, the total credit exposure under the RBL exceeds the borrowing base then in effect a "borrowing base deficiency" results. The existence of a borrowing base deficiency will typically trigger certain covenant limitations on the borrower and certain limited lender rights and remedies. The main ramification, however, will be mandatory prepayments in an amount equal to the borrowing base deficiency. Typically, this prepayment is not immediate, but due in one or more installments over a period ranging from 90 to 180 days (so that any borrowing base deficiency has been cured prior to the next scheduled redetermination of the borrowing base). This period enables the borrower to reduce its capital budget and use production proceeds to reduce the deficiency and/or pursue an orderly liquidation of assets to generate cash proceeds to repay the deficiency. Some RBLs will also offer the borrower the opportunity to cure a deficiency by supplying engineering reports on previously unevaluated assets so that credit can be given to those assets to supplement the borrowing base asset pool.

Hedging Covenants

Given that E&P companies are subject to commodity price volatility, it is not surprising that RBLs may include affirmative covenants requiring the borrower to enter into various commodity

price swap agreements or utilise other hedging techniques to reduce exposure to this volatility. A typical hedging covenant will require the borrower, either as a condition to closing or within a short time period thereafter, to enter into commodity price hedging arrangements for an agreed upon minimum percentage of its projected production over an agreed period. Both the minimum volume and tenor will be based upon the incremental amount of borrowing base credit the borrower desires, or on a credit analysis of the borrower's "base case" cash flow for both debt service and budgeted expenses, including its forecasted drilling costs. These commodity swaps are typically entered into with the RBL lenders themselves and rank *pari passu* with the principal of the loans and are secured by liens on the same oil and gas properties constituting collateral for the loans. Hedging with RBL lenders is beneficial to the borrower and the lenders because it avoids the need to provide separate collateral to secure hedging exposure and reduces the borrower's liquidity needs. It also provides the lenders with knowledge of the credit profile of the hedge counterparties. In addition to minimum affirmative hedging requirements, RBLs typically feature negative hedging covenants limiting the maximum volume a borrower may hedge and a maximum tenor for those hedges. The goal of these limitations is to avoid speculative hedges and the adverse effect of having commodity hedges with notional volumes in excess of actual physical production.

Specific Oil and Gas Representations, Warranties and Covenants

Along with those provisions which practitioners expect in any credit facility, RBLs contain several other oil and gas specific provisions. The representations and warranties tend to focus on items related to oil and gas properties, with the borrower representing that it has good title to the properties evaluated in the reserve report, that all wells are drilled in compliance with any governmental requirements and that the properties are free of any material environmental issues. Another common representation is that the borrower has no material gas imbalances, which are discrepancies that result from a difference between the amount of natural gas being taken by one working interest owner over the volume to which it is contractually entitled. Similarly, the borrower typically represents that it is not party to any contract such as a "ship or pay" contract or volume or throughput guarantee (in favour of midstream assets such as a pipeline or processing facility) requiring the borrower to utilise and pay for capacity on the pipeline or at the facility, whether or not hydrocarbons are actually physically transported or processed. In general, these representations may be viewed as diligence mechanisms designed to help lenders understand arrangements that would impact their determination of the borrowing base. Negative covenants restricting the borrower from entering into marketing contracts or engaging in marketing activities in respect of hydrocarbons produced by third parties, or from entering into contracts for the purchase and/or sale of hydrocarbons of third parties where the producer takes commodity price risk on volumes to which it is not itself producing are also common and meant to give the lenders comfort about the nature of the borrower's business activities. A RBL will also contain affirmative covenants that require the borrower to deliver certain types of information relating to its oil and gas assets to assure the lenders that the collateral is being adequately maintained and to assist in the regular evaluations conducted in the context of the reserve report. These covenants include delivery of production information on a periodic basis, lease operating statements, reserve reports in connection with the semiannual redeterminations, title information in connection with the delivery of reserve reports and lists of buyers who purchase hydrocarbons from the borrower. Additionally, a borrower will be subject to affirmative covenants which require it to operate and maintain its oil and gas properties in accordance with typical industry standards.

Conclusion

RBLs continue to be the predominant senior capital funding tool for E&P companies. The flexibility that this tool provides to both the borrowers and the lenders creates an instrument conducive to the various risks inherent in the oil and gas industry and the use of oil and gas reserves as collateral.

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Lending to Health Care Providers in the United States: Key Collateral and Legal Issues

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I. Introduction

Health care spending currently constitutes approximately 17 percent of the gross domestic product of the United States each year. While the rate of growth in health care spending has slowed somewhat since the 2008 recession, and politicians and stakeholders continue to search for the magic policy bullet that will permanently contain this growth, the massive share of the United States economy devoted to health care is a simple fact of economic and political life for the foreseeable future. Consequently, it should come as no surprise that lenders continue to view the health care industry with keen interest.

At the same time, the United States health care industry is exceptional in ways that are unrelated to its size. The industry is thoroughly regulated at the federal, state and local levels of government, and government regulations and reimbursement programs are in a constant state of flux. Most significantly, the provision of health care services to patients is distinguished by a pervasive third-party payor system. The majority of health care costs in the United States are not paid by the patient receiving services, but by third party private or government insurance programs. With increased enrollment in Medicaid and private insurance under the Affordable Care Act, the share of health care costs paid by third parties is expected to grow even larger. No other industry has a payment structure that approaches this level of disconnect in interests between consumers of services and the entities paying for those services. For governmental payors and many private insurance payors, the question is not whether the payor will be able to pay (the concern in traditional secured lending), but how much of a given receivable will be paid and when such payment will occur.

This chapter will address several collateral and legal issues that are unique to secured lending transactions with United States borrowers who provide medical services ("providers") in exchange for expected future payments from governmental programs or other third-party payors. This reliance by providers on volatile government payment programs can impair the cash flow and liquidity of such borrowers. As a result, cash flow based loan facilities are not an option for many providers, who must turn instead to asset-based loans predicated on the value of receivables owing to the provider by third-party payors. Regardless of whether a secured lender is lending on an asset-based model or cash flow model, however, the secured lender must understand its provider's third-party payor programs, how receivables under those programs are originated and valued and how security interests in such receivables are created, perfected and enforced.

II. Collateral Issues

Accounts receivable are the most common asset of a provider that can serve as collateral for a loan facility. Many providers do not own the real property where they practise or the equipment used in the provision of services, and trusts and endowments that often support hospitals and other health care facilities are customarily restricted and cannot be used for collateral. For providers that do not qualify for cash flow based financing, accounts receivable are often the only type of viable collateral for a secured loan facility. And even in a leveraged or cash flow based financing, where liquidation of accounts receivables is not the primary anticipated remedy after default, a health care lender must understand the third-party payor programs and resulting receivables of the provider borrower.

Government health care receivables and private insurance receivables are the two most common types of health care receivables that are financed by health care lenders. Other receivables, such as self-pay receivables (those owing by an uninsured or underinsured patient) and capitation payments (those owing under managed care relationships), are often excluded from borrowing base consideration because of the unpredictable or questionable nature and collectability of the payment obligation. This chapter, therefore, focuses on the principal collateral issues arising when taking a security interest in government health care receivables and private insurance receivables.

A. Government Receivables

1. Nature of Payments

Medicare and Medicaid are the two principal government health care programs in the United States. Medicare is the health insurance program for persons aged 65 or over as well as individuals who are disabled. Medicare is funded by the federal government and administered by the Centers for Medicaid and Medicare Services ("CMS"). Medicaid is the health insurance program for eligible low income individuals that is funded by the states and by federal matching funds, and is administered by the states subject to guidelines established by the CMS. Certain providers are heavily dependent on Medicare and Medicaid receivables. Typically, half of a hospital's revenue, and up to 80% of a skilled nursing facility's revenue, comes from the Medicare and Medicaid programs.

Unlike a traditional secured loan facility, the principal issue with Medicare and Medicaid receivables is not whether the payor (the United States or a state government) will have the ability to pay.

Rather, the principal issue is whether the governmental payor will pay an amount less than what was estimated or predicted by the provider. The Medicare and Medicaid programs are notoriously complex, and reimbursement rates are subject to change with little notice. Further, most Medicare and Medicaid payments that a provider receives are provisional, pending final confirmation by audit. If an audit indicates that a provider was overpaid, the Medicare or Medicaid payor may offset such overpayments against future payments (against which a secured lender may have already advanced). Lenders mitigate overpayment risk by examining historical reimbursements and monitoring the provider's claims preparation process to ensure that it is consistent with customary practice. And while any asset-based receivables financing facility is going to give some discretion to the lender to determine eligibility of receivables, it is not uncommon in a health care loan facility for the lender to have substantial (or even unlimited) flexibility to modify advance rates, set reserves (often called "liquidity factors") and otherwise adjust availability with respect to government receivables. In the context of a cash flow loan, the secured lender is also keenly interested in the provider's historical billing and collections practices and results as a predictor of future cash flow.

2. So-Called "Anti-Assignment" Issues

The Medicare and Medicaid statutes contain broadly misunderstood language commonly referred to as the "anti-assignment" provisions. The Medicare and Medicaid statutes, and their implementing regulations, generally prohibit payments from being made to any party other than the provider in connection with an "assignment" of a claim by the provider. Although the statutes and regulations do not prohibit "assignments" of claims under the Medicare and Medicaid programs (rather, only payments made to a party other than the provider are prohibited), there is a stubbornly persistent misconception that a lender cannot take an effective security interest in Medicare and Medicaid accounts receivable under Article 9 of the Uniform Commercial Code ("UCC"). However, federal case law, U.S. Congressional legislative commentary and the Medicare and Medicaid statutes and regulations themselves clearly permit the assignment or grant of a security interest in Medicare and Medicaid receivables so long as payments of such receivables are made only to the provider itself.

3. Remedies and Lockbox Issues

While a secured lender can take an effective security interest in Medicare and Medicaid receivables, there are important limitations on such a security interest that need to be thoroughly understood by lenders. For example, under Article 9 of the UCC, a secured party with a security interest in accounts receivable generally has several remedies that it may pursue after default: the secured party may (1) notify account debtors to make payment directly to the secured party, (2) enforce the rights of the borrower directly against the account debtor, and (3) compromise and settle the accounts receivable in a commercially reasonable manner. However, a secured party with a security interest in Medicare and Medicaid receivables generally cannot exercise any of the foregoing remedies, because the Medicare and Medicaid statutes and the Federal Assignment of Claims Act (which ordinarily cannot be complied with for Medicare and Medicaid receivables) expressly prohibit the exercise of these remedies. A secured lender should understand that its ability to direct the liquidation of Medicare and Medicaid receivables is substantially constrained.

Further, CMS takes seriously the statutory prohibition on making payments to any entity other than the provider and has adopted regulations and guidelines designed to prevent a lender from effectively inserting itself between the governmental payor and the provider. CMS regulations require that all Medicare and Medicaid payments must be initially paid to a deposit account with respect to which only the provider can give instructions. Consequently, this initial deposit account cannot be subject to a customary UCC three-party "control agreement" whereby the depositary bank agrees to give the lender the right to direct the disposition of funds in the deposit account (even if such right is only exercised after default). Thus, the lender cannot perfect a direct security interest in such a deposit account through the use of a control agreement. It is important to note that, assuming the lender has taken appropriate steps under the UCC to perfect its security interest in all of a provider's Medicare and Medicaid accounts receivable, the lender will continue to have an indirect security interest in any amounts on deposit in such a deposit account that constitute identifiable proceeds of the Medicare and Medicaid receivables themselves. Nevertheless, a lender's recourse against such proceeds of Medicare and Medicaid receivables is severely limited until such funds are moved out of the provider's initial deposit account.

Where the lender itself is also the depositary bank that maintains the provider's deposit account into which Medicare and Medicaid payments are made, CMS regulations require that the bank lender agree in the loan agreement to waive its offset rights with respect to such deposit accounts. And as part of the Medicare enrollment process, providers are required to obtain offset waiver confirmations from their bank lenders for deposit accounts maintained with the bank lender that will directly receive Medicare or Medicaid payments. As a result, until those payments are moved to a different deposit account at the direction of the provider, bank lenders are unable to sweep or offset such payments unilaterally.

Health care lenders mitigate the risk of not having "control" over the initial deposit account into which Medicare and Medicaid payments are made by utilising a structure known as a "double lockbox" arrangement. The goal is to move Medicare and Medicaid payments as quickly as possible from the first "tainted" deposit account and into a second deposit account that is not subject to the CMS restrictions on a non-provider having "control".

Under the "double lockbox" arrangement, the provider instructs CMS and all other applicable governmental payors (but not insurance payors) to make payment to a dedicated "government receivables deposit account". The government receivables deposit account should be subject to a modified three-party agreement that resembles a traditional deposit account control agreement in all ways except that the provider retains all rights to direct disposition of funds in the account (in order to comply with the CMS regulations). This three-party account agreement should also provide that the depositary bank waives its rights of setoff other than for customary account charges and returned items (so that the lender is not competing against the depositary bank for priority in amounts on deposit in the deposit account). And finally, the three-party account agreement should also provide that the provider voluntarily instructs the depositary bank to sweep the government receivables deposit account on a daily basis to a second deposit account over which the lender has control through a traditional control agreement.

While the provider must retain the right to rescind the daily sweep instructions to the second lockbox at any time in order to comply with the CMS regulations, the loan agreement should provide that exercising such rescission constitutes an immediate event of default. The lender should be able to determine whether such unauthorised redirection has occurred by monitoring cash flow in both of the two deposit accounts (note that the CMS regulations do not prohibit a provider from giving a lender electronic access to review deposit account balances). If a provider were to breach its obligations under the loan agreement and stop the automatic daily sweep of funds to the second deposit account, only a few days of collections should be impacted before the lender would discover the

breach and be able to call a default and stop funding additional loans (and presumably enter into workout discussions with the provider or exercise remedies against the provider). CMS has approved the double lockbox arrangement in policy statements and private decisions.

In a scenario where the lender is also the depositary bank for the provider, a modified form of the double lockbox arrangement is recommended, without the need for three-party agreements. Under this arrangement, Medicare and Medicaid payors are again instructed to make a payment to a dedicated deposit account with respect to which the depositary bank has waived its rights of offset, and the provider gives revocable instructions to the depositary bank to sweep funds out of the dedicated deposit account on a daily basis to a second deposit account over which the depositary bank has retained its rights of offset. Again, a lender's remedies with respect to Medicare and Medicaid payments are not restricted in any way once those funds are moved by the provider from the original government receivables deposit account and into a second deposit account.

B. Private Insurance Receivables

Prior to the 1999 amendments to Article 9 of the UCC, it was unclear whether accounts receivable owing by a health insurance company were within the scope of the UCC because the UCC generally does not apply to security interests in claims under insurance policies. Case law was split regarding whether the UCC governed security interests in payment obligations owing by health insurance companies under their policies. This uncertainty caused substantial discomfort for lenders and arrangers of loans and securitisation facilities secured by receivables owing by private health insurance companies. As a result, practitioners documenting such transactions often undertook the cumbersome task of creating a lien under common law, which generally involves executing an assignment agreement and requesting written acknowledgment thereof from each insurance company.

The 1999 amendments to Article 9 of the UCC put this issue to rest and created a new type of account called a "health-care-insurance receivable" which is expressly within the scope of the UCC. Thus, as a preliminary matter, it is now clear that a lender can obtain a perfected security interest in health-care-insurance receivables in the same manner as applicable to any other receivable. However, the UCC does contain several limitations or qualifications that apply to health-care-insurance receivables. For example, the general rule that a secured party can send notice to an account debtor to pay the account (and thereby create a situation where the account debtor can no longer discharge its obligation by making payment to the borrower) does not apply to health-care-insurance receivables. The UCC also provides that a secured party with a security interest in health-care-insurance receivables cannot enforce that claim directly against the insurance company and cannot require that the insurance company pay the secured party directly. In short, a lender with a security interest in private health-care-insurance receivables ends up in much the same position as it does with Medicare and Medicaid receivables with regards to remedies (although payments can at least be made to a deposit account over which the lender has "control").

To mitigate these limitations, a lender could obtain a power of attorney authorising the lender to enforce claims held by a borrower against such insurance companies, but the enforceability of such a power of attorney is outside the scope of the UCC. Theoretically, a lender could also obtain the insurance company's consent to the assignment and agreement to pay the lender directly after default, but this is not realistic in most situations because private health insurance companies typically are not willing to sign such consents.

III. Legal Issues

A comprehensive summary of legal and regulatory issues facing health care providers, and thus affecting their secured lenders, is outside the limited scope of this chapter. However, consistent with the preceding focus on government receivables (the single largest source of payment for most providers), the following summary of three major United States federal health care regulatory programs focuses on legal and regulatory risks that potentially impact a provider's payments under Medicare and Medicaid, because any liabilities owing in connection with such regulatory noncompliance can be directly offset against such payments. This summary does not address commercial payor or state law issues, both of which can also be significant sources of provider liability (and can thus trigger corresponding repayment or recoupment issues).

A. Physician Self-Referral Law (A/K/A Stark Act)

The Ethics in Patient Referrals Act of 1989 (or "Stark Act") was enacted for the purpose of prohibiting physicians from referring Medicare patients to clinical laboratories in which the physicians (or members of their immediate family) have a financial interest. The Stark Act was amended in 1993 to (1) expand the referral prohibitions to apply more broadly to certain "designated health services" ("DHS"), and (2) extend the anti-referral provisions to Medicaid patients. DHS include clinical laboratory services, imaging and radiology services, inpatient and outpatient hospital services, occupational therapy services, physical therapy services and provision of durable medical equipment and supplies.

The Stark Act rules and regulations are complex and contain detailed standards for determining whether a direct or indirect ownership, investment or compensation arrangement exists, as well as exceptions and "safe-harbors" to the referral prohibition. These rules must be carefully analysed (along with a review of applicable case law and CMS guidance) in determining whether a potential violation exists. A secured lender, as part of its due diligence, will scrutinise potential Stark violations based upon the relationship of physicians (or members of their immediate family) with DHS providers. A violation of the Stark Act may result in a denial of Medicare or Medicaid reimbursements, required refunds of Medicare/Medicaid amounts collected in violation of the statute, civil penalties, and possibly exclusion from participation in the Medicare or Medicaid programs altogether. Because such refunds and penalties can be directly offset against future Medicare or Medicaid payments, a lender must be aware of issues that could arise from the physician relationships of its provider borrower.

Note that even if the Stark Act does not apply because the referred service does not constitute a DHS, the federal Anti-Kickback Statute may apply if a person solicits or receives any remuneration (including any kickback, bribe or rebate) (1) in return for referring an individual for any service for which payment may be made under any federal health care program, or (2) in return for purchasing, leasing or ordering any good, facility, service or item for which payment may be made under a federal health care program. Accordingly, lenders need to be aware that the payment or receipt of any kind of remuneration by a borrower that is directly or indirectly tied to referrals could implicate the federal Anti-Kickback Statute. Fortunately, CMS has adopted several safe harbors that provide protection (including civil and criminal immunity) for conduct otherwise prohibited under the statute. Many financial arrangements will not fit one of these narrow safe harbors, and as a result must be analysed using a highly fact-specific approach.

B. HIPAA

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as modified by the Health Information Technology for Economic and Clinical Health Act (the "HITECH Act"), is a federal statute with two primary purposes: (1) to provide for administrative simplification of certain health care information through the development of standards and requirements for the electronic transmission of health care information, and (2) to provide federal protection for the privacy and security of such information.

HIPAA primarily applies to providers and health plans, which are referred to as "covered entities". As discussed more fully below, HIPAA also applies to "business associates" of covered entities. Under HIPAA, the United States Department of Health and Human Services has established detailed privacy standards (the "Privacy Rules") to protect certain personal health information stored and transmitted in electronic form. The Privacy Rules regulate the use and disclosure by covered entities of "protected health information" ("PHI"), which is individually identifiable health information maintained in a system of records by a covered entity. The Privacy Rules provide that a covered entity may not use or disclose PHI to anyone other than to the individual patient to which such information relates, except for purposes of treatment, payment or health care operations as permitted under the applicable rules. Violations of HIPAA by a provider may result in civil fines and criminal penalties, which could be offset against Medicare and Medicaid payments owing to the provider.

The Privacy Rules are of particular concern to a secured lender whose primary collateral consists of the provider's Medicare and Medicaid accounts receivable, because the fine details regarding such accounts receivable almost certainly contain PHI. HIPAA does permit disclosure by a covered entity of PHI to third-party "business associates" in connection with treatment, payment, or health care operations. Some lenders conclude that they may be deemed "business associates" as a result of their lending relationship and choose to enter into a written business associate agreement with the provider to formalise the relationship. However, there is little regulatory guidance regarding whether a secured lender should in fact be treated as a business associate. Regardless, because a health care lender could have direct or indirect liability under HIPAA with respect to any PHI that it receives (knowingly or otherwise), lenders should never request PHI and should carefully outline what collateral reporting will be required from the provider in a manner that expressly precludes the reporting of any PHI. Many health care lenders adopt internal policies to ensure that they do not receive PHI and to establish steps to seek legal advice regarding its obligations under HIPAA if disclosure of PHI is inadvertently made to the lender.

C. False Claims Act

The False Claims Act is a federal statute that applies to any person who knowingly (1) presents a fraudulent claim for money or property against the United States, or (2) makes or causes to be made a false statement to obtain payment or approval of a false claim paid. The most common example of a violation in the health care context is a provider who intentionally overcharges the federal government for Medicare reimbursement. Notably, Stark Act and Anti-Kickback Statute violations can serve as the basis for a cause of action under the False Claims Act, effectively transforming each claim submitted in violation of Stark or the Anti-Kickback Statute into a false claim.

The False Claims Act contains a "*qui tam*" provision whereby private citizens (known as "relators" or, more colloquially, as "whistle blowers") are permitted to sue on the federal government's behalf. The False Claims Act provides for financial incentives, through damages, to encourage private citizens and their counsel to bring such actions. In order to validly pursue a false claims action, the relator must file a complaint in U.S. District Court under seal. After an investigation by the Department of Justice ("DOJ"), the DOJ decides whether or not it will pursue (or "intervene" in) the case. The DOJ has the option whether to intervene, and less than half of *qui tam* false claims suits result in intervention by the DOJ. If the DOJ declines to intervene, the relator may still prosecute the action on behalf of the United States, and, in such case, the United States will not be a party to the proceedings (apart from its right to any recovery). Several states also have adopted similar statutes for Medicaid claims.

The False Claims Act provides for treble damages and a $5,500 to $11,000 penalty for each violation. A provider's improper billing of its Medicare claims over an extended period of time can easily give rise to thousands of separate violations. Successful *qui tam* actions are regularly brought against providers resulting in significant payments of aggregated penalties and forfeitures by those providers and the collection of significant payments by the government and the relators in those cases. Penalties for False Claims Act violations can quickly add up to an amount that exceeds the outstanding Medicare and Medicaid receivables owing to a provider, and consequently a lender should review billing procedures and policies before entering into, and during the continuance of, a loan transaction with a provider. Practically speaking, there is no quicker way for a provider to find itself in bankruptcy proceedings than through the prosecution of a large successful *qui tam* suit, though it is common for the DOJ to enter into a settlement agreement with a provider for the payment over time of obligations arising from False Claims Act violations, particularly if the provider serves a geographic or other market niche that needs to be preserved for policy reasons. Nevertheless, meaningful False Claims Act violations by a provider have the potential to materially reduce or expunge the value and collectability of the primary collateral for a secured lender.

IV. Conclusion

Notwithstanding the issues discussed above with respect to collateral and legal concerns in the health care space, lending activity remains robust and competitive. Because of the premium placed on expertise and experience with these collateral and legal issues, most lenders have dedicated departments and personnel (particularly workout specialists) who work exclusively with borrowers in the health care industry. Managed appropriately, loan transactions with health care providers can provide robust collateral coverage and borrower performance.

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Chapter 13

A Comparison of Key Provisions in U.S. and European Leveraged Loan Agreements

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While there are many broad similarities in the approach taken in European and U.S. leveraged loan transactions, there are also a number of significant differences in respect of commercial terms and general market practice. The importance of having a general understanding of these differences has been highlighted in recent years as an increasing number of European borrowers, suffering from macroeconomic uncertainty and regulatory constraints at home, have looked to the highly liquid U.S. syndicated leveraged loan market as an attractive alternative source of funding.

This chapter will focus only on certain key differences between practice in the United States and Europe that may be encountered in a typical leveraged loan transaction. References throughout this article to "U.S. loan agreements" and "European loan agreements" should be taken to mean New York-law governed and English-law governed leveraged loan agreements, respectively.

This chapter is intended as an overview and a primer for practitioners. It is divided into three parts: Part A will focus on differences in documentation and facility types, Part B will focus on covenants and undertakings and Part C will consider differences in syndicate management.

Part A – Documentation and Facility Types

Form Documentation

In both the European and U.S. leveraged loan markets, the standard forms used as a starting point for negotiation and documentation greatly influence the final terms. In Europe, both lenders and borrowers, through conduct adopted over a number of years, have typically become accustomed to and comfortable with using an "industry standard form" as a starting point for documentation. However, in the United States, such practice has not emerged and the form on which the loan documentation will be based (as well as who "holds the pen" for drafting the documentation) – which may greatly influence the final outcome – will be the subject of negotiation at an early stage.

Market practice in Europe has evolved through the influence of the Loan Market Association (or the "LMA") and the widespread membership it attracts from those involved in the financial sector: the LMA is comprised of more than 500 member organisations, including commercial and investment banks, institutional investors, law firms, service providers and rating agencies. While the LMA originated with the objective of standardising secondary loan trading documentation, it now plays an essential role in the primary loan market by producing recommended forms of English law documents suitable for a variety of circumstances, including for investment grade loan transactions, leveraged acquisition finance transactions and real estate finance transactions.

Market practice in Europe invariably anticipates that parties will adopt the LMA recommended form documents as a starting point for syndicated loans (and the practice of individual law firms or banks using their own form of loan document has largely disappeared). An important reason for starting with the LMA standard forms is familiarity of the European investor market with the documents, hopefully adding to the efficiency of review and comprehension not just by those negotiating the documents but also by those who may be considering participating in the loan. The LMA recommended forms are only a starting point, however, and whilst typically, the "back-end" LMA recommended language for boilerplate and other non-contentious provisions of the loan agreement will be only lightly negotiated (if at all), the provisions that have more commercial effect on the parties (such as mandatory prepayments, business undertakings, representations and warranties, conditions to drawdown, etc.) remain as bespoke to the specific transaction as ever.

Similar to the LMA in Europe, the Loan Syndications and Trading Association (the "LSTA") in the United States (an organisation of banks, funds, law firms and other financial institutions) was formed to develop standard procedures and practices in the trading market for corporate loans. One of the main practical differences from the LMA, however, is that although the LSTA has developed recommended standard documentation for loan agreements, those forms are rarely used as a starting draft for negotiation. Instead, U.S. documentation practice has historically been based on the form of the lead bank or agent, albeit that many banks' forms incorporate LSTA recommended language.

Increasingly, however, in both Europe and the United States, strong sponsors succeed in negotiating from an agreed borrower-friendly sponsor precedent drafted by the borrower's counsel. Even if the lead lender's counsel is responsible for drafting, sponsors often negotiate a specific precedent or form on which the loan documentation will be based.

Facility Types

The basic facility types in both U.S. and European loan agreements are very similar. Each may typically provide for one or more term loans (ranking equally but with different maturity dates, amortisation profiles (if amortising) and interest rates) and a *pari-passu* ranking revolving credit facility. Of course, depending on the nature of the borrower's business, there could be other specific, standalone facilities, such as facilities for acquisitions, working capital and letters of credit.

In the United States, as in Europe, revolving and term loan facilities typically share the same security package (or liens in U.S. loan market parlance) and priority. However, in the United States, some revolving loan facilities may be structured as "first-out-revolvers" to make such loans more attractive to potential investors. First-out-revolvers are secured by the same liens granted to all *pari-passu* creditors but provide for payment priority to the first-out-revolvers in respect of collateral proceeds.

Mezzanine finance has historically been common in the European market. Despite sharing the same name, "mezzanine" finance terms in Europe are more akin to U.S. second lien term loans than "mezzanine" financing in the United States. European mezzanine loans largely follow the same form as the senior loan agreement, though with higher pricing, a longer final maturity, more relaxed financial covenants, and secured on a subordinated basis to the senior loan (and, typically, containing call protection provisions).

U.S. Term B loans are typically made by U.S. based institutional investors (historically, there has not been much European investor appetite for this type of debt) and provide a higher interest rate and a lower rate of amortisation during the life of the loan than Term A loans, which are syndicated in the United States to traditional banking institutions. Compared to European mezzanine loans, U.S. Term B loans contain broadly more relaxed covenants, with a clear market trend emerging of the convergence of certain key terms with those found in the high yield debt market. While in Europe, some very strong sponsors and borrowers have been able to negotiate similarly relaxed terms for some time in their European loan agreements, for certain other European sponsors and borrowers, U.S. Term B loans (and/or the U.S. high yield bond market) have provided an increasingly popular alternative means of achieving a similar outcome.

Certainty of Funds

Another key difference between the U.S. and European loan markets relates to the issue of certainty of funds in an acquisition finance context. In the United Kingdom, when financing an acquisition of a U.K. incorporated public company involving a cash element, the City Code on Takeovers and Mergers requires purchasers to have "certain funds" prior to the public announcement of any bid. The bidder's financial advisor is required to confirm the availability of the funds and, if it does not diligence this appropriately, may be liable to provide the funds itself should the bidder's funding not be forthcoming. Understandably, both the bidder and its financial advisor need to ensure the highest certainty of funding.

In practice, this requires the full negotiation and execution of loan documentation and completion of conditions precedent (other than those conditions that are also conditions to the bid itself) at the bid stage of an acquisition financing. The concept of "certain funds" has also permeated the private buyout market in Europe, so that the lenders in a private acquisition finance transaction are, in effect, required to confirm satisfaction of all of their financing conditions at the signing of the loan agreement and dis-applying any drawstop events (subject to limited exceptions) until after completion of the acquisition.

In the United States, however, there is no regulatory certain fund requirement as in the United Kingdom. In U.S. acquisition financing, commitment papers, rather than loan documents, are typically executed simultaneously with the purchase agreement. Ordinarily, while such commitment papers are conditioned on the negotiation of definitive loan documentation, they contain "*SunGard*" clauses that limit the representations and warranties made by the borrower and the delivery of certain types of collateral required by the lenders on the closing date of the loan.

Part B – Covenants and Undertakings

Many of the most significant differences between U.S. and European loan agreements lie in the treatment and documentation of covenants (as such provisions are termed in U.S. loan agreements) and undertakings (as such provisions are termed in European loan agreements). This Part B explores the differences in some of the more intensively negotiated covenants/undertakings, recognising that the flexibility afforded to borrowers in these provisions depends on the financial strength of the borrower, the influence of a sponsor and market conditions.

Notwithstanding the various differences (outlined below), U.S. and European loan agreements utilise a broadly similar credit "ring fencing" concept, which underpins the construction of their respective covenants/undertakings. In U.S. loan agreements, borrowers and guarantors are known as "loan parties", while their European equivalents are known as "obligors". In each case, loan parties/obligors are generally free to deal between themselves on the basis they are all within the credit group and are bound under the terms of the loan agreement. However, to minimise the risk of credit leakage, loan agreements will invariably restrict dealings between loan parties/obligors and other members of the borrower group that are not loan parties/obligors, as well as third parties generally. In U.S. loan agreements there is usually an ability to designate members of the borrower's group as "unrestricted subsidiaries" so that they are not restricted under the loan agreement. However, the loan agreement will then limit dealings between members of the restricted and unrestricted group.

Restrictions on Indebtedness

U.S. and European loan agreements will almost always include an "indebtedness covenant" (in U.S. loan agreements) or a "restriction on financial indebtedness" undertaking (in European loan agreements) which prohibits the borrower (and usually, its subsidiaries) from incurring indebtedness outside of the amounts drawn under the particular loan facility. Typically, "indebtedness" will be broadly defined in the loan agreement to include borrowed money and other obligations such as notes, letters of credit, contingent obligations, guaranties and guaranties of indebtedness.

In U.S. loan agreements, the indebtedness covenant prohibits all indebtedness, then allows for certain customary exceptions (such as the incurrence of intercompany debt, certain acquisition debt, certain types of indebtedness incurred in the ordinary course of business or purchase money debt), as well as a specific list of exceptions tailored to the business of the borrower. The indebtedness covenant will also typically include an exception for a general "basket" of debt, which can take the form of a fixed amount or a formula based on a ratio, an incurrence test or a combination such as the greater of a fixed amount and a ratio formula. Reclassification provisions (allowing the borrower to utilise one type of permitted debt exception and then reclassify the incurred permitted debt under another exception) are also becoming more common in the United States.

The restriction on financial indebtedness undertaking typically found in European loan agreements is broadly similar to its U.S. covenant counterpart and usually follows the same construct of a general prohibition on all indebtedness, followed by certain "permitted debt" exceptions (both customary ordinary course type exceptions as well as specifically tailored exceptions requested by

the borrower). However, unlike in the United States, ratio debt exceptions and reclassification provisions are not yet commonly seen in European leveraged loan agreements.

Restrictions on Granting Security / Liens

U.S. loan agreements will also invariably restrict the ability of the borrower (and usually, its subsidiaries) to incur liens. A typical U.S. loan agreement will define "lien" broadly to include any charge, pledge, claim, mortgage, hypothecation or otherwise any arrangement to provide a priority or preference on a claim to the borrower's property. This lien covenant prohibits the incurrence of all liens but provides for certain typical exceptions, such as liens securing any permitted indebtedness, purchase money liens, statutory liens and other liens that arise in the ordinary course of business.

In the European context, the restriction on liens is known as a "negative pledge". Rather than the "lien" concept, European loan agreements will generally prohibit a borrower (and obligors under the loan agreement) from providing "security", where security is broadly defined to include mortgages, charges and pledges, but may also include other preferential arrangements. As with U.S. loan agreements, the prohibition on providing security is subject to a list of customary and specifically negotiated "permitted security" exceptions. Importantly, most European loan agreements will specifically prohibit "quasi-security" in the negative pledge (where quasi-security includes such things as sale and leaseback arrangements, retention of title arrangements and certain set-off arrangements) in circumstances where the arrangement or transaction is entered into primarily to raise financial indebtedness or to finance the acquisition of an asset. Borrowers are also typically able to negotiate a "general basket" to permit the securing of a certain fixed amount of general indebtedness, although a general carve-out for security securing any permitted indebtedness is rare. Of course, borrowers may be able to negotiate specific "permitted security" exceptions depending on their creditworthiness and specific business requirements.

Restriction on Investments

A restriction on the borrower's ability to make investments is commonly found in U.S. loan agreements. "Investments" include loans, advances, equity purchases and other asset acquisitions. Historically, investments by loan parties in non-loan parties have been capped at modest amounts. In some recent large cap deals, loan parties have been permitted to invest uncapped amounts in any of their subsidiaries, including foreign subsidiaries who are not guarantors under the loan documents. Other generally permitted investments include short term securities or other low-risk liquid investments, loans to employees and subsidiaries, and investment in other assets which may be useful to the borrower's business. In addition to the specific list of exceptions, U.S. loan agreements also include a general basket, sometimes in a fixed amount, but increasingly based on a flexible "builder basket" growth concept.

This "builder basket" concept, typically defined as a "Cumulative Credit" or an "Available Amount", represents an amount the borrower can utilise for investments, restricted payments (as discussed below), debt prepayments or other purposes. Typically, the builder basket begins with a fixed-dollar amount and "builds" as retained excess cash flow (or in some agreements, consolidated net income) accumulates. Some loan agreements may require a borrower to meet a *pro forma* financial test to use the builder basket. If the loan agreement also contains a financial maintenance covenant (such as a leverage covenant), the borrower may also be required to satisfy a tighter leverage ratio to utilise the builder basket for an investment or restricted payment. Some sponsors have also negotiated loan documents that allow the borrower to switch between different builder basket formulations for added flexibility.

European loan agreements will typically contain stand-alone undertakings restricting the making of loans, acquisitions, joint ventures and other investment activity by the borrower (and other obligors). While the use of builder baskets is still unusual in European loan agreements, often acquisitions will be permitted if funded from certain sources, such as retained excess cash flow. Exceptions by reference to ratio tests alone are not commonly seen in European loan agreements, although they frequently form one element of the tests that need to be met to allow investments such as permitted acquisitions.

Restricted Payments

U.S. loan agreements will typically restrict borrowers from making payments on equity, including repurchases of equity, payments of dividends and other distributions, as well as payments on subordinated debts. As with the covenants outlined above, there are typical exceptions for restricted payments not materially adverse to the lenders, such as payments on equity solely in shares of stock, or payments of the borrower's share of taxes paid by a parent entity of a consolidated group.

In European loan agreements, such payments are typically restricted under separate specific undertakings relating to dividends and share redemptions or the making of certain types of payments, such as management and advisory fees, or the repayment of certain types of subordinated debt. As usual, borrowers will be able to negotiate specific carve-outs (usually hard capped amounts) for particular "permitted payments" or "permitted distributions" as required (for example, to permit certain advisory and other payments to the sponsor), in addition to the customary ordinary course exceptions.

In U.S. loan agreements, a borrower may use its "builder basket" or "Available Amount" (see above) for restricted payments, investments and prepayments of debt, subject to annual baskets consisting of either a fixed-dollar amount or a certain financial ratio test. In some recent large cap and sponsored middle market deals in the United States, borrowers have been permitted to make restricted payments subject only to being in *pro forma* compliance with a specific leverage ratio, rather than meeting an annual cap or basket test.

European loan agreements typically do not provide this broad flexibility. However, some strong sponsors have been able to negotiate provisions permitting payments or distributions from retained excess cash flow, subject (typically) to satisfying a certain leverage ratio.

Call Protection

In both European and U.S. loan agreements, borrowers are commonly permitted to voluntarily prepay loans in whole or in part at any time. However, some U.S. loan agreements do include call protection for lenders, requiring the borrower pay a premium if loans are repaid within a certain period of time. While "hard call" premiums (where term loan lenders receive the premium in the call period for any prepayment, regardless of the source of funds or other circumstances) are rare, "soft call" premiums (typically 1%) on prepayments made within the first year, or increasingly, the first

six months, and made as a part of a refinancing or re-pricing of loans are common in the U.S. loan market.

While call protection is relatively rare in the European market for senior debt, soft call protections have been introduced in certain European loans which have been structured to be sold or syndicated in the U.S. market. Call protection provisions are more commonly seen in the second lien tranche of European loans and mezzanine facilities (typically containing a gradual step down in the prepayment premium from 2% in the first year, 1% in the second year, and no call protection thereafter).

Voluntary Prepayments and Debt Buybacks

During the financial crisis, many U.S. borrowers amended existing loan agreements to allow for non-*pro rata* discounted voluntary prepayments of loans that traded below par on the secondary market. Although debt buybacks are much less frequent in the current strong syndicated loan market, the provisions allowing for such prepayments have become standard in U.S. loan agreements.

U.S. loan agreements typically require the borrower to offer to repurchase loans ratably from all lenders, in the form of a reverse "Dutch auction" or similar procedure. Participating lenders are repaid at the price specified in the offer and the buyback is documented as a prepayment or an assignment. Loan buybacks may also take the form of a purchase by a sponsor or an affiliate through non-*pro rata* open market purchases. These purchases are negotiated directly with individual lenders and executed through a form of assignment. Unlike loans repurchased by the borrower and then cancelled, loans assigned to sponsors or affiliates may remain outstanding. Lenders often cap the amount that sponsors and affiliates may hold and also restrict the right of such sponsors or affiliates in voting the loans repurchased.

Similarly, in European loan agreements, "Debt Purchase Transaction" provisions have been included in LMA recommended form documentation since late 2008. The LMA standard forms contain two alternative debt purchase transaction provisions – one that prohibits debt buybacks by a borrower (and its subsidiaries), and a second alternative that permits such debt buybacks, but only in certain specific conditions (for example, no default continuing, the purchase is only in relation to a term loan tranche and the purchase is made for consideration of less than par).

Where the loan agreement permits the borrower to make a debt purchase transaction, to ensure that all members of the lending syndicate have an opportunity to participate in the sale, it must do so either by a "solicitation process" (where the parent of the borrower or a financial institution on its behalf approaches each term loan lender to enable that lender to offer to sell to the borrower an amount of its participation) or an "open order process" (where the parent of the borrower or financial institution on its behalf places an open order to purchase participations in the term loan up to a set aggregate amount at a set price by notifying all lenders at the same time).

Both LMA alternatives permit debt purchase transactions by the sponsor (and its affiliates), but such purchasers are subject to the disenfranchisement of the sponsor (or its affiliate) in respect the purchased portion of the loan.

Financial Covenants

Historically, U.S. and European leveraged loan agreements contained at least two maintenance financial covenants: total leverage; and interest coverage, typically tested at the end of each quarter.

In the United States, "covenant-lite" loan agreements containing no maintenance or ongoing financial covenants are increasingly common in large cap deals and have found their way into many middle market deals. In certain transactions, the loan agreement might be "quasi-covenant-lite" meaning that it contains only one maintenance financial covenant (usually a leverage covenant) which is applicable only to the revolver and only when a certain percentage of revolving loans are outstanding (15-25% is fairly typical, but has been as high as 37.5%). Covenant-lite (or quasi-covenant-lite) loan agreements may nonetheless contain financial ratio incurrence tests – such tests are used merely as a condition to incurring debt, making restricted payments or entering into other specified transactions. Unlike maintenance covenants, incurrence based covenants are not tested regularly and a failure to maintain the specified levels would not, in itself, trigger a default under the loan agreement.

European loan agreements invariably include on-going financial maintenance covenants with a quarterly leverage ratio test being the most common. Despite the trend of covenant-lite deals in the U.S. market, it is fair to say that they are currently less prevalent in the European market although becoming more so, especially where it is intended that the loan will be syndicated in the U.S. market in addition to the European market.

In the United States, the leverage covenant historically measured all consolidated debt of all subsidiaries of the borrower. Today, leverage covenants in U.S. loan agreements frequently apply only to the debt of restricted subsidiaries (those subsidiaries designated by the borrower to be subject to financial and negative covenants). Moreover, leverage covenants sometimes only test a portion of consolidated debt – sometimes only senior debt or only secured debt (and in large cap deals of top tier sponsors sometimes only first lien debt). Lenders are understandably concerned about this approach as the covenant may not accurately reflect overall debt service costs. Rather, it may permit the borrower to incur unsecured senior or subordinated debt and still remain in compliance with the leverage covenant. This is not a trend that has yet found its way over to Europe.

In the event a U.S. loan agreement contains a leverage covenant, it invariably uses a "net debt" test by reducing the total indebtedness (or portion of debt tested) by the borrower's unrestricted cash and cash equivalents. Lenders sometimes cap the amount of cash a borrower may net out to discourage both over-levering and hoarding cash (though the trend in U.S. loan agreements is towards uncapped netting).

In Europe, the total net debt test is tested on a consolidated group basis, with the total net debt calculation usually including the debt of all subsidiaries (but obviously excluding intra-group debt). Unlike the cap on netted cash and cash equivalents in some U.S. loan agreements, European borrowers net out all cash in calculating compliance with the covenant.

With strong sponsor backing, borrowers have increasingly eased the restriction of financial covenants by increasing the amount of add-backs included in the borrower's EBITDA calculation. Both U.S. and European loan documents now include broader and more numerous add-backs including transaction costs and expenses, restructuring charges, payments to sponsors and certain extraordinary events. Recently many borrowers have negotiated add-backs (generally to the extent reasonably identifiable and factually supportable) for projected and as-yet unrealised cost savings and synergies. While lenders have accommodated savings and synergies add-backs, increasingly such add-backs are capped at a fixed amount or certain percentage of EBITDA (15% in the United States, 5-20% in Europe).

Equity Cures of Financial Covenants

For a majority of sponsor deals in the United States, loan agreements that contain a financial maintenance covenants also contain the ability for the sponsor to provide an "equity cure" for non-compliance. The proceeds of such equity infusion are usually limited to the amount necessary to cure the applicable default, and are added as a capital contribution (and deemed added to EBTIDA or other applicable financial definition) for this this purpose. Because financial covenants are meant to regularly test the financial strength of a borrower independent of its sponsor, U.S. loan agreements increasingly place restrictions on the frequency (usually no more than two fiscal quarters out of four) and absolute number (usually no more than five times over the term of the credit facility) of equity cures.

In Europe, equity cure rights have been extremely common over the last few years. As in the United States, the key issues for negotiation relate to the treatment of the additional equity, for example, whether it should be applied to increase cash flow or earnings, or otherwise reduce indebtedness. Similar restrictions apply to equity cure rights in European loan documents as they do in the United States in respect of the frequency and absolute number of times an equity cure right may be utilised – however, in Europe the frequency is typically lower (and usually, an equity cure cannot be used in consecutive periods) and is subject to a lower overall cap (usually, no more than two or three times over the term of the facility). From a documentation perspective, it is also important to note that there is no LMA recommended equity cure language.

Part C – Syndicate Management

Voting Thresholds

In U.S. loan agreements, for matters requiring a vote of syndicate lenders holding loans or commitments, most votes of "required lenders" require only a simple majority of lenders (that is, more than 50% of lenders by commitment size) for all non-unanimous issues. In European loan agreements, most votes require 66.67% or more affirmative vote of lenders by commitment size. In some, but not all, European loan agreements, certain votes that would otherwise require unanimity may instead require only a "super-majority" vote, ranging between 85-90% of lenders by commitment size. Such super majority matters typically relate to releases of transaction security or guarantees, or an increase in the facilities.

"Unanimous" decisions in U.S. loan agreements are limited to fundamental matters and require the consent only of affected lenders (and are not, therefore, truly unanimous), while in European loan agreements (except where they may be designated as a super majority matter), decisions covering extensions to payment dates and reductions in amounts payable (even certain mandatory prepayment circumstances), changes to currencies and commitments, transfer provisions and rights between lenders all require the unanimous consent of lenders (not just those affected by the proposed changes).

Yank-a-Bank

U.S. loan agreements often contain provisions allowing the borrower to remove one or more lenders from the syndicate in certain circumstances. A borrower may, for example remove a lender where such lender refuses to agree to an amendment or waiver requiring the unanimous consent of lenders, if the "required lenders" (typically more than 50% of lenders by commitment) have consented. Other reasons a borrower may exercise "yank-a-bank" provisions are when a lender has a loss of creditworthiness, has defaulted on its obligations to fund a borrowing or has demanded certain increased cost or tax payments. In such circumstances, the borrower may facilitate the sale of the lender's commitment to another lender or other eligible assignee. In most European loan agreements, yank-a-bank provisions are also routinely included (described as such or as "Defaulting Lender" provisions) and are similar in mechanism. However, the threshold vote for "required lenders" is typically defined as at least 66.67% of lenders by commitment.

Snooze-You-Lose

In addition to provisions governing the required votes of lenders, most European loan agreements will also contain "snooze-you-lose" provisions, which favour the borrower when lenders fail to respond to a request for an amendment, consent or waiver. Where a lender does not respond within a specific time frame, such lender's vote or applicable percentage is discounted from the total when calculating whether the requisite vote percentage have approved the requested modification. Similar provisions are rare in U.S. loan agreements.

Transfers and Assignments

In European loan agreements, lenders may assign their rights or otherwise transfer by novation their rights and obligations under the loan agreement to another lender. Typically, lenders will seek to rely on the transfer mechanism, utilising the standard forms of transfer certificates which are typically scheduled to the loan agreement. However, in some cases, an assignment may be necessary to avoid issues in some European jurisdictions which would be caused by a novation under the transfer mechanic (particularly in the context of a secured deal utilising an English-law security trust, which may not be recognised in some European jurisdictions).

Generally, most sub-investment grade European deals will provide that lenders are free to assign or transfer their commitments to other existing lenders (or an affiliate of such a lender) without consulting the borrower, or free to assign or transfer their commitments to a pre-approved list of lenders (a white list), or not to a predetermined list of lenders (a blacklist). For stronger borrowers in both Europe and the United States, the lenders must usually obtain the consent of the borrower prior to any transfer or assignment to a lender that is not an existing lender (or affiliate).

In the United States, the LSTA has recommended "deemed consent" of a borrower where a borrower does not object to proposed assignments within five business days. Similar to stronger European borrowers and sponsors who are able to negotiate a "blacklist", stronger borrowers in the United States, or borrowers with strong sponsors, often negotiate a "DQ List" of excluded (disqualified) assignees. Recently in the United States, large cap borrowers have pushed for expansive DQ lists and the ability to update the list post-closing (a development not seen in European loan agreements). In both the European and US contexts, the DQ List or blacklist helps the borrower avoid assignments to lenders with difficult reputations.

In the U.S. market, exclusion of competitors and their affiliates is also negotiated in the DQ List. In European loan agreements, the LMA recommended form assignment and transfer language

provides that existing lenders may assign or transfer their participations to other banks or financial institutions, or to trusts, funds or other entities that are "regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets". This language has the practical effect of limiting the potential range of investors in the loan, including competitors of the borrower.

Conclusion

As highlighted in this article, it is important for practitioners and loan market participants to be aware of the key differences in the commercial terms and market practice in European and U.S. leveraged loan transactions. While there are many broad similarities between the jurisdictions, borrowers and lenders that enter into either market for the first time may be surprised by the differences, some of which may appear very subtle but which are of significance. As more and more European based borrowers attempt to access the U.S. syndicated loan market by entering into U.S. loan agreements (whether to obtain more favourable pricing or better loan terms generally), the importance of having a general understanding of the differences is now even more critical.

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Financing in Africa: A New Era

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Numerous publications have discussed the recent dynamism of the Sub-Saharan African economy, the increasing levels of foreign direct investment in the region (particularly from Asia), and the trend towards industrialisation which might reduce reliance upon natural resources. Rather than revisit these themes, we thought it would be useful to highlight another, perhaps less visible, development which we have observed as legal practitioners advising on matters in the region.

The change concerns business practices, in particular in the field of finance. In the past, business practices in Sub-Saharan Africa (with the exception of certain jurisdictions, such as South Africa) have tended to be far less technically sophisticated than those applied in other regions of the world. This was particularly the case in the areas of public and private financing. In recent years, however, we have observed a very rapid growth in the sophistication of business practices in the region, to such an extent that it may now be said that the techniques applied in Sub-Saharan Africa are much the same as those applied internationally. This clearly serves to facilitate foreign investment and business activity within the region and to permit development. The impact on private and public financing practices has been especially significant.

There are many possible reasons for this shift. For example, a number of professionals of Sub-Saharan origin have returned to the region from business centres such as London, Paris and New York, bringing with them international techniques and practices. An increasing number of regional private financial institutions are also participating in sophisticated financial transactions alongside international financial institutions with a resulting transmission of know-how. Furthermore, there has been considerable investment in legislative and regulatory reforms which now provide a sophisticated framework in which modern techniques applied in other regions can flourish.

In this article we have chosen to highlight two specific legal factors which we believe have contributed to the trend and illustrate it well:

- multilateral support for external legal advisors to African States; and
- regulatory reforms permitting the growth of a sophisticated regional capital market in Francophone West Africa.

1. Levelling the Legal Playing Field

1.1 For many decades, multilateral and bilateral development agencies have provided "technical assistance grants" to African governments. These grants were usually made to support research and development activities in science, medicine, engineering, etc. Technical assistance grants were also, to a lesser extent, made available in the fields of law and regulation, but principally to support institutional or fundamental legal reforms.

1.2 As such, for a long time, technical assistance grants were not available to African States to finance the cost of legal advisors on transactional or litigious matters, in particular in the field of financing. African countries, with their significant financial challenges, could therefore rarely afford to engage local or international legal advisors, and very often did without. As a result, when negotiating or litigating with the private sector, they would often rely only on the over-stretched resources of their Ministries. In these circumstances, the private sector party would invariably enjoy a considerable advantage in terms of expertise and resources.

1.3 This had various consequences. First, the interests of the State would be weakly defended, and the resulting contract or settlement would be heavily skewed in favour of the private sector party. Secondly, the structuring, documentation and implementation of these transactions or settlements tended to be simplistic, using few of the sophisticated techniques commonly applied in other regions to achieve optimal results. Thirdly, the absence of experienced, external advisors made it easier for unethical practices to flourish on both the private and public sector sides.

1.4 Furthermore, when African States entered into heavily imbalanced transactions or settlements, the imbalanced nature of the transaction tended only to be identified as such within the country long after it had taken effect. When this would finally occur, the State would have little legal recourse and would commonly resorted to unilateral rescission of the transaction or settlement. This in itself would lead to significant liability for the State, but was also more broadly unsatisfactory as it undermined the legal certainty of the jurisdiction from the perspective of future potential investors.

1.5 It gradually became clear to the development community that it was critically important for African States to be able to engage appropriate legal advisors, in particular on financing matters. Over time, the term "technical assistance" came to include more than support for research and development and to include the financing of legal advisors on transactional and litigious matters. It began to be possible for African governments to obtain multilateral technical assistance grants to cover the costs of legal advisors – typically these were provided by the public sector bilateral and multilateral facilities such as the International Development Association (IDA, the World Bank's fund for the poorest countries) or the African Development Fund (a facility of the African Development Bank (AfDB)).

1.6 In 2010, this policy of supporting the engagement by African States of advisors on transactional and litigious matters was specifically reinforced by the AfDB's launch of the African Legal Support Facility (ALSF). Although housed within the African Development Bank, it was formed as an independent institution

with legal autonomy from the bank so as to ensure its neutrality. Its specific mission was to finance legal advice for African States on transactional and litigious matters.

1.7 The specific impetus for the creation of the ALSF was the realisation that many African states were unable to defend themselves effectively against so-called "vulture funds". Vulture funds aggressively seek the repayment of sovereign debt purchased on the secondary market. Many vulture fund claims are brought in jurisdictions outside of Africa (typically for the attachment of assets of the debtor State) where the cost of engaging appropriate legal counsel is beyond the means of the relevant African State[1]. As a result, with inadequate representation, available defences are not pursued and imbalanced settlement proposals are accepted. Furthermore, it was recognised that vulture fund claims often arose out of poorly negotiated and poorly drafted agreements. From this it was a short step to identifying as a major problem the general lack of appropriate legal advice in the negotiation of complex commercial transactions.

1.8 For these reasons, the ALSF was specifically established to assist African States with:

(a) vulture fund litigation;

(b) the negotiation of complex commercial transactions, with particular focus on:

(i) the mining sector; and

(ii) public private partnerships; and

(c) capacity building.

In each case, the ALSF assists with the selection of appropriate legal advisors (both local and international) and finances legal fees on behalf of the State. The ASLF is "currently assisting African states on 32 projects. Almost 70% of the projects are related to advisory services work to either directly assist with contract negotiation or to build the legal foundations required to properly negotiate contracts. The areas that the Facility has received the most requests for assistance relate to 1) extractive resources contracts, 2) PPP negotiations, 3) commercial creditor litigation, and 4) debt negotiations"[2].

1.9 Examples of the sorts of matters covered by the ALSF include: financing advisors for vulture fund litigation; negotiations of public/private project concessions agreements; negotiations of concession agreements for agriculture projects; capacity building on sovereign assets recovery; capacity building on managing and negotiating PPPs in the mining and energy sectors; and capacity building for African lawyers, on a sub-regional basis, on negotiation of complex commercial transactions and dealing with vulture funds[3].

1.10 The following are concrete examples that illustrate the impact of the facility.

(a) In 2010, the Democratic Republic of the Congo (DRC) instructed international counsel under the ASLF programme to assist the DRC in appealing a decision in favour of a so-called "vulture fund" before Hong Kong's highest court. The fund had purchased an assignment of two ICC arbitral awards against the DRC and pursued enforcement of those awards in various jurisdictions, including Hong Kong. The DRC resisted enforcement in Hong Kong on the grounds of sovereign immunity.

The case, which lasted for approximately a year, involved complex matters of principle, some of which were controversial in Hong Kong. A key issue in the case was whether Hong Kong adopted the "absolute" doctrine of sovereign immunity or the "restrictive" doctrine. While sovereign immunity would have no exception under the absolute doctrine, there is an exception for commercial matters under the restrictive doctrine. It was generally accepted that during the British colonial era following the Second World War, Hong Kong adopted the restrictive doctrine of sovereign immunity. However, in 1997 Hong Kong reverted to Chinese sovereignty, and China has consistently adopted the absolute doctrine of sovereign immunity. The case, therefore, went to the very heart of the doctrine of "One Country: Two Systems" that has applied in Hong Kong since the handover of sovereignty in 1997.

On June 8, 2011, Hong Kong's Court of Final Appeal (CFA) provisionally held – by a majority of 3:2 – that Hong Kong, as part of China, applies the absolute doctrine of sovereign immunity. It further held that the DRC, by entering into a private arbitration agreement, had not waived and could not waive its immunity, which was a matter of convention between sovereign states. The CFA referred the question to the Standing Committee of China's National People's Congress (NPC) for a definitive ruling.

The NPC indeed went on to reinterpret the Basic Law to provide that Hong Kong, like the rest of the PRC, adopts the absolute doctrine of sovereign immunity, rather than the restrictive doctrine. In the context of the DRC case, this meant that the DRC had the benefit of sovereign immunity and FG Hemisphere will not be able to enforce the arbitral awards against the DRC's assets, if any, in Hong Kong.

Given the length and complexity of the matter, it is unlikely that the DRC would have mounted a proper defence in the absence of assistance from the ASLF.

(b) In 2013, with the assistance of the ASLF and the AfDB, the Government of the Republic of Guinea selected and instructed several international law firms to assist it with the review of all mining rights and agreements previously granted to or entered into with mining companies in Guinea. The task would involve, amongst other things, conducting due diligence on approximately twenty mining contracts, assisting the State in connection with any renegotiation of mining rights and contracts granted to or entered into with mining companies in Guinea, and elaborating and implementing a training and capacity building programme. The law firms would also assist the State in any legal proceeding resulting from the failure of the renegotiation process. The law firms would work closely with the relevant government body, and also under the supervision of the IMF and other multilaterals.

The main objective of the review was to ensure that the mining companies were fulfilling their obligations under the existing mining agreements, and to increase the State's share of project revenues without discouraging investors or jeopardising the projects. Given the complexity of the matter and its scope, it is unlikely that the Republic of Guinea could have undertaken such a policy without external, international legal advisors and financial support.

1.11 As lawyers advising members of both the public and private sectors in Sub-Saharan Africa, we observe the effects of this levelling of the legal playing field on a daily basis. Most significantly, however, we have also noted that all parties, whether in the public or private sectors, benefit significantly from the change, especially in terms of transactional efficiency and legal certainty.

2. Development of Local Capital Markets

2.1 Development specialists tend to agree that vibrant local capital markets facilitate the growth of emerging countries. They permit States and companies to raise long term capital in significant volumes. Securities issued on local markets tend to be denominated in local currencies and hence not subject to currency fluctuation

risks. In this way, they help to insulate the local economy from external shocks. Furthermore, local capital markets permit the efficient allocation of resources amongst local companies and a diversification of investment opportunities in the area.

2.2 For more than a century stock exchanges have operated with reasonable success in North and Southern Africa (for example, in Egypt, Morocco and South Africa), and more recently in East Africa. However, in West Africa, activity on local exchanges has until recently been very limited.

2.3 Whenever States and companies in West Africa have sought financing on the capital markets, they have tended to look beyond regional exchanges and issued securities on exchanges outside of the region: for example, numerous exploration and extraction companies operating in West Africa have listed on the Toronto, Johannesburg, Sydney or London exchanges in recent years.

2.4 Where West African States or companies have sought financing on local exchanges, they have faced considerable challenges. First, very few West African States or companies are rated by international agencies – without ratings, international investors tend to stay away. To compensate for this, issuers have sought specific international ratings for individual transactions, but only where the volume justifies the significant expense. Secondly, international investors are unwilling to accept the perceived country risk commonly associated with West African State and company issuers. To overcome this, issuers often resort to costly credit enhancing mechanisms (principally guarantees) provided by multilateral institutions.

2.5 But beyond these challenges, local and multilateral issuers have also faced the deficiencies of local exchanges. They tend to be small (with seldom more than a handful of participating issuers) and illiquid (most investors being local financial institutions and pension funds that often choose to retain their holdings until maturity). Back offices have typically been technologically ill-equipped with slow and laborious clearing mechanisms. Furthermore, their institutional, regulatory and legal frameworks have often remained incomplete or outdated by comparison to markets in other regions.

2.6 Given the costs and challenges, there have been few issues on local markets. Those that have occurred have generally been made by States, State owned entities, former State owned entities and local financial institutions. Occasionally, multilaterals such as the IFC and the AfDB have also issued securities in local currencies, if only to provide a minimum of activity on the exchanges.

2.7 Where, despite these obstacles, securities have been issued on local West African exchanges, they have tended to attract foreign investors. This is principally because they offer a higher return than developed market instruments, while enjoying investor level ratings due to multilateral credit enhancing mechanisms. But while these securities may bring international investment to West Africa and ensure a certain level of activity for regional exchanges, they are costly and depend largely on the availability of multilateral credit enhancing facilities. This places a cap on their potential volume and diminishes the scope for truly private sector initiatives in the region.

2.8 For these reasons, West African States have been focussing on reforms that might permit fully autonomous regional capital markets to flourish. This movement began in 1962 with the creation by international convention of the West African Monetary Union (WAMU) and in 1994 with the creation of the West African Economic and Monetary Union (WAEMU).[4] WEAMU is now a customs and monetary union with eight member countries (Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo) which share a common currency, the CFA Franc, and a common central bank, the BCEAO (*Banque Centrale des Etats de l'Afrique de l'Ouest*)[5]. The institutions and structure of the WAEMU were modelled closely on the structures of the European Union.

2.9 Specific measures were then taken in the field of capital markets. In 1996, a regional securities exchange, the BRVM (*Bourse Régionale des Valeurs Mobilières*), was established in Côte d'Ivoire to serve as a common securities market for all WAEMU member states. It is supervised by a regional securities commission (CREPMF) that was created in 1998 and transactions on the exchange are facilitated by a clearing bank, the DC/BR. Both equity and debt securities have been issued on the BRVM. The equity market capitalisation of the BRVM is currently estimated at approximately 5,988 billion Franc CFA (approximately 9 billion Euros) and the debt market capitalisation is 1,066 billion Franc CFA (approximately 1.6 billion Euros).[6]

2.10 In terms of equity, as many as forty regional companies are currently traded on the BRVM in seven sectorial categories: Industry; Public Service; Finance; Transport; Agriculture; Distribution; and others, the largest of these categories being Industry.

2.11 Debt securities activity on the BRVM is even more impressive. The regional exchange hosts approximately 30 debt securities falling within four categories: corporate bonds (issued by companies established within the WAEMU); treasury bonds (issued by individual member states pursuant to a central auction system run by the BCEAO since 2001)[7]; regional bonds issued by financial institutions established within the region (typically, the West African Development Bank or BOAD) and bonds issued by bilateral and multilateral development agencies domiciled outside of the WAEMU (the AFD and the IFC). The issuance of debt securities in general has increased 15 fold since 2001, with most growth occurring in respect of treasury bonds.

2.12 However, more sophisticated reforms followed, including: (a) regulations facilitating the securitisation of receivables; (b) regulations creating covered bonds; (c) the creation of a regional mortgage refinancing fund; (d) the establishment of two regional ratings agencies; and (e) proposed regulations introducing criminal sanctions for improper market activity.

(a) *Securitisation*

At the end of the 1980s the crushing deficit in residential housing throughout the WAEMU was identified as one of the greatest challenges to regional development. The housing sector in each WAEMU member state relied principally on government financing, with limited private sector investment provided by specialised institutions. Given the shortage of government funds, it was clear that the housing deficit could not be addressed without additional resources from the private sector. In order to encourage a greater number of financial institutions to be involved in residential property lending and to increase the volume of private sector financing available to the housing sector, it was decided that a viable means of refinancing residential housing loans was needed. In short, a secondary market in residential housing loans should be created.

To do so, the WAEMU member states turned to the regional capital markets where it was thought that the necessary scale would be attainable. Suitable reforms were proposed to facilitate the securitisation of mortgage backed securities. Financial institutions would be able to transfer their mortgage backed lending (and some of the risk attached to them) to special purpose vehicles which would in turn issue debt securities on the BRVM.

In 2010, the WAEMU member states adopted a regulation[8] (the "**Securitisation Regulation**") to facilitate this practise, although the regulation went further than initially envisaged, permitting not only the securitisation of mortgage backed securities but also a whole range of other receivables, including treasury deposits, treasury bonds and any present or future debt whether or not determined or certain. The Securitisation Regulation created a structure known as a debt securitisation common fund (FCTC)[9] to which financial institutions could transfer by simplified means any qualifying existing or future lending instrument, together with accompanying security. An FCTC would be established by an independent management company and a financial institution acting as depositary. An FCTC would be able to hold all of its assets in an undivided, single patrimony and issue securities on the basis of this patrimony. Alternatively, the patrimony of an FCTC could be split into a series of separate compartments containing different sets of assets. Each compartment could issue securities separately based on the specific assets within it. To make this workable, the Regulation provided that if a compartment became insolvent, the holders of securities issued on the basis of that compartment would not have access to assets held in any other compartment of the FCTC. The whole regime was placed under the control of the regional securities commission, the CREPMF, the approval of which was required for each securitisation transaction. At this stage, the BOAD, has established an independent management company to manage the first FCTC to be created.

(b) *Covered bonds*

To complement the Securitisation Regulation, the WAEMU member states adopted a second regulation in 2010 providing for the creation of covered bonds (*obligations sécurisées*), the "**Covered Bond Regulation**")[10]. The regulation permits financial institutions approved by the regional banking commission to issue debt securities which are backed by a specific group of its assets. These may be secured real property loans, public sector loans or equivalent instruments. If the issuer defaults on the securities, the investor is entitled to recourse against the issuer, but also against the underlying debtors. Furthermore, if the issuer goes into insolvency, the investor is entitled to recourse in priority against the specific group of assets. This form of statutory ring-fencing is intended to enhance the rating of bond issues, while permitting the issuer to keep the assets on its balance sheet.

(c) *Regional mortgage refinancing fund*

To further complement the Securitisation Regulation (and more specifically to advance the initial policy of attracting additional private sector financing to the residential property sector) the regional central bank (BCEAO), the West African Development Bank (BOAD) and the regional securities commission (CREPMF) created in 2010 a regional mortgage refinancing fund, the "**CRRH-UEMOA**" (*Caisse Régionale de Refinancement Hypothécaire*). The CRRH-UEMOA received its regulatory approval in 2011.

A majority of the capital of the CRRH-UEMOA is held by approximately 45 regional banks that have agreed to participate in the scheme and a minority (approximately one third) by regional development agencies. A participating bank is able to grant a pledge to the CRRH-UEMOA over a portfolio of mortgage backed loans made for the construction or acquisition of residential property. On the basis of the pledged portfolio, the CRRH-UEMOA issues securities on the BRVM and uses the proceeds to provide refinancing loans to the participating bank.

Since receiving its authorisation from the banking authority in 2011, the CRRH-UEMOA completed two security issues in 2012 and 2013 respectively, with the securities being subsequently listed on the BRVM. Each of the issues was over-subscribed and raised an overall amount of 31,661,000,000 Franc CFA (approximately 48 million Euros), refinancing the residential loans of some 18 regional banks in 7 countries.

(d) *Regional ratings agencies*

The regional securities commission (CREPMF) has also taken steps to overcome the costs associated with international rating agencies. In 2012 it approved Bloomfield Investment Corporation as a regional rating agency covering a full range of items, including commercial and industrial companies, financial institutions, public and *quasi*-public bodies, countries and sovereign debt, municipal bodies, ordinary and covered bonds, FCTCs and any other debt securities and structured finance products. In the same year, a second regional ratings agency, EMR – WARA, was approved by the CREPMF for the same broad range of items.

(e) *Criminal sanctions*

Although the initial convention establishing the CREPMF stated that breaches of market rules could constitute criminal offences and give rise to prosecution, and various market institutions have the power to impose administrative and disciplinary sanctions (including fines) for market rule breaches, there is no specific criminal law regime sanctioning breaches of market rules. It was thought that the absence of such a regime diminished investor confidence in the regional market.

To rectify this, the CREPMF has proposed the adoption of a draft regulation which would create the following criminal offences:

- insider trading;
- the communication of insider information;
- the communication of false or misleading information; and
- market manipulation.

The draft regulation would also render criminal breaches of a number of other market regulations and reinforce the powers of the supervisory authorities.

The timetable for adoption of the proposed draft regulation by the WAEMU member states is not yet set. However, observers believe that it is likely to occur within the year.

Endnotes

1 The AfDB estimates the average cost of external legal advice on a contentious matter involving vulture funds at USD 1.5 million.

2 www.aflsf.org.

3 Statement by Charles Boamah, Finance Vice-President, African Development Bank, 24 January 2012.

4 The intention of the member states was to merge the WAMU and WAEMU conventions into the same legal instrument. Although this is yet to be accomplished, for ease of reference, WAEMU will be used in this article to refer to WAMU as well.

5 A different CFA franc is used by six other Central African countries (Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea and Gabon), the common central bank of which is the BEAC (*Banque des Etats de l'Afrique Centrale*).

6 Lettre Mensuelle N° 173 – février 2014, CGF Bourse.

7 As an example of recent activity, on 14 February 2014 treasury bonds issued by Burkina Faso (6.50%, 2013-2020) were listed on the exchange. The bonds had previously enjoyed a significant oversubscription (221%) and raised

121,600,000,000 Franc CFA (approximately 185 million Euros) for the treasury.

8 Regulation N° 02/2010/CM/UEMOA regarding debt securitisation funds and securitisation transactions in the WAEMU.

9 The FCTC, which is modelled on the French FCT, is not a legal entity or a commercial company, but an economic interest grouping with joint ownership.

10 Regulation N° 03/2010/CM/UEMOA regarding covered bonds in the WAEMU.

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LSTA v. LMA: Comparing and Contrasting Loan Secondary Trading Documentation Used Across the Pond

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Both the Loan Syndications and Trading Association, Inc. (the "LSTA") and the Loan Market Association (the "LMA") publish the forms of documentation used by sophisticated financial entities involved in the trading of large corporate syndicated loans in the secondary trading market. The LSTA based in New York was founded in 1995. The LMA based in London was formed in 1996. Both the LSTA and LMA share the common aim of assisting in developing best practices and standard documentation to facilitate the growth and liquidity of efficient trading of syndicated corporate loans. Over the past two decades, the use of these secondary trading forms has become widespread and customary by market participants.

Under LSTA trading documentation approximately $517,000,000,000 notional amount of loans traded in 2013 and $396,000,000,000 notional amount of loans traded in 2012.[1] Whereas, under LMA trading documentation approximately $67,000,000,000 notional amount of loans traded in 2013 through the first three calendar quarters and $66,000,000,000 notional amount of loans traded through the entire calendar year in 2012.[2]

The focus of this article is to give the reader a high-level overview of some of the important similarities and distinctions between LSTA secondary loan trading documentation and LMA secondary loan trading documentation.

Which Documents to Use - LSTA or LMA?

Typically whether the parties will use LSTA or LMA trading documentation will be decided by the parties at the time of trade. There are no formal requirements for selecting LSTA or LMA documentation, however, a number of informal factors contribute to the determination of the documentation to be utilised.

Governing Law. Where the credit agreement is based on law of the United Kingdom or another European jurisdiction, LMA documentation will be typically utilised. On the contrary, where the governing law of the applicable credit agreement is New York law or of another jurisdiction within the United States, usually LSTA documentation will be utilised. LMA documents are governed by English law whereas LSTA documents are governed by the laws of New York.

Borrower's Jurisdiction. If the organisation and principal location of the borrower is outside of the United States, LMA documentation will generally be used. LSTA documents will most likely be used if the borrower is principally located and organised in the United States.

Upstream Documentation. If a party purchased the loans utilising LSTA documents, such party will almost always want to sell the loans to its purchaser utilising LSTA documents (and *vice versa* if such party purchased on LMA) so as not to have a mismatch between the rights and obligations acquired when it purchased the loans as compared to the rights and obligations transferred when it sells the loan. The risks facing a party that buys and sells a loan using different types of form documentation (e.g., buy on LSTA and sell on LMA) will become more transparent below when discussing the different styles of representations provided by a seller using LSTA documentation versus LMA documentation.

Par or Distressed?

Both LSTA secondary trading documentation and LMA secondary trading documentation have different terms and conditions applicable to the trade depending on whether a trade is agreed to be a "par" trade or a "distressed" trade. As a general principle, the seller will be required to provide the buyer with more robust representations and warranties when selling on distressed terms as compared to par terms. Typically performing loans trade on par documentation while non-performing loans (or loans expected to become non-performing) trade on distressed documentation.

Pricing

Regardless of the type of documentation agreed upon by the parties in settling the secondary loan transaction, the LSTA and LMA both set forth substantially similar methodologies for determining the purchase price to be paid with respect to secondary loan transactions (whether traded on par or distressed). Under both LSTA and LMA trades, the buyer generally receives the benefit of any payments or distributions made with respect to the loans being sold from and after the trade date. The one material exception under both LSTA and LMA pricing conventions provides for the seller to retain the right to any accrued and unpaid interest on performing loans for the period of time up to (i) seven (7) business days after trade date ("T+7") for LSTA par trades or ten (10) business days after trade date ("T+10") for LMA par trades, or (ii) twenty (20) business days after trade date ("T+20") for both LSTA and LMA distressed trades. Both LSTA and LMA par and distressed trades further require for the buyer to pay seller interest based upon 1-month Libor (or 1-month Euribor) on the purchase price the buyer would have paid the seller had the trade closed on either (i) T+7 for LSTA par trades or T+10 for LMA par trades or (ii) T+20 for both LSTA and LMA trades. A detailed discussion of how pricing conventions work under LSTA and LMA documentation is beyond the scope of this article and the foregoing is meant as a simplified overview.

A Trade is a Trade

A concept paramount to both LSTA and LMA secondary loan trading markets is the concept that a "trade is a trade". This maxim forms the bedrock for the hundreds of billions of dollars traded annually in the secondary loan trading market. Once the material terms of a trade are agreed to orally or in writing, a binding contract is formed. The material terms typically include: (i) the borrower name; (ii) the identity, type and amount of debt being purchased or sold; (iii) the purchase rate; (iv) whether settlement shall be par or distressed; and (v) whether it shall be subject to LSTA or LMA documentation.

With respect to trades done pursuant to LSTA documentation, the enforceability of oral trades was codified in New York in 2002 when such trades, subject to certain requirements being met, became exempt from the statute of frauds.[3] LSTA trade confirmations further provide that once parties have executed an LSTA trade confirmation incorporating LSTA standard terms to such loan trade, the parties to such confirmation agree to be bound to any other transaction between them with respect to the purchase or sale of bank loans upon reaching agreement to terms (whether by telephone, exchange of e-mail or otherwise).[4]

Similarly, case law in England demonstrates that oral agreements relating to loan trades may be enforceable once the material terms are agreed upon.[5] LMA documents also expressly provide in the standard terms for both par and distressed bank debt trades that a binding contract between the parties comes into effect between the parties "upon oral or written agreement" of the material terms on the date agreed upon.[6] Notwithstanding that under both New York law and English law oral or electronic communication between the parties may be enforceable without a formal written trade confirmation, enforcement of such communication may be difficult and will depend on an analysis of the facts and circumstances.[7] Parties are therefore encouraged to keep internal written records of all agreed upon trades and to endeavour to promptly formalise the terms of a secondary loan transaction pursuant to a written trade confirmation or by some form of electronic communication.

Since both LSTA and LMA trades may become binding upon oral or electronic communication prior to the signing of a formal written confirmation, a party looking to enter into a bank debt trade with a counterparty must be careful to do its diligence and homework upfront before agreeing to the material terms. A party must make certain that in communicating with a counterparty that it is referencing the correct borrower/obligor in the capital structure of a corporate family as well as be aware of the following: (i) whether any payment or non-payment default have occurred under the credit agreement; (ii) whether the credit agreement provides for collateral (and, if collateral is pledged or granted for the benefit of lenders, whether any costs will be imposed upon a party when acquiring such debt to remain properly perfected upon consummation of the trade)[8]; (iii) the status of an insolvency proceeding (if any) relating to the borrower/obligor; (iv) the transfer requirements imposed by the governing credit agreement (e.g., will the entity purchasing the loans be able to take legal title to the loans or will the parties be required to settle via participation or sub-participation); (v) the governing law of the credit agreement (e.g., certain jurisdictions may prohibit or have limitations on certain entities becoming lenders); and (vi) the jurisdiction of organisation of the borrower (e.g., depending on the jurisdiction of the borrower, a party may be subject to tax withholding on payments).

A buyer of loans does not want to learn of a material issue that would have affected its decision to enter into the trade, *after* it has committed to purchase a loan, such as, the transfer will require high expenses not anticipated (e.g., stamp taxes or expensive costs to perfect interest in collateral) or that it will not qualify to become a lender of record. Accordingly, it is important to complete the diligence prior to committing to a trade.

Confidentiality Agreements

Before committing to the material terms with a counterparty, both the LSTA and LMA provide for parties to utilise a form confidentiality agreement.[9] Such confidentiality agreement will typically allow for the seller to provide the buyer syndicate level confidential information relating to the loan, thus providing the buyer with an opportunity to perform diligence on the loan prior to committing to purchase. Both the LSTA and the LMA also have a master form of confidentiality agreement which allows for parties on subsequent loan trades to execute a schedule to the confidentiality agreement specific to the relevant credit agreement to which the underlying loan being sold or purchased relates.

Non-Standard Terms

To the extent a party is aware of a non-typical trade term that is important to such party or it wants to deviate from either the LSTA or LMA standard terms and conditions, such party should state, clearly and unambiguously at the time of trade, the non-standard conditions. As the secondary loan trading market has continued to expand and customs have become more entrenched, unless some reference to the conditionality of the transaction is expressly established at time of trade, it will prove difficult for a party to contend that a trade had not been agreed upon once the material terms of a trade are agreed upon. For example, if the trade relates to a sale of a revolving commitment (with future funding obligations) and the buyer realises that it may not be able to settle via assignment because of an inability to obtain borrower consent under the credit agreement, the buyer may want at time of trade to agree with the seller as to whether collateral will be required to be posted (and, if yes, how much collateral will be required).[10]

Further, if there is an important vote or decision to be made with respect to an upcoming amendment, rights offering or restructuring proposal and the buyer would like to direct seller as to how to act, the buyer should agree with the seller about such direction rights at time of trade. Without modification, neither LSTA nor LMA documents require the seller to take direction from the buyer with respect to amendments or modifications to the credit agreement occurring during the period of time after trade date and before settlement date.[11] However, it is often customary for a seller to consult with its buyer regarding such buyer's preference when a material action is occurring post-trade date but pre-settlement date with respect to a loan (e.g., extending maturity date, releasing collateral, waiver of default, etc.).

Trade Confirmations

Important distinctions exist with respect to the trade confirmations entered into in respect of LSTA secondary loan trades as compared to LMA secondary loan trades. When entering a loan trade pursuant to LSTA documentation, the parties will utilise either an LSTA par confirm or an LSTA distressed confirm. Whereas, under LMA secondary loan trades, the parties will utilise the same confirmation document with some different check box elections to memorialise whether certain provisions within apply depending on whether the trade will be treated as par or distressed.

Under both LSTA and LMA par transactions the only other operative document that will typically need to be agreed upon in finalising the transaction (outside of a funding memorandum setting

forth the purchase price calculation) will be an assignment and acceptance agreement or transfer certificate in substantially the form set forth as an exhibit to the underlying credit agreement. Hence, on par trades, once the assignment agreement is executed and the purchase price is paid, the rights and obligations of the party to settle the transfer of the loan will be satisfied and performed.

The settlement process for distressed trades, however, differs on LSTA and LMA following the execution of a trade confirmation. An LMA trade confirmation serves two purposes: (i) to document the agreement to the terms of the trade on trade date; and (ii) to act as the purchase and sale agreement. Thus, with respect to an LMA distressed trade no subsequent LMA documentation generally needs to be executed after the trade confirmation. This is not the case under LSTA distressed documentation. An LSTA distressed trade confirmation specifically provides that the secondary loan trade shall be subject to "negotiation, execution and delivery of reasonably" acceptable contracts.[12] Notwithstanding the ability of parties to negotiate, the standard terms for an LSTA distressed confirmation requires the parties to use a supplemental purchase agreement substantially in the form of the LSTA Purchase and Sale Agreement for Distressed Trades as in effect on the trade date.

When a party signs an LMA confirmation without modification to the standard terms, such confirmation shall govern all of the representations, warranties, covenants and agreements that are made by the seller or buyer not only on the trade date but also on the settlement date of the trade. Thus, if an LMA trade confirmation has been executed and an event occurs prior to the settlement date but after the trade date, causing one party to request modifications to the LMA standard terms (because a standard LMA representation to be made by such party as of the settlement date shall no longer be true without modification), such party may be in a precarious position to the extent its counterparty is unwilling to allow for modifications to the standard terms after the trade confirmation has been executed. Hence, parties need to be especially careful prior to executing an LMA trade confirmation in situations where the parties are not consummating the loan trade on or around the same date as the trade confirmation is executed.

This is not the case for an LSTA distressed trade. As noted above for LSTA distressed trades, after an LSTA distressed trade confirmation is executed the parties will still be obligated to enter into a supplemental purchase and sale agreement which is subject to negotiation. Hence, in the event that something occurred between trade date and settlement date that one party felt required modification to the standard terms the opportunity expressly exists within the four corners of the LSTA document to negotiate such terms prior to settlement.

Predecessor-in-Title Representations v. Upstream Chain of Title

Where the LMA and LSTA secondary loan trading documentation differ most significantly is with respect to the use of predecessor-in-title representations. LSTA documentation generally does not provide for any predecessor-in-title representations to be made by a seller. In contrast, whenever a seller transfers loans pursuant to LMA documentation, certain representations and warranties are made by such seller not only on behalf of itself *but also on behalf of any prior seller* who held such loans dating back to the time when the loans were first extended to the borrower. This is true on LMA documentation for representations and warranties made by the seller whether the trade settles on par terms or distressed terms (although the breadth of such representations is greater for distressed trades).[13]

The specific representations and warranties provided by the parties under both LMA and LSTA documents are generally similar. For a par trade where the loan is performing and the risk of the loan subsequently becoming non-performing are low, the representations and warranties to be provided by a seller to its buyer are generally limited in scope. For both LMA and LSTA par trades, the seller will provide a good title representation and warranty to the buyer on the settlement date that the seller owns sole legal and beneficial title to the loans free and clear of lien, encumbrance or adverse claim against title of any kind.

LMA par trades include additional representations and warranties by the seller to the buyer (and, thus, create greater exposure to the seller relative to LSTA par trades). Such additional representations and warranties include: (i) to seller's knowledge, the loans have not been accelerated by the lenders and no principal or interest payment defaults have occurred; (ii) neither seller nor any of its predecessors-in-title have executed any other documents which could materially and adversely affect the loans; (iii) neither seller nor any predecessor-in-title is in default with respect to any of its obligations in relation to the loans and related rights being sold; and (iv) the loans and the rights related to the loans are free from any set-off in favour of the borrower. None of the foregoing representations and warranties are generally provided by a seller when selling loans on par LSTA documentation. It is noteworthy, however, that all of the foregoing representations and warranties are provided by a seller (*on behalf of itself alone and not any prior seller*) transferring loans pursuant to LSTA distressed documentation (except for the representation relating to no payment defaults).

Since the seller under an LMA loan trade provides recourse to its buyer for all prior sellers of the loan with respect to certain representations, the buyer has recourse against its immediate seller for any breach of such representations regardless of whether such breach relates to an action (or inaction) or the status of the specific selling party. This method of documentation provides some advantages and disadvantages to buying parties as compared to LSTA trades. One obvious advantage to such buyer is that, with respect to distressed trades, a buyer acquiring loans under LMA documentation will have less diligence to conduct. Under LMA distressed documentation, the rights to predecessor transfer agreements are not transferred, so no other predecessor transfer documents will be provided to the buyer for its review. One disadvantage is that the buyer's recourse will be limited entirely to its immediate seller. Thus, to the extent the seller is not creditworthy, the predecessor-in-title representations will be of limited value. Generally, this will be more of a concern for market-makers/dealers purchasing from speculative hedge funds than for end buyers purchasing from a market-maker/dealer.

With respect to LSTA loan trades that settle pursuant to par documentation, a seller will not be required to make representations on behalf of any prior seller who owned the loans. The same is generally true for sellers transferring loans pursuant to LSTA distressed secondary trading documentation. Unlike LMA trades, LSTA distressed trading documentation provides for an upstream chain of title. Under such circumstances, a buyer purchasing distressed loans will receive a chain of title showing any transfer of the loans since the loans "shifted" to trading distressed from par.[14]

LSTA distressed sales settle on the basis of the delivery of predecessor transfer agreements and the assignment to the buyer of all of the seller's rights against prior sellers under such predecessor transfer agreements rather than the use of predecessor-in-title representations. Hence, to the extent the recovery received on the loan purchased by the buyer is impaired because of an action (or inaction) taken by an upstream seller in the chain, the buyer under

LSTA distressed documentation may be able to seek recourse not only against its immediate seller but against a further removed prior seller. Although a buyer may have to conduct more diligence when settling a LSTA distressed trade as compared to a LMA distressed trade by reviewing prior transfer documentation, such buyer will have recourse against each upstream seller who sold the loans being transferred on distressed documents.

Since a seller transferring loans on LSTA documents will generally not have to be concerned about a buyer seeking recourse against it for actions taken by a prior seller, its exposure for any losses that the buyer may incur due to an issue in the chain of title is less than a seller transferring loans under LMA documents. Under certain limited circumstances, a party that settles a loan trade on par LSTA documentation after the credit has shifted to distressed will be required to provide the buyer with certain representations and warranties on behalf of not only itself but any predecessor-in-title who held such loans from and after the date the credit was deemed to have shifted from par to distressed.[15]

Outside of the different approaches to predecessor-in-title representations, the LSTA representations, warranties and indemnities for distressed trades are in and of themselves generally similar to those found in LMA documentation applicable to distressed trades. Both the LSTA and LMA distressed transactions provide recourse to the buyer in the event the buyer's rights with respect to the loans are impaired because (i) the selling party is an insider or an affiliate of the company, (ii) litigation is pending or, to seller's knowledge, threatened against the selling party, and (iii) there are set-off rights against the selling party.

The most important distressed representation provided under both LSTA and LMA documentation is the "no bad acts" representation.[16] This representation provides the buyer with comfort that the seller has taken no actions (or inactions) that will result in the buyer receiving less in payments or distributions or less favourable treatment than other lenders in the syndicate with respect to the same type of loans being sold. This representation is intended to act as a catch-all protection for a buyer purchasing distressed loans. For example, this representation would provide a buyer with recourse in a situation where other lenders instituted proceedings against the borrower or a professional advisor which the seller has not joined, with the result that the buyer does not share in the proceeds. Although there are differences in the aforementioned representations (including the timing of when certain representations and warranties are made), as previously mentioned, the most significant difference is that the seller under LMA distressed trades provides recourse to its buyer on behalf of itself and any predecessor in title.[17]

Credit Risk Part I - Counterparty Insolvency

One mutual goal of both the LSTA and the LMA is to expedite settlement thereby reducing exposure to counterparty risk. Loans do not settle electronically like securities and, therefore, require some time to settle. The goal of the LSTA and the LMA is to settle par trades within seven (7) business days and ten (10) business days, respectively, from the trade date and within twenty (20) business days from the trade date for distressed trades. Unfortunately, these targeted goals on average are generally not being met.[18] The credit risk issue for loan trade parties is that after trade date, but prior to settlement date, a counterparty will enter into an insolvency proceeding or will otherwise subsequently be unable to perform its obligations (e.g., pay the purchase price).

This concern over counterparty risk became a real issue for many market participants with the bankruptcy filing of Lehman Commercial Paper Inc. ("LCPI") in 2008. LCPI is the Lehman entity which, among other things, traded syndicated loans in the secondary market. At the time of LCPI's bankruptcy filing, LCPI had hundreds of unsettled bank debt trades leaving its counterparties in a precarious position.[19] Under US bankruptcy law, counterparties of LCPI with unsettled LSTA bank loan trades were prohibited from terminating their trades or taking other enforcement actions against LCPI based upon the automatic stay of Section 362(a) of the US Bankruptcy Code.

In LCPI's US bankruptcy case, LCPI filed a motion with the Bankruptcy Court for a finding and/or Order that the unsettled open trade confirmations were "executory contracts" under the Bankruptcy Code.[20] Bankruptcy Code section 365 permits a debtor to reject or assume executory contracts. Certain counterparties to these open, unsettled trades objected to such motion on various grounds.[21] For parties that did not object to this motion, however, the Bankruptcy Court found and ordered that the unsettled secondary loan trades were executory contracts.[22] This allowed LCPI to assume unsettled trades that were "in the money" while rejecting "out of the money" contracts. Where LCPI rejected a loan trade, its counterparty was stuck with an unsecured claim against LCPI for any damages resulting from economic loss on the unsettled trade (e.g., loss of value related to increase in market value of the loan subsequent to trade date).

It is important to recognise that LSTA transactional documents do not have an *ipso facto* clause allowing a party to terminate the contract with its counterparty upon the bankruptcy filing of its counterparty, as such *ipso facto* clauses are generally not enforceable in the United States.[23] Under English law, however, *ipso facto* clauses are generally enforceable.[24] Under a contract governed by English law, a counterparty remains entitled to terminate the contract if the contract contains a right of termination upon the insolvency of its counterparty. This is a material difference from US bankruptcy law.

Prior to Lehman's bankruptcy filing, LMA documentation did not provide an *ipso facto* provision allowing a party to terminate its loan trade upon an insolvency event of its counterparty. Not surprisingly, in response to the bankruptcy of LCPI and the resulting negative effects for market participants, the LMA updated its standard documentation to try and alleviate counterparty insolvency risk by adding an *ipso facto* provision for unsettled loan trades.

The revised LMA documentation provides that if an "insolvency event" occurs in respect of either party prior to the settlement date of such transaction, the non-insolvent party may terminate the open trade by giving notice.[25] The LMA also allows for parties to elect that automatic termination shall apply instead of termination by giving notice. Following the termination of an open transaction, the non-insolvent party must calculate in good faith its damages as soon as practicable. The intention of this provision is to ensure that LMA loan trades do not remain open and outstanding without prospect of settlement during an insolvency case and provide a methodology for the non-insolvent party to establish an unsecured claim against its insolvent counterparty. Notwithstanding the contractual rights to terminate a trade upon the insolvency of a counterparty under LMA documentation, the ability of a non-insolvent party to actually close out and terminate a trade may be limited depending upon the jurisdiction of the insolvent party and the insolvency laws where the insolvency case is pending.

Credit Risk Part II - Participations

Credit agreements typically permit the sale of loans by participation as opposed to outright assignment. Both LSTA and LMA

documentation generally provide that in the event the settlement of a loan by assignment is not possible the parties will settle the terms of the trade via participation or sub-participation. When settling a trade via participation as opposed to assignment, the borrower will continue to have obligations owed only to the seller/grantor of the participation and not the buyer/participant. The seller/grantor in turn will then be obligated to pass along or turn over an equivalent amount of payments or distributions received from the borrower to the buyer/participant. Thus, market participants use participations as an alternative method to acquire the loan when a direct assignment is not possible, or to preserve anonymity in the credit.

Owners of bank loan participations take on two types of credit risk: (i) the borrower's failure to pay the underlying bank loan (which is equally applicable to an assignment); and (ii) the occurrence of an insolvency event of the grantor of the participation or the inability of the grantor to perform its obligations under the participation agreement. A very important distinction between LSTA and LMA documentation that affects the second prong of such credit risk is the way in which the form LSTA and LMA participation agreements are structured. LMA style participations create a debtor and creditor relationship between the grantor and the buyer of the participation.[26] If the grantor becomes insolvent, the participant will be treated like an unsecured creditor of the grantor without having a beneficial interest in the underlying loan. In contrast, LSTA participations are intended to effect a true sale of the beneficial interest in the loan. In other words, under LSTA participations, the beneficial and economic interests in the loan are transferred from the grantor to the participant and not a part of the insolvent entity's estate. Under US law, a typical LSTA participation agreement results in the participant being considered the beneficial and economic owner of the underlying loan. The grantor's bankruptcy estate will be considered merely the owner of bare legal title to the underlying loan. Thus, the underlying economic interest in the loan that had been participated will not be considered part of the grantor's estate.[27]

A participant under an LSTA form participation agreement should have good grounds to seek relief from the automatic stay and elevate the participation to an outright assignment of the underlying loan (provided that the participant is eligible to hold the loan as a direct assignee under the underlying credit agreement or the applicable borrower consents).[28] Not uncommonly, end buyers entering into LMA participation agreements often seek to modify such documentation to provide for a transfer of a beneficial, economic interest in the loan to remedy this enhanced credit risk under LMA form documentation.

Conclusion

The foregoing overview highlights some important considerations that market participants engaging in secondary loan trades should be cognizant of when agreeing to utilise either LSTA or LMA secondary transfer documentation. Although there are a fair amount of similarities between the secondary loan transfer documentation used across the pond, there exist some substantive, material differences in the two types of documentation which affect the allocation of risk and the relative rights and obligations of both seller and buyer. The reader should be cognizant that the foregoing overview is intended to be introductory in nature. For detailed guidance relating to trading of syndicated bank loans in the secondary market, parties should obtain legal counsel with respect to same.

Endnotes

1 Such amounts are based upon information provided by the 4Q 2013 LSTA Secondary Trading & Settlement Study dated January 27, 2014. Out of such notional amounts, approximately $19,000,000,000 traded on LSTA distressed documentation in 2013 and $22,000,000,000 traded on LSTA distressed documentation in 2012 with the respective balances trading on LSTA par documentation. *Id.*

2 Such amounts are based upon Thomson Reuters LPC Secondary Loan Trading Volume Survey published on the LMA webpage. Based on such statistics, the total notional amount of loans traded on LSTA documentation is much greater than on LMA documentation (*six times as great* during the full calendar year of 2012). The percentage amount of distressed loans recently traded as compared to par loans, however, is significantly higher on LMA documents than on LSTA documents. This fact should not come as a surprise to market participants based upon the benign credit markets and low default rates for corporate borrowers in the United States as compared to the recent economic turmoil affecting corporate borrowers in Europe. Out of the $67,000,000,000 notional amount traded on LMA documentation for the first three calendar quarters of 2013, $17,000,000,000 notional amount was distressed with balance being par. *Id.* Note that the methodology for determining whether the loans traded on LMA were distressed or par was based upon whether the loans traded were categorised as distressed or par (and does not mean necessarily that LMA distressed or par documentation was utilised in settling such trades).

3 *See* N.Y. Gen. Oblig. Law § 5-701(b) (McKinney 2014).

4 *See LSTA Standard Terms and Conditions for Par/Near Par Trade Confirmations* (the "LSTA Standard Par Terms"), at ¶ 22, "Binding Effect"; and LSTA *Standard Terms and Conditions for Distressed Trade Confirmations* (the "LSTA Standard Distressed Terms"), at ¶ 26, "Binding Effect".

5 *See Bear Stearns Bank Plc v. Forum Global Equity Ltd*., [2007] EWHC (Comm) 1576 (holding that buyer and seller had enforceable oral agreement where parties had agreed on, among other things, a firm price for the underlying notes).

6 *See LMA Standard Terms and Conditions for Par and Distressed Trade Transactions (Bank Debt/Claims)* (the "LMA Standard Terms"), at ¶ 2(a), "Contract Point".

7 Without "sufficient evidence", an alleged oral agreement to a trade may be left to the court in a cumbersome "he said, she said" litigation process. *See, e.g., Highland Capital Mgmt., L.P. v. Bank of Am., Nat'l Assoc*., 2013 U.S. Dist. LEXIS 119935 (N.D. Tex. August 23, 2013) (analysing factual circumstances surrounding parties purported contract based upon electronic communication under New York law and holding that no binding contract existed). Plaintiff Highland Capital Management, L.P. has appealed the ruling of the District Court.

8 This is particularly relevant when the trade relates to purchase of a loan extended to a European borrower under a credit agreement governed by a European jurisdiction. Often perfection of security in European jurisdictions must be done by each individual lender in a syndicate and costs to perfect such interest in collateral may be expensive. Under LMA standard documentation the costs to perfect an interest in security related to a loan being transferred are borne entirely by the buyer. *See* LMA Standard Terms, at ¶ 18.2.

9 *See LMA Confidentiality Undertaking, March 24, 2011; LSTA Form of Master Confidentiality Agreement for Secondary Sales & Trading,* December, 2006.

10 Typically syndicated credit agreements will provide the borrower with consent rights prior to allowing a prospective assignee to become a lender in the syndicate. This consent

right is understandably important to a borrower when the facility relates to a revolving commitment whereby the creditworthiness of a prospective lender will be important due to future funding obligations.

11 *See* LSTA Standard Par Terms, at ¶ 13, "Syndicate Information"; LSTA Standard Distressed Terms, at ¶ 20, "Syndicate Information"; and LMA Standard Terms, at ¶ 26.1.

12 *See LSTA Distressed Trade Confirmation* (the "LSTA Distressed Trade Confirm"), at 3.

13 *See* LMA Standard Terms, at ¶¶ 22.3 and 22.4.

14 Such determination of when a credit shifts from par to distressed is pursuant to a shift date poll mechanism. See LSTA Standard Distressed Terms, at ¶ 12, "Step-Up Provisions" (defining "Shift Date" and setting forth seller's obligations with respect thereto).

15 *See* LSTA Standard Distressed Terms, at ¶ 12, "Step-Up Provisions."

16 *See LSTA Purchase and Sale Agreement for Distressed Trades – LSTA Standard Terms and Conditions* (the "LSTA Standard Distressed Terms and Conditions"), at §4(h)(i):

"Seller has not engaged in any acts or conduct or made any omissions (including by virtue of Seller's holding any funds or property of, or owing amounts or property to, Borrower or any Obligor), that will result in Buyer's receiving proportionately less in payments or distributions under, or less favorable treatment (including the timing of payments or distributions) for, the Transferred Rights than is received by other Lenders holding loans or commitments of the same tranche, class or type as the Loans or Commitments (if any)."

LMA Standard Terms, at § 22.4(c):

"*No bad acts*: neither it nor any of its Predecessors-in-Title has engaged in any acts or conduct, or made any omissions, independently of the other Lenders (or, if this is a Claims Trade, of other creditors of the Obligors holding claims of a similar nature to the Traded Portion) that would result in the Buyer receiving proportionately less payments or distributions or less favourable treatment in respect of the Purchased Assets or Purchased Obligations than any other Lender holding advances or a participation (of a similar nature to the Traded Portion) and similar claims under the Credit Documentation (or, if this is a Claims Trade, than such other creditors) or result in any Purchased Assets, or any part thereof, being subject to a Claim Impairment and, in particular, neither it nor any of its Predecessors-in-Title has set off any amounts against the Purchased Assets."

17 *Compare* LMA Standard terms, § 22, *and* LSTA Standard Distressed Terms and Conditions, at §§ 4, 5 (whereas LMA representations and warranties are made as of either the "Trade Date", "Settlement Date", or "Seller Representation Date", LSTA representations are made as of the "Settlement Date", unless otherwise noted.

18 *See, e.g.,* The Q4 2013 LSTA Secondary Trading & Settlement Study, January 27, 2014, at 36, 41 (noting that for LSTA par and distressed trades, the median number of business days between trade and settlement date in Q4 2013 was 15 and 49 days, respectively). The reasons for these delays include, among other things, agent delays, a credit freeze, delays in obtaining borrower consent and an upstream party not owing the loans being sold. The LMA does not currently provide data with respect to settlement times.

19 *See Debtor's Motion for an Order Pursuant to Section 365 of the Bankruptcy Code Approving the Assumption or Rejection of Open Trade Confirmations*, November 14, 2008, Case No. 08-13555, Docket No. 1541 (the "LCPI Assumption Motion"), at ¶ 8.

20 *See* LCPI Assumption Motion. An "executory contract" is not defined under the US Bankruptcy Code, however, case law indicates that an executory contract is a contract on which performance is still required on both sides. *See, e.g., In re Penn Traffic Co.*, 524 F. 3d 373, 379 (2d Cir. 2008).

21 *See, e.g., Counterparties' Objection to Debtors' Motion for an Order Pursuant to Section 365 of the Bankruptcy Code Approving the Assumption or Rejection of Open Trade Confirmations*, November 26, 2008, Case No. 08-13555, Docket No. 1841, at ¶ 1 (arguing that LCPI Assumption Motion amounted to impermissible effort to profit from downturn in financial markets in 2008); and *Limited Objection of Tennenbaum Entities to Debtors' Motion to Approve Assumption of Trade Confirmations and Prohibit Setoffs of Prepetition Claims*, November 26, 2008, Case No. 08-13555, Docket No. 1848, at ¶¶ 8-9 (arguing that trade confirmations at issue were not "executory" because only remaining obligations were "ministerial and non-material").

22 *See Order Pursuant to Section 365 of the Bankruptcy Code Approving the Assumption or Rejection of Open Trade Confirmations*, December 16, 2008, Case No. 08-13555, Docket No. 2258.

23 There are certain exceptions to this rule which permit parties to transactions involving a swap agreement, securities contract, forward contract, commodity contract, repurchase agreement, or master netting agreement the ability to terminate its contract and establish damages owed upon the filing of bankruptcy of a counterparty. See 11 U.S.C. § 562 (establishing method for determining damages arising from termination of swap agreement, securities contract, forward contract, commodity contract, repurchase agreement, or master netting agreement). Such exceptions do not exist for secondary loan trades.

24 *Compare Perpetual Trustee Company Ltd. & Anor v. BNY Corporate Trustee Services Ltd. & Ors*, [2009] EWCA (Civ) 1160 (holding so-called "flip provision" enforceable under English law), *and Lehman Bros. Special Fin. Inc. v. BNY Corporate Tr. Servs.* (*In re Lehman Bros. Holdings Inc.*), 422 B.R. 407 (Bankr. S.D.N.Y. 2010) (holding same provision to be unenforceable *ipso facto* clause).

25 The definition of "insolvency event" is substantially similar to the definition of "bankruptcy" used in Section 5(a)(vii) of the ISDA Master Agreement. *Compare* LMA Standard Terms, at ¶ 1.2 *and 2002 ISDA Master Agreement, at § 5(a)(vii)*.

26 *See LMA Funded Participation (Par/Distressed) (March 2014)*, at ¶ 6.1(b) (stating that under an LMA participation the relationship between the grantor and participant is that of debtor and creditor with the right of the participant to receive an equivalent amount of payments received by the grantor with respect to the loan participated).

27 *See* 11 U.S.C. § 541(d) (stating that "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest" only results in the debtor's estate having an interest in such property to the extent of its bare title and not any equitable interest).

28 *See Order Pursuant to Sections 105(a), 363(b), 363(c), and 541(d) of the Bankruptcy Code and Bankruptcy Rule 6004 Authorizing Debtor to (a) Continue to Utilize its Agency Bank Account, (b) Terminate Agency Relationships, and (c) Elevate Loan Participations,* October 6, 2008, Case No. 08-13900, Docket No. 11.

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The Global Subscription Credit Facility Market – Key Trends and Emerging Developments

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Introduction

Subscription credit facilities (each, a "***Facility***"), also known as 'capital call' or 'capital commitment' facilities, are credit facilities extended to real estate, private equity, infrastructure, debt and similarly focused closed-end funds (each, a "***Fund***") that are secured by the uncalled capital commitments (the "***Uncalled Commitments***") of the Fund's limited partner investors ("***Investors***"). Once a relatively obscure and niche component of the finance market, Facilities continued their rapid expansion in 2013 and had an excellent year as an asset class. Consistent with experience before, during and after the financial crisis, Investor funding performance on calls ("***Capital Calls***") on their Unfunded Commitments was near perfect in 2013. Correspondingly, Facility credit performance was excellent, and we are not aware of any Facility payment events of default last year. In addition to the very positive credit performance, the volume of consummated Facilities has continued to expand year-over-year as well, despite significant and increasing challenges and uncertainties for lenders ("***Lenders***") in the market. This chapter explores the state of the Facility market and the key trends and emerging developments likely to be relevant in the immediate future.

Facility Growth and Prospects

The Facility market enjoyed substantial tailwinds in 2013 from both the material uptick in Fund formation and the increased penetration into Fund families that have historically not utilized Facilities. In 2013 worldwide, 873 private equity Funds of all asset classes reached a final close and raised an aggregate of $454 billion in Capital Commitments. This represents the most successful fundraising seen in the market since 2008 and is a 19% increase on 2012.[1] But while this clear increase certainly provided additional collateral enabling more and larger Facilities, it was only part of the growth story. Facilities continue to gain traction beyond their real estate Fund roots and into buyout and infrastructure and other Fund asset classes that are relatively new to Facilities, as these Funds become increasingly familiar with the benefits and utility of having a Facility. Further, as a result of the excellent credit performance of Facilities over time (especially during the financial crisis), Lenders have become increasingly comfortable with certain Facility structures and Investors that historically would not have met credit underwriting standards. This expansion of underwriting has also enabled Facility growth.

While there is not presently an industry recognized data resource surveying and tracking Facilities, based on anecdotal data the market is covertly large. On the "*Subscription Credit Facilities and Fund Finance Strategies*" panel at the ABS Vegas conference sponsored by the Structured Finance Industry Group in January 2014, several panelists estimated that the current Facility market may well be $75-$100 billion in terms of global Lender commitments to Funds. Looking forward for 2014, we forecast continued incremental growth for the volume of Facilities consummated and the size of the market. As of January 2014, there were 2,081 Funds on the road fundraising (up from 1,940 in 2013 and 1,814 in 2012), and the vast majority of market sentiment predicts an increase in aggregate Capital Commitments to be raised in 2014.[2] This forecasted increase will certainly continue to seed Facility growth. There is also still a large universe of Funds and entire Fund families not utilizing Facilities, at least in the buyout and venture capital asset classes, which presents additional opportunity. Finally, Funds are now using Facilities much more frequently during their entire tenor (i.e., from their initial Investor closing through their liquidation of final assets), and this continuity of use of Facilities throughout a Fund's life cycle is keeping Facilities on the books for many years beyond their original tenor.

De-Commoditizing and the Increase in Bespoke Structures

Facilities are sometimes seen as a commodity product in the real estate Fund space, as some real estate Funds have been using the product for years in a largely consistent structure. However, a confluence of factors is driving significant change in Fund and Facility structures, and the product is in many respects de-commoditizing.

Fund Structural Evolution and a Changing Investor Universe

While Investor fundraising did show significant overall improvement in 2013, securing Capital Commitments from Investors is requiring more time and more structural accommodations than in the past. Funds continue to form more separate accounts (often called 'managed accounts'), parallel funds-of-one, blocker corporations to negate tax concerns and alternative investment vehicles, in each case to more precisely optimize the Fund for the specific preferences of particular Investors. These structural changes to Funds are increasing the complexity of Facilities, as additional Fund entities need to be incorporated into the Facility collateral package to ensure ultimate security in the Unfunded Commitments. Further, a number of Investor issues are challenging historical Lender underwriting guidelines. The single Investor exposure in separate accounts conflicts with the Lender

preference for a granular pool of Investors offering diversification and overcollateralization. Investor side letters from time-to-time include provisions that challenge or create ambiguity as to a Lender's unimpaired enforcement rights. Sovereign wealth funds and fund of fund Investors (which entities are typically unrated and without publically available financial statements) are increasingly significant and even flagship Investors in Funds. High net worth individual Investors, including those investing through a managed platform sponsored by an investment bank or advisor, are increasingly providing Funds material Capital Commitments. These trends can be challenging for those Lenders used to relying on credit ratings for Investor underwriting, but excluding them from Facility borrowing bases ("***Borrowing Bases***") may fatally impair the utility of a prospective Facility.

Overcall Limitations

Overcall limitations ("***Overcall Limitations***") are provisions in a Fund's partnership agreement that limit an Investor's obligation to fund a supplementary Capital Call made for the purpose of funding any shortfall created by another Investor's default or exercise of an excuse right. While a rarity prior to the financial crisis, Overcall Limitations seem to be permeating the market and increasing in both prevalence and grip, especially outside of real estate Funds. The initial 150% threshold is now sometimes as low as 120% and Overcall Limitations linked to a Fund's investment concentration limits sometimes provide no overcollateralization buffer at all for maximum size investments. This trend is of course problematic for Lenders and threatens the traditional underwriting criteria for Facilities. Overcall Limitations both undermine the general premise that one Investor's Uncalled Commitment over-collateralizes that of a defaulting Investor and broadens the Lender's credit exposure to Investors that were excluded from the Borrowing Base in the first instance. For a Fund with Overcall Limitations, the Fund's particular Investor constituency needs to be carefully analyzed as a whole and applied to the particular form of Overcall Limitation, and there are certain Facilities that are simply not viable because the particular Overcall Limitation does not afford sufficient overcollateralization for the Lender.

Facility Analysis

As each of these variables can combine in an infinite number of forms in any particular Facility, each Facility must be evaluated in the context of its whole and gone are the days of simply checking for a few sizeable rated Investors. In many cases, Lenders are now actively considering and implementing asset-level mitigants to attempt to offset any perceived shortcomings in the Fund structure, the Investor pool or the Fund's partnership agreement, including in certain circumstances minimum net asset value covenants and requirements to make periodic Capital Calls. The Facility market is simply not a commodity market at present.

Lender Border Crossings and Regional Lender Expansions

Facility structures are also evolving as new Lenders enter new sub-markets. While new entrants have for years endeavored to enter the Facility market, certain movements accelerated in 2013 that have the potential for better traction. Multiple European Lenders are making real investments to build their capabilities in the United States. Unlike some of their new entrant predecessors, these Lenders have real, demonstrable execution capabilities, if primarily in a different sub-market. Similarly and in reverse, many of the dominant US Lenders are increasingly attentive to Europe and Asia. Several US-based Lenders had real successes in 2013 and early 2014, at least in Europe. As Lenders emigrate, they bring their historical Facility structures and underwriting guidelines to the new sub-market. As a result, Funds are increasingly finding themselves with Facility proposals with significant structural variation (a traditional Borrowing Base versus a coverage ratio, as a simple example). Along a parallel path, multiple regional Lenders are expanding beyond their historical footprints, often in efforts to keep up with the growth of their Fund clients. Many regional Lenders have increased their Facility maximum hold positions significantly and several regional Lenders made impressive progress increasing their brand awareness and relevance in the market last year. As their Facility structures and underwriting parameters often differ from a traditional Facility, they are also altering the competitive landscape.

There are several areas where these developments are likely to have a meaningful impact in the near term. First, structural variations in Facilities have an immediate impact on syndication strategy, as certain Lenders have structural guidelines that may or may not permit deviation as wide as what is now being seen in the market. Thus, Funds need to determine Facility structures in hand with syndication preferences and needs. Additionally, the growing competitive challenges are stressing those Lenders that have historically only participated in, and not led, Facilities. Because Funds in the new environment are more likely to have multiple suitors, they are more frequently dictating their own syndicate members, making it far more challenging for Lenders that are used to seeing opportunities presented by a lead arranger. However, the Facility market has shown multiple times in recent years that if you add an experienced origination banker you can become relevant relatively quickly, it is likely that 2014 includes some lateral banker movement as Lenders seek to increase their direct visibility with Funds.

While these competitive changes are real and increasingly evident every day, we expect that the actual impact to the competitive landscape for incumbent Lenders to be largely contained to the margins. If 2014 Facility growth is just 5-10% of 2013 (which a number of reasonable factors seem to support), for a market as large as the Facility market, growth will simply consume a major portion of any new lending capacity entering each sub-market. But further, there are several factors that suggest changes will be incremental, not immediate. First, a number of the large incumbent Lenders in both the US and Europe have done an excellent job the last three years pivoting with the market and building out great portfolios. Because the switching costs in this product are real, not just when a Facility comes up for renewal (in which case they are very real) but also with successor Funds in the same Fund family, wholesale turnover in Lender groups across the market is highly unlikely. Further, if you look behind the aggregate fundraising numbers into which Funds are actually raising the capital, concentration and the continuing 'flight to quality' is evident. Investors are making larger Capital Commitments to fewer Fund sponsors ("***Sponsors***") and this is resulting in larger Funds run primarily by top tier Sponsors. Preqin reports that only 7% of 2014 capital raised was by first-time Sponsors. These established Funds are often deeply aligned with incumbent Lenders, further making a significant shift in the market unlikely. When you couple virtually any growth in the overall size of the Facility market with the incumbent Lenders' large existing portfolios, expansive origination reach and typically greater entanglements with top tier Sponsors in terms of financing the assets, a material 2014 volume downturn for them seems unlikely, despite the increased competition.

Credit Continuum

Supported by the excellent credit performance of Facilities throughout the financial crisis (and probably in part due to the increasingly competitive landscape), Lenders are now more willing to underwrite Facilities further down the risk continuum than they have in the past. For example, we are increasingly seeing Facilities consummated for Funds with partnership agreements with more general and less precisely tailored Facility authorization language. Lenders' tolerance for certain levels of Overcall Limitations has increased, at least for certain experienced Sponsors and Funds with strong and diverse Investor pools. Additionally, in many contexts, Investors are being included in Borrowing Bases that were historically excluded, including unrated Investors, Investors with sovereign immunity or side letter issues and high net worth Investors in managed platforms.

Based on the vast majority of Facilities we have seen to date, we think this downward trending has been largely rational and supportable based on the greater availability of extremely positive Investor funding and Facility performance data. Facilities are an asset class where the historical funding delinquency percentages of the excluded Investors – those where the Lenders provide a zero advance rate – is significantly lower than the delinquency percentage of the included assets in virtually any other ABL or securitization asset class. When you combine (i) that level of favorable Investor funding performance, (ii) a robust secondary market in Investor partnership interests eager to take out any financially stressed Investors, and (iii) Facilities being structured as full recourse loans likely to have some asset value sufficient to contribute to repayment if ever needed, some structural evolution designed to accommodate Funds seems supportable.

Additional Market Trends and Developments

There are a host of secondary developments in the Facility market worthy of note, including the following:

- ***The Regulatory Environment***. Similar to virtually every lending market, Lenders are facing an uncertain and challenging regulatory environment. Many of the regulations emanating from the credit crisis are now moving to the finalization and implementation stages, and Lenders are having to adapt. Moreover, additional regulations continue to be proposed. Lenders may evolve Facility structures, including potentially greater emphasis on uncommitted tranches, to adapt.
- ***Municipal Pensions***. Municipal pension funds in the United States, often flagship Investors, are under ever-increasing pressures. Despite the relatively robust performance of the equity markets and the significant rebound in many real estate markets in 2013, the outlook for many of these Investors is declining. As a result, the credit profile of many municipal pensions will continue to trend negatively going forward, stressing the underwriting for including them in Borrowing Bases.
- ***Cayman Limited Partnership Act Updates***. As many offshore Funds are organized in the Cayman Islands to achieve tax efficiencies, market participants should be aware of pending legislation that would overhaul their existing partnership law. The proposed changes, announced in February 2014, aim to, among other things, (1) synchronize the drafting of Cayman Islands partnership agreements, (2) declare that default penalties will not be unenforceable solely because they are punitive in nature, (3) confirm that the right to clawback distributions will only be required if the Fund is insolvent at the time of the original distribution, and (4) streamline the procedure to admit new Investors and effectuate transfers of partnership interests. Additionally, the Contracts (Rights of Third Parties) Law, also pending, is designed to confer third party beneficiary rights via an opt-in requirement. Any changes in the partnership law of this key jurisdiction need to be monitored closely.

Conclusion

Facilities enjoyed a very positive 2013 from both a credit and growth perspective, but not without real and increasing challenges. With double digit performance returns for Funds in the majority of asset classes last year, Investors now have extensive 'skin in the game' and funding incentives across a wide swath of Funds supporting Facilities. Such increases in Fund net asset value certainly project well for 2014 Facility performance. But while the data suggests the positive trends for Facilities will continue, competitive, underwriting and regulatory developments are all likely to increasingly challenge Lenders, at least at the fringes, throughout the upcoming year.

Endnotes

1 See, Presentation Materials of Ignatius Fogarty, Head of Private Equity Products, Preqin, from the 4th Annual Subscription Credit Facility and Fund Finance Symposium, held January 16, 2014 in New York, NY.

2 See, *2014 Preqin Global Private Equity Report*; and *Global Private Equity Report 2014*, by Bain & Company.

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Majority Rules: Credit Bidding Under a Syndicated Facility

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A. Introduction

Credit bidding for a debtor's assets in a bankruptcy case is a valuable technique that enables secured creditors to preserve their rights and recover the value of their collateral. For secured lenders in a syndicated credit facility, however, credit bidding can also be a powerful tool by which majority lenders – with the ability to exercise control over the agent – may credit bid the entire syndicate's claim for their benefit. This can have devastating effects on minority lenders, who may be forced to watch helplessly as their collateral is liquidated – over their objection – for the benefit of the majority. This article discusses recent holdings in bankruptcy cases that have interpreted standard language contained in most credit agreements that allows an agent, often at the direction of the majority lenders, to credit bid for assets over the objection of the minority, and, in at least one case, limit the minority lenders' ability to benefit from certain collateral as a result of a hybrid bid proposal that combines a cash bid with a credit bid.

By way of background, section 363(k) of the Bankruptcy Code authorises a holder of an allowed secured claim to use up to the face amount of its claim as currency in connection with any sale of its collateral.[1] This entitlement applies "unless the court for cause orders otherwise".[2] The term "cause" is not defined in the Bankruptcy Code, and courts have taken a case-by-case approach to determining whether it exists. "Cause" has been found, for example, where a secured creditor's liens are subject to dispute.[3] In addition, certain courts, including the Third Circuit Court of Appeals in *Philadelphia Newspapers*, seem to be expanding the scope of what is generally viewed to be "cause" under section 363(k) to include the impact of the credit bid on the bidding and auction process.[4] Generally, however, where a secured lender has a valid secured claim, a bankruptcy court will allow the secured lender to credit bid the face amount of its debt, regardless of the asserted value of the collateral.[5]

B. Risks to Minority Lenders

(i) Minority Lenders in a Syndicated Facility: *Chrysler*, *GWLS* and Progeny

Although the right to credit bid is commonly viewed as an advantage to the secured creditor, it may be largely illusory and carries significant risks for minority lenders in a syndicated facility. While almost every credit agreement contains a list of certain key provisions that may not be amended absent the consent of each lender – a structure intended to protect minority lenders – courts have found these amendment provisions are not implicated in the credit bidding context.[6]

This is due to the language in a credit agreement that provides for the appointment of an administrative agent and collateral agent, and authorises the agents to take certain actions on behalf of the lenders.[7] Although not a credit bidding situation, in *Chrysler*, the Second Circuit clarified that a debtor's assets that are encumbered by a lien of a secured credit facility may be sold free and clear under section 363(b) of the Bankruptcy Code over the objection of a minority lender where the agent has consented to the sale, as such a sale is not an amendment to the credit agreement.[8]

While credit agreements generally do not refer specifically to the right to credit bid under section 363(k), courts have interpreted standard language in a credit agreement that authorizes an agent to "exercise . . . all rights and remedies of a secured party under the UCC or any other applicable law" to permit an agent to credit bid.[9] Like the Second Circuit in *Chrysler*, these courts have found the right to credit bid is not an amendment to the credit agreement, and thus does not require the consent of each lender.[10]

In *GWLS*, for example, the Delaware Bankruptcy Court approved a credit bid sale over the objection of a minority lender in a credit facility. The minority lender had argued that the agent could not credit bid without unanimous lender approval because the bid constituted an amendment to the credit agreement that would release the lenders' collateral, and any such amendment required unanimous consent.[11] The Court rejected this argument, noting that (i) the credit agreement empowered the agent with "all rights and remedies of a secured creditor" under applicable law, and (ii) the collateral agreement, executed contemporaneously with the credit agreement, permitted the agent to "dispose of or deliver the Collateral or any part thereof". It was therefore "abundantly clear" that the operative documents permitted the agent to credit bid on the lenders' collective behalf, and such an action did not amount to an amendment releasing collateral.[12]

In *Metaldyne*, the S.D.N.Y. Bankruptcy Court made a similar ruling when presented with a minority lender's argument that the governing security agreement gave each lender exclusive authority to direct the disposition of its claim.[13] The minority lender also argued that a credit bid would amount to an unauthorised amendment to the credit agreement releasing that lender's liens.[14] The Court rejected these arguments, noting that the Second Circuit in *Chrysler* had analysed similar language prohibiting amendments that would release collateral and found that it "did not give a dissenting lender rights to prohibit the collateral agent from acting on its behalf" in submitting a credit bid.[15] The fact that the agent enjoyed "all rights and remedies of a secured party under New York UCC or any applicable law" made clear that lenders did not control their individual claims.[16]

As a result of this widely accepted interpretation of what is standard language in most credit agreements, minority lenders should be aware that they can be dragged along in a credit bid; transforming them from minority secured *lenders*, with at least the partial protections provided under the credit and security agreements, to minority *equity holders*, with almost no protection.

(ii) Minority Lenders vs. Equity Sponsor, As Lender: *PTC Alliance*

Minority lenders in a credit facility should also be wary of rights exercisable by an equity sponsor, who, in addition to its equity interests, is a lender and may control the agent to the same effect as in the cases discussed above. In *PTC Alliance*, for example, entities affiliated with the equity sponsor owned a majority of the secured debt (though, notably, not a *requisite* majority required to direct the agent) and served as the agent of the debtors' ABL credit facility.[17] Under the relevant credit documents, the agent was empowered to take remedial action at its own discretion upon default – without the direction of a requisite majority and not subject to lenders' veto power. The Bankruptcy Court found that the credit documents clearly authorised the agent to credit bid the entire facility over the objections of individual minority lenders, and noted that any claims relating to the propriety of the agent's actions *vis-à-vis* the other lenders was "not my problem . . . not the debtor's problem", but rather an intercreditor issue to be adjudicated in another forum.[18] Thus, the equity sponsor was authorised to use the credit bid to maintain majority control of the insolvent debtor over the minority lenders' objection.

C. Hybrid Cash and Credit Bids: The Lesson of *GSC*

When combined with a cash bid, a credit bid can be even more hazardous to minority lenders, as majority lenders may cause the agent to limit the credit bid to certain portions of the collateral, thereby causing the minority lenders' recovery to be limited to their *pro rata* share of assets allocated to the credit bid. The *GSC* cases provide a sobering example of what can happen to minority lenders when the agent combines a cash and credit bid.[19]

In *GSC*, the debtors had entered into a prepetition credit facility with approximately $200 million in term loans and $40 million of revolver access secured by substantially all the debtors' assets (the "GSC Facility").[20] A single investor (the "Majority GSC Lender") had acquired a 51.1% stake in the GSC Facility, entitling it to appoint the collateral agent and direct the agent in the exercise of remedies under the security agreement governing the GSC Facility.[21] The GSC debtors (and, ultimately, a chapter 11 trustee appointed at the minority lenders' request) had two principal types of assets that they sought to sell in bankruptcy, referred to as the "Management Contract Assets" and the "Credit Bid Assets" – both of which were subject to the GSC Facility's liens.

In seeking to purchase the assets, the Majority GSC Lender structured a hybrid cash and credit bid whereby it would: (i) credit bid $224 million for the Credit Bid Assets in its capacity as agent (such assets were valued by the debtors' financial advisor as being worth approximately $5.1 million); and (ii) pay $11 million in cash on its own account for the Management Contract Assets (valued by the debtors' financial advisor to be worth in excess of $126 million).[22] The Credit Bid Assets would then be shared, *pro rata*, among the syndicated lenders, including the minority lenders, while the more valuable Management Contract Assets, purchased with the Majority GSC Lender's cash bid, would be distributed solely to the Majority GSC Lender. Because the Majority GSC Lender had the exclusive right to pair its cash bid with the credit bid as a result of its majority holdings, it was determined to have submitted the highest and best bid for the debtors' assets.[23]

At a hearing at which the minority lenders sought to reopen the auction of the debtors' assets, their counsel highlighted what appeared to be transparent self-dealing by the Majority GSC Lender:

> It's as if, Your Honor, it would be appropriate for this court to sanction a bid where [the Majority GSC Lender] bid 220 million dollars for a paperclip pursuant to a credit bid, and then tried to take the remainder of the assets for one dollar.[24]

Ultimately, the Court was unmoved by the minority's protestations, ruling in its sale opinion that:

> When the Non–Controlling Lenders entered into the Prepetition Credit Agreement and Security Agreement, they agreed that the Agent had the sole ability to take action on the Collateral and realize upon the security. . . . The Sale does not dictate how proceeds from or equity in the purchased assets will be shared between bidders; issues concerning the distribution of the assets or value between the bidders was not properly before the Court.[25]

The Bankruptcy Court preserved the minority's rights to seek remedies against the Majority GSC Lender on account of the allegedly improper allocation, but determined that the enforcement of any such remedies was not within its purview and should proceed in another forum.[26] Even as it did this, however, the Court found the Majority GSC Lender to be a "good faith purchaser" for purposes of section 363(m) of the Bankruptcy Code; and, contrary to the minority lenders' assertions, the Majority GSC Lender had not engaged in improper conduct in connection with the purchase of the debtors' assets, because the "relevant inquiry [is] whether that conduct was intended to control the sale price or take unfair advantage of prospective bidders".[27]

D. Conclusion: Protecting the Minority in a Syndicated Facility

Minority lenders should be aware that they can quickly find themselves holding minority equity interests where they once had the benefit of security interests – and these equity interests may attach to much less valuable assets than originally contemplated. To members of a syndicated credit facility seeking to protect themselves from this outcome, an understanding of the operative credit documents is crucial. Lenders should consider both the requisite majority's ability to appoint an agent and the powers that such an agent may hold, including the right to credit bid. Even where a credit document does not provide expressly that an agent has the right to credit bid the syndicate's claim, such authority may be found in more general provisions authorising actions available "under applicable law". Therefore, lenders seeking to prevent credit bidding by an agent over a minority's objection may be well served by a provision in the credit agreement specifying in detail that such a bid is prohibited or conditioned on minority lender consent.

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Endnotes

1 11 U.S.C. § 363(k). The general requirement that a secured lender be permitted to credit bid also applies by incorporation into 11 U.S.C. § 1129(b)(2)(A)(ii) in the context of a chapter 11 plan sale. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012).

2 *Id*.

3 *See, e.g., Morgan Stanley Dean Witter Mortg. Capital, Inc. v. Alon USA LP* (In re Akard St. Fuels, L.P.), No. 01-1927, 2001 U.S. Dist. LEXIS 21644 (N.D. Tex. Dec. 4, 2001) (affirming bankruptcy court's denial of right to credit bid where a *bona fide* dispute existed as to lender's liens).

4 *See In re Phila. Newspapers*, LLC, 599 F.3d 298, 316 n.14 (3d Cir. 2010) ("A court may deny a lender the right to credit bid in the interest of any policy advanced by the Code", including the policy favouring a robust bidding process.); *see also In re Fisker Auto. Holdings, Inc*., No. 13-13087, 2014 Bankr. LEXIS 230 at *13 (Bankr. D. Del. Jan. 17, 2014) (Gross, J.) (limiting right to credit bid to amount creditor paid for secured debt where the evidence was "express and unrebutted that there will be no bidding – not just the chilling of bidding – if the Court does not limit the credit bid"). The question of what constitutes cause, and the unique facts and circumstances that led to the decisions in both *Philadelphia Newspapers and Fisker*, are beyond the scope of this article.

5 *In re Submicron Sys. Corp*., 432 F.3d 448, 459-60 (3d Cir. 2006).

6 A typical credit agreement may prohibit amendments to, among other things, maturity date, interest rate, the waiver of any payment defaults and, most relevant for present purposes, the release of collateral. For example, the credit agreement at issue in GWLS, discussed *infra*, provided that absent the consent of each lender, "no . . . amendment, supplement or modification shall (i) release all or substantially all of the Collateral or alter the relative priorities of the secured obligations entitled to the Liens of the Security Documents, in each case without the written consent of all Lenders . . . ." *In re GWLS Holdings, Inc*., 2009 Bankr. LEXIS 378 at *4-6 (Bankr. D. Del. Feb. 23, 2009); *see also In re Metaldyne Corp*., 409 B.R. 671, 675 (Bankr. S.D.N.Y. 2009) (credit agreement may not be "waived, amended or modified" absent consent of certain specified parties, and any such amendment shall not "release all or substantially all of the Collateral from the Liens of the Security Documents, without the written consent of each Lender").

7 For example, the credit agreement in *GWLS* provided:

> Each of the Lenders and the Issuing Lenders hereby irrevocably appoints USB [sic] AG, Stamford Branch, to act on its behalf as . . . the Collateral Agent hereunder and under the other Credit Documents and authorizes such Agents to take such actions on its behalf and to exercise such powers as are delegated to such Agents by the terms hereof or thereof, together with such actions and powers as are reasonably incidental thereto.
>
> The collateral agreement, executed contemporaneously with the credit agreement, further provided:
>
> If an Event of Default shall occur and be continuing, the Collateral Agent, on behalf of the other Secured Parties, may exercise . . . all rights and remedies of a secured party under the New York UCC or any other applicable law. Without limiting the generality of the foregoing, the Collateral Agent . . . may sell, lease, license, sublicense, assign, give option or options to purchase, or otherwise dispose of and deliver the Collateral or any part thereof . . . .
>
> *GWLS*, 2009 Bankr. LEXIS 378 at *6-7; *see also Metaldyne*, 409 B.R. at 678 (reciting substantially identical provisions).

8 The Second Circuit held:

> [T]he § 363(b) Sale did not entail amendment of any loan document. To the contrary, the § 363(b) sale was effected by implementing the clear terms of the loan agreements – specifically, the terms by which (1) the lenders assigned an agent to act on their behalf, (2) the agent was empowered, upon request from the majority lenders, to direct the trustee to act, and (3) the trustee was empowered, at the direction of the agent, to sell the collateral in the event of a bankruptcy. Because the Sale required no amendment to the loan documents, *Chrysler* was not required to seek, let alone receive, the [objectors'] written consent.
>
> *Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108, 120 (2d Cir. 2009).

9 *GWLS*, 2009 Bankr. LEXIS 378 at *7. *See also GSC*, 453 B.R. at 141 n.8; *Metaldyne*, 409 B.R. at 678-79.

10 *See, e.g., In re GSC Group, Inc*., 453 B.R. 132, 172 n.59 (Bankr. S.D.N.Y. 2011); Metaldyne, 409 B.R. at 673.

11 *GWLS*, 2009 Bankr. LEXIS 378 at *4-6.

12 *Id.* at *11-15.

13 *See Metaldyne*, 409 B.R. at 675. The minority lender pointed to a provision of the security agreement providing that:

> At any public . . . sale made pursuant to this Section, any Secured Party may bid for . . . the Collateral or any part thereof offered for sale and may make payment on account thereof by using *any claim then due and payable to such Secured Party* . . . .
>
> *Id.* (emphasis added).

14 *Id.*

15 *Id.* at 677.

16 *Id.* at 678-79.

17 *In re PTC Alliance Corp.,* No. 09-13395 (Bankr. D. Del.) (Sontchi, J.).

18 *See* Transcript of Hearing dated April 14, 2010, at 49 [Dkt. No. 613].

19 *In re GSC Group, Inc.*, No. 10-14653 (Bankr. S.D.N.Y.) (Gonzalez, J.). These cases are commonly referred to as the "*Greenwich Street Capital*" cases.

20 *GSC,* 453 B.R. at 140-42.

21 The Majority GSC Lender used these powers, first, to appoint one of its affiliates as collateral agent. *Id.* at 142.

22 *Id.* at 144 n.11 ("After the Auction, [the financial advisor] acknowledged that, in his view, the assets of the Debtors to be acquired by [the Majority GSC Lender] on account of its $11 million bid were worth in excess of $126 million and that the assets of the Debtors to be acquired by [the Majority GSC Lender agent] on behalf of the Prepetition Lenders with the $224 million credit bid were only worth $5.1 million.").

23 While there were other cash bids for the Management Contract Assets that exceeded the Majority GSC Lender's cash bid of $11 million, because these other cash bids were not paired with the $224 million credit bid, they were determined to be less than the Majority GSC Lender's hybrid bid.

24 See Transcript of Hearing dated November 1, 2010, at 26 [Dkt. No. 186]. The Court responded at the time:

> Well, it depends. If it was a collective bid, and any other collective bid didn't amount to that much, I'm not so sure why it would be so offensive. I mean, at the end of the day the estate is interested in the highest bid . . . . If, ultimately, that was produced regardless of the allocation, what difference does it make?
>
> *See id. at* 26-27.

25 *Id.* at 163-64.

26 *Id.* at 172-73. See also Amended Complaint dated September 28, 2011, *Credit Agricole Corp. and Inv. Bank N.Y. Branch v. BDC Fin., L.L.C.*, No. 651989/2010 (N.Y. Sup. Ct. N.Y. C'ty) [Dkt. No. 83].

27 *Id.* at 181; *see also id.* at 154 ("An agreement between two bidders resulting in a single bid in exchange for consideration does not, without more, constitute collusion.") (citation omitted).

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KRAMER LEVIN

Kramer Levin Naftalis & Frankel LLP is a premier, full-service law firm with offices in New York, Silicon Valley and Paris. The firm's 45-attorney Corporate Restructuring and Bankruptcy Department has been actively involved in most of the nation's major bankruptcy cases over the last 30 years and the group's successes for clients continue to set precedents that define new areas of bankruptcy law. The group is well-known for its analytical and creative approach in complex bankruptcy cases, the ability to structure and negotiate transactions as well as the litigation expertise necessary to protect clients' rights. The firm has recently received the Bankruptcy Litigation Law Firm of the Year award from *Best Lawyers/US News & World Report*, the Bankruptcy Law Firm of the Year award from *M&A Advisor*, the Top Practice Group of the Year from *Law360*, and the highest rankings and honours from *Chambers USA/Global* and *Legal 500*, among many others.

Albania

KALO & ASSOCIATES

Nives Shtylla

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Albania?

The lending market in Albania is one of the most important additional means of supporting and developing private sector entrepreneurship. Besides the demand and supply interplay, the performance of lending was heavily affected by cleansing of banks' balance sheets. There have been positive developments in lending to households in recent years, especially for short-term loans on households (consumer credit based on income), which are in line with banks' positive reports on the performance of household credit supply and demand.

However, banks report a tightening of credit standards applied to loans granted for working capital and investments financing. Developments in lending reflected mainly the poor performance of lending to the private sector of the economy, particularly to private businesses. Credit standards have been tightened especially on loans to small, medium-sized and even large enterprises. This restricted lending to the economy has been reflected in a lower level of economic growth.

The performance of lending to businesses has deteriorated in recent years, especially in 2013. Even though banks insist that there is a low credit demand by businesses, particularly for investment loans, tight credit supply and lending standards on investment loans by banks to businesses has been emphasised by several business associations in the country and also noted/admitted by the Bank of Albania throughout last year. Statistics on lending to businesses by sector of the economy indicate a poor performance in almost all areas. The continued decrease in lending can be also attributed to a deterioration of asset quality. NPL percentage over the total number of loans has risen sharply over the last three years and is currently in the mid-20s. The main reasons behind that increase have been: the economic slowdown/cycle; the unpaid dues by the government on bills and VAT refunds to companies that make up for large part of the NPLs of banks; and the inefficient procedures for the execution of collateral, through lengthy legal and judicial procedures, which hinders recovery of collateral properties. Nevertheless, banks have created sound provisions to cover for loans losses.

1.2 What are some significant lending transactions that have taken place in Albania in recent years?

In Albania, lending activity (especially foreign crediting) has seen continuous developments in terms of the amount invested and the variety of sectors covered in the financing process. Key sectors with significant lending transactions are:

- financial institutions;
- transport;
- natural resources;
- power and energy;
- commercial construction;
- government institution projects; and
- infrastructure.

Some of the significant lending transactions in recent years by the ERBD (European Bank for Reconstruction and Development) to the public and private sector are:

Financial institutions and leasing finance:

- a €10 million loan to Credins Bank;
- €1 million to Landeslease in support of leasing in Albania;
- a €5.0 million small and medium-sized enterprises credit line to Veneto Banca;
- a €1.3 million credit line to NOA;
- a €1.1 million credit line to Fondi Besa; and
- €1.5 million to Albania's Credins Leasing s.a for small businesses to boost leasing finance to SMEs for vehicles and equipment.

Power and energy:

- a €12.7 million investment for the safety upgrade of the Komani hydropower plant dam;
- a €5.2 million loan to Hydro Power Plant of Korca for two units generating 23 GWh per year;
- €6 million to finance the construction of the Ternove hydropower plant in north-east Albania;
- a €3 million loan to Energy Partners (local privately owned developer) to finance construction of two small hydropower utilities; and
- a €50 million loan to CEZ Distribution to improve energy efficiency.

Transport:

- €7.5 million for the completion of the new road between the cities of Levan and Vlore in south-western Albania; and
- a €53 million loan for the construction of the Fier and Vlore bypasses.

Natural resources:

- €19.2 million to Bankers Petroleum to support the remediation and redevelopment of the Patos-Marina oilfield.

Construction:

- €4.4 million additional equity support for the Antea Cement Factory.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

The Albanian legal provisions do not contain any specific limitation applicable to the granting of intra-group guarantees, provided that such creation of guarantees receives adequate corporate approval based on the corporate acts of the company, and no court practice has developed in this respect. To mitigate risk of transactions becoming void, however, it is recommended that intra-group guarantees are created to the benefit of the guaranteeing company.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

It is arguable whether there may be enforceability concerns in this case as the company law does not strictly prohibit the extension of intra-group guarantees or provide any clear guidance in this respect. Third parties are therefore advised to request and review adequate corporate approvals (e.g. from the shareholders' meeting) in respect of the guarantee, such approval to recognise direct or indirect benefits to the company for the granting of a guarantee and also compliance with the company's corporate purpose. Directors on the other hand face personal liability for acting in breach of their fiduciary duties and duties of care and skill, therefore any assessment of directors' liability should be made by paying specific consideration to these duties and in general whether directors were acting in excess of their powers granted by the company's constitutional documents when granting the guarantee. The most likely legal consequence of a guarantee granted with no benefit to the company is personal liability of shareholders and also directors on the grounds of abuse of the company's assets; this in turn requires some element of fraud at the expense of creditors.

2.3 Is lack of corporate power an issue?

This is not expressly regulated in the company law therefore it is recommended that if the granting of a guarantee is not expressly or otherwise permitted by the corporate power (i.e. scope of activity of the company), it is at least approved by the highest company's decision making organ i.e. the shareholders' meeting.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Shareholder approval is normally needed, unless directors or boards of directors are expressly authorised to issue intra-group guarantees pursuant to the company's bylaws and statute. Government consents may be required for specific sectors (such as energy regulatory authority for securities with assets of a company) or for companies enjoying rights over assets based on a concession agreement with the Albanian state.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

The guarantor is responsible only up to the amount of the principal debt, including the payment of interest, compensation for damage caused by delay in execution and other expenses incurred by the contractor in obtaining his loan, unless upon agreement it is accepted that the guarantee shall be granted also for a part of the obligation, or under easier conditions or for an amount lower than the principal debt.

The guarantee which transfers the obligation or is given subject to more severe conditions than the principal debt is valid only up to the limits of the latter.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Please be advised that according to the Regulation of the Bank of Albania "On Foreign Exchange Activities" the incoming capital transfers to the territory of the Republic of Albania may be carried out without any restrictions by residents or non-residents.

The capital transfer from the territory of the Republic of Albania abroad for the account of the entities themselves licensed by the Bank of Albania can be made with the decision taken by their respective bodies. The licensed entities can carry out the capital transfer from the territory of the Republic of Albania to the account of their customers after the completion of the documentation defined in the Regulation, as well as additional documentation that is deemed reasonable by such entities.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Collateral in Albana is regulated by several laws: the Law On Securing Charge; the Albanian Civil Code; and the Law On Payment System. The range of collaterals provided by the abovementioned laws includes pledges, mortgages, securing charges and financial collateral.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

In Albania, securing charges over movable property is regulated by the Law On Securing Charges. An itemised description of the asset in the respective security agreement is not necessary. However, in order to avoid disputes in case of enforcement, it should contain an adequate description of it.

According to the Civil Code provisions the securities granted over immovable property, which are subject to a mortgage agreement, must be described, even in case of taking/granting mortgages over future assets.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

According to Albanian legislation, security can be taken either over real (immovable) property (land) or over movable property (i.e. machinery and equipment).

The mortgage (security taken over immovable assets, usufruct or emphyteusis rights) can be taken/given not only over present or future immovable assets, as well as present and/or future fixtures

related thereto, but also easement rights over immovable property. It is created upon an agreement made in writing before the Notary Public, which in turn is perfected by registering it with the immovable properties registry kept by the local Real Estate Registration Office.

The Law on Securing Charges provides as an instrument of security a non-possessory pledge which is an alternative to the possessory pledge provided by the Albanian Civil Code. Therefore, a non-possessory security securing charge is given/taken only over present or future movable, tangible assets (i.e. machineries and equipment), for securing either a present or a future debt. In order to create a securing charge, a written agreement is needed. The securing charge is then perfected through registration with the securing charges registry.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Albanian legislation allows security over receivables, whereas the chargor can hold the security and make use of it in order to exercise its activity by continuing to collect the receivables, until the chargor is in default. The chargee notifies the debtor in relation thereto.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Bank accounts can be taken as security and will be subject to a securing charge agreement and perfected upon registration with the securing charges registry.

3.6 Can collateral security be taken over shares in companies incorporated in Albania? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

According to recent changes in the relevant Albanian legislation shares may no longer be subject to securing charges. Regarding shares of an LLC (in Alb. "*kuota*") the relevant Albanian legislation provides for an instrument of security through a pledge, subject to an agreement and to registration in the share ledger and with the National Registration Centre.

Regarding shares of a JSC (in Alb. "*aksione*") the relevant Albanian legislation provides for an instrument of security through financial collateral, subject to an agreement and to registration in the share ledger and with the National Registration Centre.

The company can issue a certificate where it has confirmed the shareholding, as long as it is not a saleable instrument.

It is the prudent view to use an Albanian law governed document and to comply in particular with Albanian formality requirements (e.g. notarisation).

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes. Inventory means goods which are held by a person to be sold or leased to, or which are leased by that person as a lessor. This definition includes supplied goods or goods to be supplied under different contracts for the rendering of services.

When a registration or a registration change is made to a collateral as a good that is not provided with a serial number, or to goods with a serial numbered as inventory, the collateral can be described, depending on the case, as "inventories", "account", "instruments", or "cash". In the case of other goods, there has to be a general or specific description.

The description of goods as "inventories" is not valid when the goods are not classed as inventory.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, a company can grant a security interest in such cases, subject to fulfilling the conditions as provided in the relevant corporate legislation.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

According to Albanian law, it is not mandatory that the securing charge agreement be made in writing in the form of a notary deed, however in practice the document is drawn up by the Notary Public and the notarisation fee for it may vary from ALL 1,500 (approx. EUR 11) to ALL 4,000 (approx. EUR 29), depending on the guaranteed amount to be repaid by means of the securing charge agreement. For mortgage agreement it may vary from ALL 2,000 (approx. EUR 14) to ALL 15,000 (approx. EUR 107).

The registration fee with the securing charges registry is ALL 1,400 (approx. EUR 10). Additional fees will be charged depending on the pages of the extract and how many additional collaterals, chargees/chargors, etc. shall be registered under the same registration number.

The fees applicable for registration with the Real Estate Registration Office of mortgage agreements depend on the amount of the loan.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The relevant Albanian legislation does not provide for any term for the completion of the registration by the securing charge registry.

The registration with the Real Estate Registration Office takes 30 (thirty) days (it may vary in practice).

3.11 Are any regulatory or similar consents required with respect to the creation of security?

There are no regulatory consents required for the creation of securities, except in cases of the implementation of concession agreements. In such cases, to create security over the assets of the project company, the approval of the Contracting Authority is necessary.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Please note that Albanian legislation does not provide for special

security and in this case the ranking priority as specified in the Albanian Civil Code will apply.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Most of the security agreements do not need to be signed before a Notary Public, except for the Mortgage Agreement. The pledge agreement shall be made in a written form or before a Notary Public.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Rules on financial assistance are absent in Albanian company law, therefore general principles noted above should apply. However, a joint stock company is prohibited from subscribing for its own shares, unless specifically provided under the law.

(b) Shares of any company which directly or indirectly owns shares in the company

It is prohibited for a joint stock company to purchase shares of its parent company.

(c) Shares in a sister subsidiary

There is no regulation of this scenario in company law.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Albania recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Under the Albanian legislation the bailiff's office performs the enforcement of security interests. If, by law, the security agreement constitutes an executive title, the enforcement procedure can be initiated by obtaining an enforcement order from the court. This can then be forwarded to the Bailiff's Office to make the execution and consign the collateral to the chargee or to the person who is authorised by the chargee.

5.2 If an agent or trustee is not recognised in Albania, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Please refer to the answer to question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of Albania and guaranteed by a guarantor organised under the laws of Albania. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

According to the Albanian Civil Code, the lender may transfer the loan to another lender even without the prior debtor's consent, except for the cases provided by the Albanian Civil Code.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Yes, according to the Albanian tax legislation the interest payable on loans is subject to withholding tax of 10%. However, in cases of a Double Taxation Treaty between the Republic of Albania and the foreign country, the provisions of the treaty are given priority.

Albanian tax legislation does not expressly provide for the withholding tax from the proceeds of a claim under a guarantee or the proceeds of enforcing security.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Albanian legislation does not provide for any tax or other incentives preferentially to foreign lenders.

6.3 Will any income of a foreign lender become taxable in Albania solely because of a loan to or guarantee and/or grant of security from a company in Albania?

According to Albanian tax legislation only incomes which have their source in Albania can be taxable in Albania.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Other costs such as notarial fees, legalisation/Apostil seal and translation costs, etc., may be incurred by foreign lenders and will be determined on a case-by-case basis.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Albanian legislation does not provide for different rules in cases where some or all of the lenders are organised under the laws of a jurisdiction other than the Albanian jurisdiction.

7 Judicial Enforcement

7.1 Will the courts in Albania recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Albania enforce a contract that has a foreign governing law?

Yes, the Law "On International Private Law" explicitly provides for cases when Albanian or foreign material law is applicable. However, the judgments of court cases with foreign elements before Albanian courts are carried out under Albanian procedural law. Therefore even contracts that have a foreign governing law can be enforced by the courts in Albania.

7.2 Will the courts in Albania recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Foreign court decisions can be recognised and enforced by the Albanian courts if they are final and binding. The decision of a court of a foreign state shall not be entered into force in Albania when:

a) under the provisions in force in the Republic of Albania, the dispute does not fall under the jurisdiction of the state court where the decision was made;

b) the claim and invitation to trial have not been announced to the absent defendant duly and in time in order to give him the opportunity to defend him/herself;

c) there has been another decision between the same parties for the same cause by a court outside of Albania;

d) a lawsuit which was filed before the decision of the foreign court became final and binding is being reviewed by an Albanian court;

e) a decision has become final and binding contrary to the applicable legislation; or

f) the decision goes against the basic principles of Albanian legislation.

In cases of recognition and enforcement of foreign courts the Court of Appeal does not judge on the merits of the case. It only examines whether or not the court decision contains provisions that are in contrary to the aforementioned.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Albania, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Albania against the assets of the company?

The duration depends on whether the lenders are licensed by the Bank of Albania or not. If so, according to the Albanian Civil Code these Banking Credit Contracts are defined as proven and enforceable titles. The enforcement procedure is very formal and it can be initiated by obtaining immediately an enforcement order by the court. This can then be forwarded to the Bailiff's Office to make the execution.

In cases of non-proven and enforceable titles the lender must file a suit against the company in a court in Albania, obtain a final and binding judgment, and enforce the judgment against the assets of the company. This procedure may last approximately 2 years.

Enforcing the foreign judgment in a court against the assets of the company may take approximately 2-3 months.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

The enforcement procedure is initiated by obtaining an enforcement order from the Court and forwarding it to the Bailiff's Office to make the execution.

The Bailiff's Office will appoint an accountant to calculate the monetary obligations at the date of execution – such fees shall also be paid by the creditor. However, any expenses accrued by the creditor will be added to the obligation being enforced so the creditor shall ultimately be able to recover them. Thereafter, the Bailiff's Office will proceed with the sale of collateral and give to the creditor the proceeds owed to him by the debtor along with any expenses referred to above. Before the enforcement is initiated, however, the Bailiff Officer shall invite the debtor to settle the obligations to the creditor within (10) ten days.

On expiry of the above-mentioned term the bailiff initiates the enforcement procedures by seizing the collateral, as the first step. The property is appraised by the bailiff according to that value specified in the Real Estate Registry, and if not registered, the property is then appraised by an appraiser.

During this process the collateral is generally kept in custody by the debtor, and if it is found that the debtor is not taking care of its condition (thus affecting its value) then the bailiff appoints a third party to keep it until the auction takes place.

Following the 10 (ten) day grace period which the debtor is given to repay any outstanding amount to the creditor, the property is put forward for sale by auction. The auction procedure is described below:

Finalisation of sale in the first auction:

The announcement for the sale of collateral by auction is posted at the Bailiff's Office and at the location of the collateral. The sale cannot be performed within 15 days of the date of the announcement of the auction. The auction is performed at the Bailiff's Office.

Sale by second auction, failing successful sale at first auction:

In the case that there are no bidders in the first auction or if the proposed prices have not exceeded the minimum price set out in the first auction, a second auction will be held in conformity with the rules of the first one. This second auction can only be held after 3 months of the termination of the first one.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Albania or (b) foreclosure on collateral security?

No, the relevant Albanian legislation does not provide for specific restrictions applicable to foreign investors.

7.6 Do the bankruptcy, reorganisation or similar laws in Albania provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Once the court insolvency proceedings have been opened, unsecured creditors cannot enforce their rights. All claims against the debtor are suspended and writs of execution cannot be enforced.

All pending and new claims should be submitted to the Bankruptcy Administrator.

According to the Bankruptcy Law, secured creditors are considered as insolvency creditors and are entitled to preferential satisfaction compared to unsecured ones. However, the secured creditors cannot enforce their security immediately.

Please note that the Bankruptcy Law does provide for the right of the creditors to enforce their claims in accordance with the applicable provisions outside the bankruptcy proceedings in the case that the value of the security is lower or equal to the sum of the value of the claimed credit and to the enforcement expenses. However, please note that the implementation of such provisions remains untested in the Albanian courts and there is no related doctrine.

7.7 Will the courts in Albania recognise and enforce an arbitral award given against the company without re-examination of the merits?

Albania is party to, and has ratified, the New York Convention on the Recognition and Enforcement of Arbitral Awards (by Law no. 8688, dated 9.11.2000). A final arbitral award against an Albanian commercial company (i.e. the borrower) rendered in any foreign tribunal arising out of any proceeding would be enforceable against the borrower or any of its properties located in the Republic of Albania. Albania is not party to any international convention that pertains to the procedure of recognition and enforcement of foreign court judgments. There are specific procedures to be followed under the Albanian Civil Procedural Code for the recognition (by the Court of Appeal), which does not enter into the merits of the claim, and procedures for subsequent enforcement.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In accordance with the relevant Albanian legislation, secured lenders are entitled to enforce their rights out of insolvency proceedings, even though chargees or lessors may not raise claims related to rent or financial lease payments to a period of 12 months prior to the opening of the bankruptcy proceedings, or any other claims on damages relief, as a consequence of the termination of the lease.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Pursuant to Article 100 of the Bankruptcy Law, the Bankruptcy Administrator may challenge all transactions which are carried out prior to the opening of the court bankruptcy proceedings and which damage the bankruptcy creditors. Such transactions may be challenged (i) if they are carried out 3 (three) months before the submission of the petition for the opening of the bankruptcy proceedings upon condition that the debtor was insolvent, and/or (ii) if the transactions are carried out after the date of submission of the petition for the opening of the bankruptcy court procedure upon condition that the other party was aware about the insolvency of the debtor or about the petition for the opening of the court bankruptcy proceedings.

In addition, note that pursuant to Article 104 of the Bankruptcy Law, any transaction of the debtor executed in the 10 (ten) years before the filing of the petition for the initiation of the bankruptcy proceedings or after such petition is filed, which had the intention of damaging the creditors, may be challenged if the other party was aware of the debtor's intention on the date of such transaction. Such awareness is presumed if the other party was aware of the debtor's imminent insolvency and that the transaction was to the disadvantage of the other creditors.

The Albanian Civil Code provides for the following preference order:

(a) credits which derive from secured financial transactions by securing charges for the purchase price of a particular asset;

(b) credits which derive from salaries related to labour or service relationships and nurture obligations, but not for more than 12 months;

(c) credits of social insurance which derive from the non-payment of contributions, together with penalties in case of delay, as well as credits of employees for damages caused as a result of non-payment by employers of the above contributions;

(d) credits deriving from funeral and medical expenses;

(e) credits of authors and their heirs for compensation which derive from the total or partial transfer of their rights in intellectual property, due for the past two years;

(f) credits of the State which derive from obligations toward the budget and credits of the Social Insurance Institute for compulsory insurance established by law;

(g) credits which from financial transactions, secured by a securing charge according to criteria provided by law;

(h) credits which derive from salaries related to labour or service relationships and nurture obligations, over the limit set out in (b) above;

(i) the intermediation's commission deriving from the contract of the agency, due in the last year of the service;

(j) credits which are secured with a pledge or mortgage that do not create securing charges, according to law, equal to the value of things given in the pledge or mortgage;

(k) claims for expenses which are related to judicial proceedings incurred to secure the property and expenses for executions, in the common interest of creditors, from the sale's value of the things;

(l) claims which derive from bank loans (which are not included in (g) above) and claims arising from voluntary insurance; and

(m) claims for supplies of seeds, fertilizers, pesticides, irrigation waters and waters for the operations of cultivation and of gathering of the agricultural products, over the agricultural production (fruits) harvest of the year, for which the claims are used.

However, there are some exemptions thereof, including cases otherwise provided for by the Albanian Civil Code and specific laws.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Yes, according to the Bankruptcy Law, the following entities are excluded from bankruptcy proceedings:

a) property of the State and its bodies;

b) the strategic sectors; and

c) local government and its bodies.

The bankruptcy proceedings applicable to banks and other financing institutions are not governed by the Bankruptcy Law but by specific laws.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

According to Albanian legislation, there are no processes other than out-of-court proceedings available for the creditor to seize the asset subject to enforcement.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Albania?

Yes, according to the Albanian legislation it is possible that the parties submit disputes for resolution before a court of foreign jurisdiction, provided that at least one of the parties is not Albanian.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Albania?

Waiver of immunity in this regard is not provided by Albanian legislation.

10 Other Matters

10.1 Are there any eligibility requirements in Albania for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Albania need to be licensed or authorised in Albania or in their jurisdiction of incorporation?

Please be advised that there is no restriction for a foreign bank to lend money to a person resident in the Republic of Albania. However, we assume that this is going to be a single transaction. If the Bank (and after a decision of the Supreme Court also other institutions which grant loans and are licensed by the Bank of Albania, such as non-bank financial institutions, etc.) is going to lend in Albania on regular basis (i.e. different times, in continuity, not only in cases of a single transaction), according to the banking law this will be qualified as a financial activity and will meet the requirements for being licensed by the Albanian banking authority.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Albania?

Even though Albanian legislation is still in the process of harmonising to the *acquis communautaire*, a great deal has been done so far. Please note that the major challenges faced presently are the changes in Albanian legislation on securities, which need further consolidating in practice.

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KALO & ASSOCIATES was the first law firm to set up a commercial practice in Albania in 1994, and has been operating from the jurisdiction of Kosovo since 2008. It provides a full range of legal services in all core aspects of commercial and corporate law for foreign, multinational and domestic companies and agencies across all sectors and industries. The firm acts as counsel for a number of Fortune 500 and Fortune 100 companies, as well as IFIs.

The firm's strongest practice areas are: Banking and Finance, Corporate and Competition, Entertainment Law, Infrastructure and Property, Intellectual Property, Litigation and Arbitration, Natural Resources, Tax and Customs, and Telecoms and Media.

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Angola

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Angola?

Angola's financial market is restricted to the banking system. In the last ten years, a huge development has taken place with more than fifteen new banks operating in Angola. The market is characterised by a very strong concentration of the banking system. The lion's share of lending volume has been taken by large corporates of Angola, mostly those operating in the oil and real estate sectors.

One of the main developments in the financial markets during the last year was the introduction of the new foreign exchange law for the oil sector. The existing dual (U.S. dollar/kwanza) monetary system is likely to last until the non-oil sector becomes significant. Currently, the majority of the revenue of the State budget is derived from oil and is U.S. dollar denominated, whereas expenditure is kwanza denominated.

The kwanza exchange rate has been largely stable but remains at the core of the macroeconomic policy concerns.

Given the swift expansion of the banking sector, the recent proliferation of financial companies and the increase in lending, the main goals of the Angolan authorities are the following: (i) to increase transparency and ensure accountability of bank management (by the end of 2014, banks operating in Angola must comply with strict rules in relation to financial reporting standards and disclosure of shareholder structure); and (ii) to regulate risk management through the adoption of certain measures in relation to auditing, compliance and stress tests.

These reforms are encouraging evidence of the strong commitment of the Government in the supervision of the financial system, which, until now has presented several weaknesses.

1.2 What are some significant lending transactions that have taken place in Angola in recent years?

The most significant financing transactions carried out in Angola involved the oil sector and were mainly made through bank syndicates. The construction sector has resorted to bank financing, which is syndicated in large transactions and those involving a higher level of risk. Financing to the private sector represents 95 per cent of total volume.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

As a general rule, the corporate powers of a company are restricted to those rights and obligations which are necessary or convenient for accomplishing the purpose of the company (which, generally, is to make a profit).

In accordance with Article 6(3) of the Angola Company Law (the "ACL"), there is a legal presumption that the granting of guarantees in respect of obligations of other entities is contrary to the purpose of companies, unless there is a justifiable own interest of the company in providing the guarantee or the company in question is in a group or has a dominion relationship with such entity.

According to the ACL, only the estate of the company (either a private limited liability company or a public limited liability company – the two types of companies under the ACL) is responsible for the debts of the company which have been validly constituted, as set out in Articles 217 and 301 of the ACL.

As an exception to such rule, Article 218 of the ACL provides that shareholders in a private limited liability company may stipulate in the articles of association that one or more shareholders, besides being liable towards the company for a maximum amount equal to the nominal amount of the shares held by such shareholder, may also be liable up to a certain amount, and such liability may be joint and several with the liability of the company or a subsidiary thereof and will become effective upon the winding up of the company.

In accordance with Article 425(2)(f) of the ACL, public limited liability companies may secure debts of subsidiaries.

In the case of companies in a dominion relationship (as defined under the ACL), the dominant company (being the company which holds the majority of share capital, the voting rights or the right to appoint the majority of the management and audit board members) is liable for the obligations of the dominated company which have arisen prior to or after the creation of the dominion relationship and for so long as such relationship exists.

In the case of companies in a subordination relationship (as defined under the ACL) the directing company assumes the liabilities of the subordinated which have arisen prior to or after the creation of the subordination relationship and for so long as such relationship exists.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

In such situations, it is likely that there is no justifiable own interest to the company in providing the guarantee and unless the company is in a group or dominion relationship with the entity whose obligations it guarantees, the provision of the guarantee may be considered to be null and void.

2.3 Is lack of corporate power an issue?

Yes. Please see question 2.1 above.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

In respect of private limited liability companies, and in the event that the articles of association of the company do not grant powers to the management to approve the execution of a loan with a credit institution (or the granting of a guarantee or security), the approval of the transaction pursuant to a shareholder resolution is required.

The powers of the management of a public limited liability company are, in general, broader than those of a private limited liability company. Article 272(2)(f) of the ACL allows the management to enter into any loans without a shareholders' resolution being required.

In addition, so far as state-owned companies and other public sector companies are concerned, unless there is a restriction contained in the articles of association of the company, in principle, no governmental approvals, consents, filings or other formalities are required by law, for a guarantee to be an Angolan company.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No such limitations are imposed, but a credit analysis is recommended.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, there are not.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

There are various types of collateral available to secure lending obligations, such as:

(i) mortgage over real estate property, aircrafts, vessels, cars and industrial units (e.g. factories);

(ii) pledge over movable assets not referred to in (i) above;

(iii) pledge over a business (including inventory) – only possible if the pledgee is a credit institution;

(iv) pledge of rights (only permitted when the rights relate to movable assets and are capable of being transferred, including credits and receivables);

(v) financial pledge – a pledge of cash or securities in favour of a credit institution; and

(vi) escrow of income deriving from real estate, aircrafts, vessels or cars.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

In accordance with Angolan law, the provision of generic security (i.e. over the assets of a given entity generically) is considered null and void because of a lack of determination of the specific assets that become subject to the security.

It is therefore necessary that a security agreement identifies, to the greatest extent possible, the assets which are subject to the security created by such agreement. At least, the security agreement must contain certain criteria which would allow the identification of the secured assets at a given time.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, collateral security may be taken over such assets by means of a deed of mortgage or by its inclusion in a financing agreement in the case that a lender is a credit institution (in this case notarial attestation is sufficient for registration of the mortgage).

A mortgage over a plant will include the real estate property and all the machinery and equipment thereof which is identified in a schedule to the deed.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, collateral security by means of a pledge over receivables may be taken. An agreement (with signatures certified by a notary) is required, as well as notification of the creation of the pledge to the debtors, so that the pledge may be enforced against such persons.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, a pledge over cash deposited in a bank account is possible. Formalities include the execution of an agreement and notice to the bank where the cash is deposited (of the custody bank is not the pledgee). The acknowledgment of the pledge by the bank is not required, but is useful so as to ensure swift enforcement.

3.6 Can collateral security be taken over shares in companies incorporated in Angola? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, collateral security may be taken over shares in companies incorporated in Angola as a pledge of shares.

Shares may be either in certificated form or in book-entry form.

Yes, provided that any formalities required under Angolan law for the validity and effectiveness of the pledge are complied with.

The procedure will depend on the type of company in question.

If the company is a private limited liability company (*sociedade por quotas*), registration of the pledge over the shares at the Commercial Registry is required.

If the company is a public limited liability company (*sociedade anónima*) the necessary formalities will depend on whether the shares are in certificated form of book-entry form. A pledge of shares in certificate form requires the delivery of the shares to the pledgee, in the case of bearer shares, or annotation of the creation of the pledge on the share certificate and registration of the pledge in the books of the issuer, in the case of registered shares.

The creation of the pledge over book-entry shares is made by annotation of the creation of the pledge in the securities account in which the shares are deposited.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over inventory is possible if such security is granted in favour of a credit institution. The procedure includes the execution of a written agreement (with signatures certified by a notary). Upon default or the occurrence of other circumstances as set out in the pledge agreement, it is customary for the pledgee or security agent to give an enforcement notice to the pledgor.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, but please see the restrictions on the provision of guarantees in question 2.1 above, which are also applicable in relation to the provision of security interest by companies.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The costs for the provision of personal guarantees and security are calculated in Fiscal Correction Units ("FCU" having a current value of 1 FCU = 88 Angola Kwanza ("AKZ") or 0.90 USD):

(i) notarial fees:

- the cost of notarial certification – 102 FCU (8,976 AKZ / 91.96 USD);
- for each deed comprising one transaction – 80 FCU (7,040 AKZ / 72.12 USD), accrued of 10 FCU (880 AKZ / 9.02 USD) per leaf of the deed;
- in the event that the deed relates to a transaction on an asset with a certain value, the following additional fees will apply (calculated by reference to the value of the asset):
  a) up to 60 FCU – 6 FCU (528 AKZ / 5.41 USD);
  b) more than 60 FCU and up to 400 FCU – 9 FCU (792 AKZ / 8.11 USD);
  c) more than 400 FCU and up to 4000 FCU – 10 FCU (880 AKZ / 9.02 USD); and
  d) more than 4000 FCU – 0.5 FCU (44 AKZ / 0.45 USD);

(ii) registration fees:

- per registration – 4 FCU (352 AKZ / 3.61 USD);
- in the event that the registration relates to an asset with a certain value:
  a) up to 60 FCU – 12 FCU (1,056 AKZ / 10.82 USD);
  b) more than 60 FCU and up to 400 FCU – 102 FCU (8,976 AKZ / 91.96 USD);
  c) more than 400 FCU and up to 4000 FCU – 1200 FCU (105,600 AKZ / 1,081.94 USD); and
  d) more than 4000 FCU – 1800 FCU (158,400 AKZ / 1,622.91 USD); and

(iii) stamp duty – please refer to the answer to question 6.1.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Assuming that the asset is duly legalised and documented, the deadline for registration is 20 days.

The expenses are those as set out in question 3.9 above.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No consents are required.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Yes, the creation of security over real estate requires the execution of a deed, usually made before a notary or if the lender is a credit institution and the transaction involves a secured loan agreement, then only notarial authentication of such loan is required.

In the event that a power of attorney is used, such power of attorney must be granted before a notary. If executed outside of Angola, the power of attorney must be translated into Portuguese and such translation must be certified and stamped at the Ministry of Foreign Affairs of the country of origin of the document and subsequently stamped at the respective Angolan Consulate.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Yes, this is expressly forbidden in accordance with Article 344 of the ACL. Few exceptions are available.

(b) Shares of any company which directly or indirectly owns shares in the company

No express prohibition exists, but please note that the corporate powers of the company may be restricted in respect of the granting of guarantees or security – please see question 2.1 above.

(c) Shares in a sister subsidiary

No express prohibition exists, but please note that the corporate powers of the company may be restricted in respect of the granting of guarantees or security – please see question 2.1 above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Angola recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes, it will.

5.2 If an agent or trustee is not recognised in Angola, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable. Please see the answer to question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of Angola and guaranteed by a guarantor organised under the laws of Angola. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Provided that the borrower has provided its consent to the assignment of the contractual position (which can be provided *ex ante* in the loan agreement), there is no restriction to such assignment.

However, please note that there might be situations in which the guarantee may not be assigned. For example, if the parties have restricted the ability of the guarantor to assign, or if the guarantee has been provided *intuitu personae* (i.e. the nature of the guarantee is not separable from the person of the borrower).

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Angola has not entered into any treaty for the avoidance of double taxation.

Any security or guarantee, of whatever nature, will be subject to stamp duty at the following rates over the secured/guaranteed amount, except if it is ancillary to an agreement (such as a loan agreement) which is already subject to stamp duty:

(a) 0.3 per cent over the secured amount, in the case of security granted for a period of less than one year;

(b) 0.2 per cent over the secured amount for security granted for a period of one year or more and less than five years; and

(c) 0.1 per cent over the secured amount for security granted for a period of five years or more.

It should be noted that, for the purposes of application of Stamp Duty, the prorogation of the initial term of a guarantee is considered to be a new transaction.

The proceeds from any claim under, or the enforcement of, security are not subject to withholding for the account of tax.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

In Angola, in the context of the current tax law reforms, there are no tax or other incentives available for foreign lenders in the context of bank lending transactions.

Any loan to an Angolan entity or any security provided to an Angolan entity is subject to stamp duty at the current tax rates. However, it should be noted that non-payment of the stamp duty will not have an impact on the validity and effectiveness of the loan, the security or the valid registration of the security.

Any acts, contracts, documents, certificates, books, papers, transactions and other facts described in the Stamp Duty Tax Code Table are subject to stamp duty, namely:

(i) share capital increases or initial share capital – 0.05 per cent of the amount of the increase of capital or initial capital;

(ii) guarantees and security for transactions – variable rate between 0.1 and 0.3 per cent of the guaranteed/secured amount, depending on the term of the transaction;

(iii) finance transactions – variable rate between 0.001 and 1 per cent, depending on the period of time, of the amount of the transaction; and

(iv) acquisition of property in real estate assets – rate of 0.003 per cent of the value of the asset.

6.3 Will any income of a foreign lender become taxable in Angola solely because of a loan to or guarantee and/or grant of security from a company in Angola?

Non-resident companies or individuals are subject to tax on income generated in Angola. Therefore, branches, permanent establishments or other forms of representatives of companies which are not resident in Angola are subject to taxation in Angola for the income generated in, or attributable to, Angola.

Therefore, the income of a foreign lender deriving from payments of interest will be subject to tax in Angola.

The concept of income in the Angolan tax system is broad. Capital gains, income derived from economic activities (whether main or ancillary activities), rents (excluding property rents), income from a foreign source, dividends, interest and royalties are all considered "income".

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are other costs, such as notarial fees and land registry fees, for the registration of a mortgage over real estate.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in Angola recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Angola enforce a contract that has a foreign governing law?

In accordance with the general principle set out in the Angolan Civil Code, the parties to an agreement may elect the law governing the agreement, provided that such election corresponds to a serious interest of the parties or is the law of a jurisdiction which has a connection with the agreement and is legitimate in the context of the principles of private international law.

7.2 Will the courts in Angola recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

In the absence of any treaty or convention, foreign law judgments (issued by a court or arbitration tribunal) are not recognised in Angola, whatever the nationality of the parties, without re-examination and confirmation by Angolan courts. Such re-examination will not involve the merits of the case, provided that:

(a) there are no doubts about the authenticity of the document in which the judgment is given and the intelligibility of the decision;

(b) it was adjudged *res judicata* by the courts of the country issuing the decision;

(c) it has been issued by a competent court in accordance with the rules on conflict of jurisdiction set out in Angolan law;

(d) it would not be considered as being currently decided by another court or adjudged *res judicata* on the grounds that it affects the jurisdiction of Angola courts, except in the case where the foreign court prevented the jurisdiction of Angolan courts;

(e) the defendant was duly served for the action, except if it relates to an action in respect of which Angolan law waives the requirement for initial service or, in the event that the defendant was condemned by lack of opposition, that serviced was made to himself;

(f) it does not contravene the principles of Angolan public order; and

(g) if a decision was taken against an Angolan citizen, it does not contravene the provisions of Angolan private law, whenever the case should have been decided in accordance with Angolan law.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Angola, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Angola against the assets of the company?

In general, filing a suit in Angola, obtaining a judgment and enforcing it could take between 36 and 60 months. Enforcing a foreign judgment in Angola against the assets of the company could take between 24 and 48 months. In both (a) and (b) scenarios, the timeframe for enforcement of the court decision will depend on how long it takes to identify the assets to be seized.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Yes, timing of the enforcement may be affected in the event that there is a public auction of the assets or in the event that such auctions are not successful, if, for instance, no offers higher than the reserve amount are received.

Regulatory consents do not apply to the enforcement of collateral security.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Angola or (b) foreclosure on collateral security?

There are no restrictions.

7.6 Do the bankruptcy, reorganisation or similar laws in Angola provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, in accordance with Angolan law, the commencement of an insolvency or similar proceeding will imply a moratorium on the enforcement of collateral security against the debtor.

7.7 Will the courts in Angola recognise and enforce an arbitral award given against the company without re-examination of the merits?

In accordance with Law no. 16/03 of 25 July:

(i) the parties shall abide by the decision of the arbitral tribunal in the precise terms as decided by the tribunal; and

(ii) upon expiry of the deadline given by the arbitral tribunal for the voluntary compliance with the decision or, in the event that no deadline is given, 30 days after the parties have been notified of the decision by the arbitral tribunal, the affected party may request the enforcement of the decision on the competent Provincial Court, in accordance with the terms of the Civil Procedure Rules.

Please also refer to the answer to question 7.2 above, which is also applicable to foreign arbitral awards.

The Republic of Angola has not yet ratified the New York Convention on arbitration, despite the fact that in 2012 the Ministry of Justice admitted its ratification.

The enforcement of an arbitral decision in Angola is subject to the recognition of such decision by the Supreme Court, irrespective of the nationality of the parties.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Upon declaration of insolvency by the competent court, all enforcement proceedings against the insolvent company will be suspended, with the exception of those which relate to the claims of preferred creditors which are admitted in the context of an insolvency proceeding.

The credit held by the lender shall be claimed in the context of the

insolvency proceeding and prior to the general meeting of creditors being held.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Under the Angolan Civil Code there is the concept of *impugnação pauliana* pursuant to which an action could be brought by a creditor to set aside a transaction which results in the decrease of the bankrupt companies' assets and in circumstances in which there was no consideration given certain requirements are met.

Preferential creditors' rights exist in Angolan law, such as court fees, tax debts and employees' claims.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Yes, the Republic of Angola and certain public sector entities are excluded from Angolan insolvency laws and there is no applicable legislation governing the insolvency of such entities.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

In accordance with (i) the Angolan Civil Code, (ii) the regime of the financial pledge, or (iii) the regime of the banking pledge, it is possible that the enforcement of a pledge is conducted in an out-of-court proceeding, if the parties have so agreed.

Please note, however, that in this situation, the pledged assets will, in principle, be in the possession of the pledgee or a custodian appointed by the parties.

The parties may also agree for enforcement by means of an arbitral tribunal.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Angola?

Provided that the choice of law is valid (please see question 7.1 above) such choice is legally binding and enforceable under the laws of Angola.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Angola?

In the event that an entity waives the benefit of sovereign immunity, such waiver is valid if it relates to disposable rights of monetary value.

10 Other Matters

10.1 Are there any eligibility requirements in Angola for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Angola need to be licensed or authorised in Angola or in their jurisdiction of incorporation?

In the event that the lender exercises the lending activity in Angola, it is necessary that the lender is licensed or authorised in Angola and subject to the supervision of the National Bank of Angola.

Only financial banking institutions may carry out the activity of receiving deposits or other redeemable funds for their own account use and perform the role of intermediary in the settlement of payment transactions.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Angola?

No, there are not.

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The Financial Markets Department has extensive experience in all relevant areas of the financial sector, including banking, capital markets, corporate finance, derivatives, distressed debt, financial services, funds, regulatory, private equity, project finance, securitisation and structured finance.

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With more than 20 years of legal practice, Adjuris Luanda is one of the most prestigious firms in the dynamic Angolan market. Adjuris Luanda comprises a strong team of legal specialists with expertise and proven track record in all key areas of business law, including banking and finance, corporate, energy and natural resources, infrastructure, litigation and arbitration, projects, real estate and planning and transport.

Argentina

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in the Republic of Argentina?

The main issues at hand are those triggered by three current forces that have proved to be disruptive in the local financial market: (i) inflation; (ii) foreign exchange restrictions limiting the ability of local residents and non-Argentine residents to acquire foreign currency; and (iii) lack of long-term financing. In a nutshell, current interest rates in connection with secured financing in pesos (but also in dollars) are priced at a rate that, at some points, is even lower than inflation. In other words, inflation has trumped interest rates in terms of percentage and, therefore, interest rates have sometimes even proven to be negative.

In light of this issue, the most significant trends have been those aimed at structuring transactions that could mitigate the adverse effects of these situations. As an example of these features, we can mention:

(i) dollar-linked transactions, i.e. financings which are denominated in foreign currency but for which disbursements and repayments are made in local currency. This feature has been included in most recently issued securities (by private entities but also by public owned companies) and in some syndicate and bilateral loans. In addition, there are specific regulations issued by the Central Bank of the Republic of Argentina (the "Central Bank") that could be construed as supporting this mechanism;

(ii) transactions on which the conversion of local currency into foreign currency and vice versa is made at a rate which does not reflect the official foreign exchange rate but an implicit rate arising from the quotation of dual currency securities trading in local currency and foreign currency; and

(iii) transactions including terms which allow the lender to request payment of principal and interest in a foreign currency, local currency at a specific exchange rate, or payment in kind.

Finally, since the re-enactment of foreign exchange restrictions in 2001, most of the financings received by local companies are trade-related financings, the proceeds of which are used by local companies to either finance production of commodities or other exportable goods or finance the acquisition of equipment or other goods. This type of transaction is afforded preferential treatment from a foreign exchange perspective.

1.2 What are some significant lending transactions that have taken place in the Republic of Argentina in recent years?

- In 2014, Latin American development bank Corporación Andina de Fomento granted Argentine oil and gas producer Pan American Energy a US$ 238 million loan.
- During 2013 and 2014, the Provinces of Neuquén, Chubut, Mendoza, Buenos Aires, and Entre Ríos issued notes for US$ 330 million, US$ 264 million, US$ 219.9 million, US$ 200 million, and US$ 63.7 million, respectively. The City of Buenos Aires also issued notes for US$ 216 million.
- In 2013, Argentine downstream oil company, Axion Energy, secured two loans worth 800 million Argentine pesos (US$ 150 million) in total.
- In 2013, Argentina's local wheat and oilseed milling company, Molino Cañuelas SA, obtained a 200 million Argentine pesos (US$ 38 million) loan from a syndicate of banks.
- In 2012, Exal Argentina S.A. and Exal Packaging S.A., together with other members of the Exal Group as borrowers, executed a secured loan agreement with Fifth Third Bank as lender and agent, and Equity Trust Company Argentina as Argentine collateral agent, for the amount of US$ 250 million.
- In 2012, Synthon Argentina (and other subsidiaries) secured a US$ 123 million revolving loan facility granted by ABN AMRO Bank, Rabobank, Deutsche Bank Nederland and ING Bank to Synthon International Holding.
- In 2011, Energía Argentina S.A. issued securities through two financial trusts, for the amounts of US$ 690 million and US$ 350 million.
- In 2011, NASA Trust launched the second bond offering, raising US$ 407 million for financing the Atucha II nuclear power plant.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, it is possible to secure the borrowings of other members of the corporate group. The company acting as a guarantor should receive proper benefits or consideration in return. Otherwise, it may be considered that the granting of the guarantee derives no benefit for the securing company and, hence, other creditors could challenge such transaction.

Besides, the by-laws of the securing company should include the prerogative to grant borrowings to third parties or, alternatively, the main activity of the company should be financing.

These requirements should be strictly defined when the guarantee is up-stream (a controlled entity acting as guarantor of an obligation of its direct or indirect parent company or an affiliate).

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

In case the securing company does not have any financial corporate purpose, nor receives a consideration or benefit, the guarantee may be deemed out of the scope of the securing company's corporate purpose (*ultra vires*) and, consequently, may be declared void.

Besides, pursuant to Argentine law, directors must act loyally towards the company and its shareholders, loyalty which includes the director's responsibility to perform its duties with the diligence of a "good businessman" and in the interest of the company. Any failure to comply with these standards results in directors' unlimited liability for the damages arising therefrom.

To be released from any such liability, the director must timely file written objections to the company's resolution that caused the damages, and, if applicable, give notice thereof to the company's statutory auditors or file proceedings for challenging the decision.

Therefore, although it is not specifically provided, if a guarantee is deemed out of the scope of the securing company's purpose, it might be understood as a breach of the director's duties and, consequently, the director would be deemed responsible for negligence.

2.3 Is lack of corporate power an issue?

Yes. Corporate power is required to grant guarantees.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental authorisation, consent or approval is required to grant a guarantee. However, it is advisable that the Board of Directors or the shareholders' meeting previously approves the transaction, particularly if the guarantee is for a significant amount considering the net-worth of the guarantor and there is no specific provision in the by-laws of the guarantor. A unanimous approval of the shareholders' meeting is also advisable.

Also, if the security consists of a mortgage over real property located in a security zone (close to borders and other strategic zones), upon execution, transfer of land will require prior approval from the Security Zone Commission, unless the transferee is an Argentine individual.

Besides, third parties' consents may be required for the assignment of agreements to a trust. As a general rule, since contracts involve both rights and obligations, the transfer of the obligations is not allowed unless an express consent of the counterparty is obtained (see questions 3.1 and 3.4).

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

As long as the company operates within its corporate purpose, as explained in question 2.1, Argentine law does not provide limitations on the amount of a guarantee; however, deduction of interest may be limited under certain thin capitalisation rules. Please refer to question 6.5.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Assuming that the enforcement of a guarantee implies an international transaction (i.e. a payment from an Argentine resident to a non-Argentine resident), it will be subject to foreign exchange regulations.

Foreign exchange rules allow access to the Argentine Foreign Exchange Market (the "FX Market") to purchase foreign currency to make payments abroad under the items "*Commercial guarantees for export of goods and services*" and "*Financial guarantees*", subject to compliance with applicable requirements in each case. Argentine foreign exchange rules do not affect a foreign lender's ability to exercise its rights against a foreign guarantor.

If the guarantee is established over a local asset and its enforcement implies the collection of Argentine pesos, the foreign lender is able to purchase foreign currency for repatriation purposes, subject to compliance with certain specific requirements.

Also, proceeds obtained from a bankruptcy proceeding can be transferred abroad through the FX Market, provided that the creditor accessing the FX Market is the same creditor that filed for recognition of the credit in the insolvency proceeding.

Besides, although not expressly regulated, the Central Bank has been imposing certain *de facto* restrictions that may delay or, in certain cases, prevent access to the FX Market for means of purchasing foreign currency.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

In general terms, Argentine law recognises two kinds of guarantees: the "personal" guarantees; and the "asset-backed guarantees".

"Personal" guarantees are granted by a person or a legal entity committing its property to assure the performance of one or more obligations of the debtor. Upon the debtor's default, the creditor may eventually take legal action over the debtor's property and the guarantor's property. This guarantee, unlike asset-backed guarantees, does not create a lien or a privilege in favour of the creditor.

"Asset-backed" guarantees are granted over a specific property owned by the guarantor. In this kind of guarantee, either the debtor or a third party may be the guarantor. Unlike personal guarantees, asset-backed guarantees grant the creditor (i) the rights of "persecution" and "preference" over the asset in question, which means that the creditor has the right to pursue the guarantor's property, even if the guarantor sells or transfers his/her property, and (ii) the right to execute the guarantee and receive the corresponding payment with preference over other creditors, even in the event of insolvency or bankruptcy of the debtor or the guarantor.

The most common guarantees are:

a) Mortgage: The mortgage is the most frequently used security over immovable property. Also for certain movable property which has significant value the law specifically demands the constitution of a mortgage instead of a pledge (i.e. airplanes). For further details, please refer to question 3.3.

b) Pledge: A pledge may be constituted over movable property, including but not limited to, machinery, vehicles, patents and trademarks. For further details, please refer to question 3.3.

c) Trust in Guarantee: A trust may secure both movable and immovable property. Goods held in trust form an estate separate from that of the trustee and the trustor. If the property given in trust is registered in a public registry, the relevant registry will record the property in the trustee's

name. Therefore, they should not be affected by any individual or joint actions brought by the trustee's or trustor's creditors, except in the case of fraud. The beneficiary's creditors may exercise their rights over the proceeds of the goods held in trust and be subrogated to the beneficiary's rights.

Any individual or legal entity may be appointed as a trustee of an ordinary trust. Although there is no ruling on the issue, it is advisable that the trustee be a different person from the secured creditor (although there is no obstacle if the trustee is a controlled or controlling entity of the secured party).

d) Security Assignments: Assets may also be assigned as security. One of the differences with a trust is that, in the case of security assignments, assigned assets are typically limited to rights or credits including, without limitation, receivables.

The creditor may demand payment of the credit to either the assignor or the debtor of the assigned credit. If the assignor pays the amounts owed, then the assigned credit should be assigned back to the assignor.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Although it is not possible to execute a general security agreement, including different types of collateral securities, it is possible to execute a general agreement including more than one asset **of the same type**, for example, a pledge may include machinery and vehicles.

In relation to the procedure, a security is executed by means of an agreement between parties.

Besides, Argentine law allows the pledge over an inventory of goods ("floating pledge"). Please refer to question 3.3.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Collateral security can be taken over real property (mortgage) or over machinery and equipment (pledge).

a) Mortgage: A mortgage generally secures the principal amount, accrued interest, and other related expenses owed by the debtor. To be valid, the following conditions should be met:

(i) The mortgagor must own the property to be mortgaged.

(ii) The mortgagor must have the capacity to transfer its assets.

(iii) In certain cases, prior consent of the spouse is required.

(iv) The mortgage must be granted over a specific property and the amount and the obligation secured must be certain and determined. Conditional, future or undetermined obligations are permitted to be secured, provided that an estimated value of the obligation is determined upon creation of the mortgage. Additionally, the mortgage over real property extends to: (i) all its accessories as long as they are attached to the principal property; and (ii) the supervening improvements made to the property.

Mortgages must be executed in writing by means of a public deed, which must be registered with the Land Registry of the jurisdiction where the property is located to be valid *vis-à-vis* third parties.

A mortgage remains in full force and effect until all amounts secured have been paid or the mortgage is otherwise cancelled. The registration of a mortgage will automatically expire 20 years after the date upon which it was registered, unless renewed.

b) Pledges: The debts secured by a pledge can be conditional, future or indeterminate, or otherwise uncertain in amount.

(i) "Civil pledge": The pledged assets are delivered to the creditor or placed in the custody of a third party. Upon default, the creditor must sell the pledged asset through a court auction and, in principle, may not obtain ownership of the asset.

(ii) "Commercial pledge": The pledged assets are delivered to the creditor or placed in the custody of a third party and consist of chattels to be used as collateral for commercial obligations (for example, pledge granted over shares). The main difference with the civil pledge is that in a commercial pledge some creditors are entitled to a private sale (i.e., an out-of-court foreclosure). Unless the debtor and creditor agree upon a special sale proceeding, the pledged asset must be sold through a public auction.

(iii) "Registered pledge": There are two types of registered pledges: the "fixed pledge", used for specified assets; and the "floating pledge", used for a certain inventory of goods, with no precise identification of the goods. A floating pledge allows for the replacement of the goods of the pledged inventory.

The registration of a fixed pledge involves the filing of the petition to the Pledge Registry of the jurisdiction in which the personal property is located.

The pledge agreement is legally binding between the parties from the date of execution. Upon registration, the agreement is opposable *vis-à-vis* third parties. It shall be opposable *vis-à-vis* third parties from the execution date if the petition to register the pledge is filed before the corresponding Registry within 24 hours of its execution.

The registration of a pledge expires 5 years after the date on which it was registered, unless renewed. Once perfected, a pledge remains in full force and effect until all amounts secured have been fully paid or the pledge is otherwise cancelled.

The floating pledge may be created through a notarised private document, using the form provided by the Registry of Pledges for such purposes (a public deed is not required).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. Collateral security can be taken over receivables. In order to have effect *vis-à-vis* third parties, a private assignment agreement must be executed and the assigned debtor must be notified by a notary public.

Alternatively, a trust structure may be used. Please refer to question 3.1.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Argentine law recognises the validity of a pledge over cash. In this case, the pledge shall have full effects upon delivery of the amounts pledged to the pledgee. These guarantees are not usual, though.

As for the procedure, please refer to question 3.3.

3.6 Can collateral security be taken over shares in companies incorporated in The Republic of Argentina? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes. To be valid, the shareholder must inform the company about the terms and conditions of the pledge and the Board of Directors must record the existence of the pledge (i) in the Registry of Shares Book, and (ii) with a notation at the back of the share certificate.

Pursuant to Argentine law, movable assets which are permanently situated in a place and are not intended to be moved to a different jurisdiction are governed by the rules of the place where they are located. Thus, a guarantee agreement over the shares of a local company shall be governed by the rules of Argentina.

Parties in a loan agreement may freely agree on the law applicable to the contract (see question 7.1), but Argentine law must rule the content, conditions and effects of a security over the shares of the company.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, under a "floating pledge".

Please refer to question 3.3.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

(i) Yes, debtors may guarantee their own obligations. Please refer to questions 3.1 and 3.3 above.

(ii) Yes. It is a guarantee of a third party, different from the debtor. Please refer to questions 3.1 and 3.3 above.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notarisation, registration and other fees vary depending on the jurisdiction in which the agreement is executed.

The following chart details the main costs applicable to different securities:

Security	Fees
Real Property (Mortgage)	Notary Fees: 1% of the principal amount. Stamp Tax: 1% of the economic value of the agreement. Registration Fees: 0.2% to 0.3% of the guaranteed obligation.
Chattel/Personal Property (Pledge)	Notary Fees: low, depending on the characteristics of the pledge. Registration Fees: 0.2% of the guaranteed obligation. Stamp Tax: 1% of the economic value of the agreement.
Accounts Receivable/Debt Securities	Notary Fees: low, depending on the characteristics of the security. Registration Fees: 0.2% of the guaranteed obligation. Stamp Tax: 1% of the economic value of the agreement.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Registration before the applicable registry may take approximately 1 to 6 months, depending on the type of assets involved.

As to expenses, please see the chart in question 3.9.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

There are no explicit statutory restrictions on the ability of Argentine companies to create pledges on their assets to secure their own obligations. However, certain limitations to, or special requirements on, the ability of an Argentine company to create pledges in its assets may be included in the by-laws of the company.

In addition, the by-laws may require express approval for the creation of any pledge on the assets of a company by its Board of Directors, in which case a resolution of the Board would be needed. In the absence of such requirement, the pledge may be created by any representative acting pursuant to an adequate power of attorney or, in the case of a corporation, by the president of the company.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No special priorities are provided for revolving credit facilities. In this kind of loan, careful drafting should be taken into account. The guarantee granted at execution of the agreement may secure the subsequent renewals of the loan.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

For documentary requirements, please refer to question 3.3.

When a public deed is required, signing in counterparts, although not expressly prohibited, is not advisable since it could create certain issues in terms of proof.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

The limitations referred to above with respect to guarantees also apply here. In addition, there might be a tax impact related to a leverage buy out operation.

It should be noted that Income Tax Law does not provide clear parameters to distinguish between "debt" and "capital". Guidelines can be found in the Income Tax Law and its Regulating Decree, when they require – for irrevocable contributions – that "in no case shall there accrue interest or any accessories for the contributor".

As explained in question 6.1, a borrower is able to deduct interest (for income tax purposes) as long as the expenses were incurred to generate taxable income.

The Argentine Tax Authority has challenged the deduction of interest in cases of a leverage buy out to acquire shares of local companies. The National Tax Authority considered that such expense is not necessary to obtain taxable income or to keep or maintain its source. In certain cases, the resolution of the Tax Authority was confirmed by the Tax Court.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will the Republic of Argentina recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

In Argentina, the role of the agent or trustee is governed by the rules of contract. Therefore, the parties in a syndicated lending may freely determine the functions and powers of the agent; such powers might include calculating the due amount of principal and interest, calculating financial ratios, informing the compliance or defaults of the debtor's obligations under the agreement, and keeping and guarding the loan documentation.

The figure of the agent in a syndicated loan is different from the figure of a collateral agent. Since in Argentina the guarantees must be linked to the credits which are guaranteed, it is not possible to split the holder of the credit from the holder of the guarantee. Thus, if a collateral agent is appointed, it might act as representative of the creditors but not as the holder of the rights arising from the guarantee.

5.2 If an agent or trustee is not recognised in Republic of Argentina, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

- The credits and the guarantee might be transferred to a trustee, who will be committed to enforcing the security if the debtor fails to comply with the agreement and applying the proceeds from the security among the grantors-beneficiaries.
- A real property might be transferred to a trustee, who might constitute a guarantee trust over such property in favour of the creditors.
- The guarantee might be granted in favour of one creditor, who commits to act as a collateral agent based on an intercreditor agreement.

5.3 Assume a loan is made to a company organised under the laws of the Republic of Argentina and guaranteed by a guarantor organised under the laws of Republic of Argentina. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The assignment of credits must be documented in an agreement. A debtor's intervention in the agreement is not required.

The enforceability of the credits by the new lender is subject to two requirements: (i) the transfer of the credit; and (ii) the debt being payable.

Debtors should be given notarised notice of the assignment to be effective *vis-à-vis* third parties and the debtor itself, in case of a judicial claim.

Upon assignment of the credit, the local debtor must inform the details of the new creditor to the Central Bank, pursuant to a certain foreign debt information regime.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Deduction is allowed only for expenses incurred to generate taxable income.

Interest is deductible for the borrower. Interest deduction is limited by thin capitalisation rules (see question 6.5).

In addition, if the loan is made with a related party or with a party located in a low tax jurisdiction (regardless if it is related or not), interest is deductible only when paid and transfer-pricing rules apply. If the loan is made with a non-related party which is not located in a tax haven jurisdiction, interest is deductible on an accrual basis and no transfer pricing rules apply.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives to foreign lenders. Non-Argentine residents without a permanent establishment in Argentina are only subject to income tax on their Argentine-source income.

Foreign lenders will be taxed by income tax only on their profits from Argentina. When the lender is a bank or financial institution incorporated or located in a country not deemed to be a low tax jurisdiction or in a jurisdiction that has entered into agreements of exchange of information with Argentina and, also, is a jurisdiction where the relevant governmental authority has adopted the international standards approved by the Basel Committee on Banking Regulations and Supervisory Practices, the presumed net income in case of cross-border interest payments is 43% and, deriving from that, a 15.05% effective withholding rate. In all other cases of cross-border interest payments, the presumed net income is 100% and, therefore, the effective withholding rate is 35%. The Argentine debtor is responsible for the withholding and payment of the tax.

Value Added Tax ("VAT") applies to the sale of goods, the provision of services and the importation of goods and services. Under certain circumstances, services rendered outside Argentina, which are effectively used or exploited in Argentina, are subject to VAT.

Interest arising from a loan granted by a foreign entity is subject to VAT and the Argentine debtor is responsible for the payment of the tax.

The tax is levied on the interests paid and the current general rate is 21%. However, interests arising from loans granted by foreign banks are subject to a 10.5% rate when the central banks of their countries of incorporation have adopted the regulations provided by the Basel Committee.

Argentine Provinces and the City of Buenos Aires apply the Turnover Tax (Tax on Gross Income), levied on gross income

obtained from the exercise of onerous and habitual activity within each relevant jurisdiction. The tax rate varies in each jurisdiction.

For tax purposes, the activity of lending money is presumed to be carried out on a habitual basis, even if carried out once, and therefore is subject to Turnover Tax. The amount of returned capital is excluded from the taxable base. Thus, only the total amount of interest will be subject to Turnover Tax. Notwithstanding, it is not clear if interest collected by a foreign lender is subject to Turnover Tax.

Stamp tax is a local tax levied on public or private instruments executed in Argentina, or documents executed abroad with effect in one or more relevant jurisdictions within Argentina. In general, this tax is calculated on the economic value of the agreement. Each jurisdiction applies different tax rates to different types of agreements, but the most common rate is 1%. Certain ways of entering into contracts do not trigger this tax.

Finally, a tax imposed on credits and debits in bank accounts (the "TDC") must be paid in the case of credits and debits in Argentine bank accounts at a rate of 0.6%. However, the credit of the borrower in an Argentine bank account arising from the disbursement of principal of the loan would not be subject to the TDC since the disbursement of principal under a "banking loan" is exempt from the TDC.

6.3 Will any income of a foreign lender become taxable in the Republic of Argentina solely because of a loan to or guarantee and/or grant of security from a company in the Republic of Argentina?

Non-Argentine residents without a permanent establishment in Argentina are only subject to Income Tax on their Argentine-source income. Only incomes from Argentina will be taxed by Argentine Income Tax.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

For notarisation, registration and other fees, please refer to question 3.9.

Also, the loan and the guarantees will generally be taxed by Stamp Tax. For the purposes of the Stamp Tax, the loan and the guarantees could be considered independently even if they were agreed in the same document. Then, the transaction might be doubly taxed in certain jurisdictions.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

When the loan is granted by a related party, interest payments are subject to thin capitalisation rules. According to these rules, the percentage of the interest payments equal to the percentage of the debt exceeding two times the net worth will not be deductible for the borrower, and will be treated as a dividend. This limitation will not apply if the recipient of the interest payments is a non-related party.

If the lender is located in a low tax jurisdiction (regardless whether it is related or not) interest is deductible only at the moment it is paid and transfer-pricing rules apply. If the loan is made with a non-related party which is not located in a tax haven, interest is deductible on an accrual basis and no transfer pricing rules apply.

7 Judicial Enforcement

7.1 Will the courts in the Republic of Argentina recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in the Republic of Argentina enforce a contract that has a foreign governing law?

Yes. Parties are able to choose the laws that will govern the agreement as long as some connection to the system of the chosen law exists. Further, foreign law will only be valid to the extent that it does not contravene Argentine international public policy (e.g. criminal, tax, labour and bankruptcy laws). Also, rights associated with real estate are governed exclusively by local laws.

7.2 Will the courts in the Republic of Argentina recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes. In principle, the courts of Argentina will recognise as valid and will enforce judgments of foreign courts if they refer to monetary transactions, subject to compliance with certain procedural conditions.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in the Republic of Argentina, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in the Republic of Argentina against the assets of the company?

In Argentina, the length of litigation disputes depends on the complexity of the case.

Assuming the lender's creditor is unsecured, it might take between 3 and 6 years to obtain and enforce a final judgment. The rendering of a final decision might be delayed if foreign legislation governs the relationship between the parties.

Argentine procedural rules provide a fast-track proceeding called "exequatur" for the recognition and enforcement of a foreign judgment, which might last between 1 and 3 years. Exequatur proceedings do not require the re-examination of the merits of the case.

Despite the estimation above, freezing injunctions might be granted by Argentine courts if procedural requirements are met.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

In principle, there are no restrictions in order to enforce collateral security. Nevertheless, if the guarantor does not comply with its obligations, the creditor would have to file a suit in court.

Please refer to questions 2.6 and 7.3.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in the Republic of Argentina or (b) foreclosure on collateral security?

In order to file a suit against a company in Argentina, the foreign lender must prove, if it is a company, that it is duly incorporated under the legal rules of its country.

As foreign exchange restrictions may apply, please refer to question 2.6.

7.6 Do the bankruptcy, reorganisation or similar laws in the Republic of Argentina provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

The Bankruptcy Law does not provide any kind of moratorium on enforcement of lender claims.

Please refer to question 8.1.

7.7 Will the courts in the Republic of Argentina recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. Arbitral tribunals are competent in monetary disputes. The enforcement of the arbitral award will be as equal as the enforcement of a judgment.

Arbitral tribunals may not solve cases in which Argentine tribunals have exclusive jurisdiction, nor when there is an express prohibition against arbitration (e.g. certain provincial matters).

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Although the creditor does not have to wait until the credit filing procedure is finished before requesting the liquidation of the asset, the court will perform a summary examination of the documentation evidencing the creditor's preference and request the opinion of the trustee before carrying out the liquidation of the asset.

A credit with a special preference has priority over credits with general preferences and unsecured credits. However, the recognition of these credits must be verified and accepted by the court.

Credits with special preferences will have priority on a specific asset, such as mortgages and pledges. This kind of preference can be enforced exclusively on the relevant assets and up to the proceeds of the liquidation of such asset.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The court may determine a preference period of up to 2 years prior to the bankruptcy proceedings, depending on the date when insolvency was first evidenced.

Certain acts which occur during that preference period may be ineffective, such as: acts for which no consideration is given; debts paid prior to its maturity; and security interests obtained for a debt which is un-matured and which was originally unsecured.

There are two types of preferences:

(i) Special preferences, which are granted exclusively over certain specific assets of the debtor. E.g.: securities over the proceeds from the sale of the secured asset; expenses related to the assets that continue to be in debtor's possession; salaries; etc.

(ii) General preferences, which are granted over all of the debtor's assets. E.g.: labour credits not subject to a special preference; social security debts; certain personal expenses (as funeral or medical costs); etc.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Yes. Among others, insurance companies, cooperative associations and public entities, such as the Nation, Provinces and Municipalities, the Catholic Church and embassies.

Financial institutions are, with a few exceptions, subject to general bankruptcy law. However, the Central Bank's cancellation of their banking licence is required and they may not voluntarily enter into a reorganisation or bankruptcy proceeding.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes. The debtor may enter into out-of-court agreements with all or part of the creditors. A certain majority of unsecured creditors is required.

These agreements imply a debt restructure and are enforceable against all the unsecured creditors who executed it, including those that did not approve its content or voted against it.

To be enforceable against all unsecured creditors, the out-of-court agreement must be endorsed or validated by a competent court. Companies that are regulated by special insolvency rules (e.g., banks and insurance companies) cannot enter into this kind of proceeding.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of the Republic of Argentina?

In principle, Argentine law allows parties of an international contract to submit to a foreign jurisdiction in matters of an economic content.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of the Republic of Argentina?

Yes. The waiver of sovereign immunity is valid under Argentine law (it should be expressly provided in the underlying agreement).

10 Other Matters

10.1 Are there any eligibility requirements in the Republic of Argentina for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in the Republic of Argentina need to be licensed or authorised in the Republic of Argentina or in their jurisdiction of incorporation?

There are no eligibility requirements in Argentina for lenders, agents or security agents. A loan may be granted by, and the agent may be, an individual, a company, a bank, or any other entity.

In the case of loans granted by banks, the role of an agent is generally performed by a financial entity.

In principle, lenders do not need to be licensed or authorised to grant loans, provided that the financing activity is not performed on a regular basis. Otherwise, certain corporate and regulatory issues should be considered.

From a corporate standpoint, foreign companies are able to perform isolated acts in Argentina but if they want to perform their activities on a regular basis, a branch or a subsidiary must be established. For such purpose, foreign companies must: (i) evidence before the Registry of Commerce the existence of the company; (ii) establish a domicile in Argentina; and (iii) justify the decision of establishing such branch or subsidiary and appoint a legal representative.

From a regulatory perspective, if the activities performed by the lender fall under "financial intermediation" (intermediation between the supply and demand of financial resources on a regular basis), prior authorisation of the Central Bank is required. An activity shall be deemed financial intermediation if it combines both raising local or foreign funds and granting financing to third parties with such funds.

The activity in Argentina of the subsidiaries or representation offices of foreign financial entities is subject to regulation by the Central Bank, who will grant the required authorisation subject to the analysis of the backgrounds and responsibility of the foreign entity and its local office.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in the Republic of Argentina?

There are no other material considerations which should be taken into account.

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Australia

Clayton Utz

David Fagan

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Australia?

In 2013 new mining and resources investment retreated from previous peaks and Australia's manufacturing industry continued to contract. While concerns over the European debt crisis have subsided somewhat, stimulus tapering by the US Federal Reserve, the potential for a slowdown in Chinese growth and difficulties in the manufacturing and retail sectors were key issues influencing the Australian market in 2013 and early 2014. Despite these concerns, the Australian economy grew throughout 2013 and consumer and business confidence experienced a modest recovery in the wake of federal elections in September 2013 (where the latest results for Australian economic growth in Q4 of 2013 surpassed expectations) and improved export conditions due to a fall in the AUD towards the end of 2013. Australian companies have been strengthening their balance sheets throughout 2013 as mergers and acquisitions activity remained subdued.

For the Australian lending market, this translated into a significant increase in loan volumes to facilitate refinancings, but only an incremental increase in demand for new money. Lending volumes were particularly strong in late 2013 as companies refinanced to take advantage of strong bank liquidity and cheaper pricing. Although still below their pre-GFC peak, loan volumes have been reported as having grown by as much as 54% year-on-year in Australia in 2013.

Australia's big four domestic banks remain the main players in the Australian lending market but 2013 saw overseas banks return to the lending market. Overseas investment and pension funds continue to show a keen interest in existing income generating assets within the infrastructure space.

While loans remained the key source of debt funding in 2013, Australian companies also pursued longer tenor and competitive pricing by diversifying funding sources into hybrids, USPPs, AUD medium Term Notes and AUD Bonds.

Significant legal/regulatory developments included:

(a) the implementation by the Australian Prudential Regulatory Authority ("**APRA**") of the final version of the Basel III capital reform package which could potentially push up borrower costs in 2014; and

(b) the expiry of the transition period for the registration of security interests under the *Personal Property Securities Act* 2009 (Cth) (the "**PPS Act**") on 31 January 2014.

The Australian Government will conduct its first scheduled review of the PPS Act in 2014 which may lead to changes to the regime. There has been ongoing criticism of the PPS Act that it has led to more work for small business, and to fear and confusion. The register created under the PPS Act is seen as inefficient, relies too much on businesses and financiers updating it, is more costly to search than previous state-based mechanisms and made it harder to find title to assets due to the greater number of identification numbers that can be used to identify an organisation.

1.2 What are some significant lending transactions that have taken place in Australia in recent years?

Significant transactions in 2013 included the following:

(a) A US$20bn debt package as part of the US$34bn Ichthys LNG project. The project involves the construction of offshore facilities to extract hydrocarbons from the Ichthys Field off the coast of Western Australia and onshore processing facilities 885 km away at Blaydin Point in Northern Australia. The debt package relied on more than 20 banks, with the support of 8 export credit agencies.

(b) A A$7.4bn syndicated loan facility to Origin Energy with a term of 4 to 5 years. The facility is being provided by a consortium of domestic and international lenders and was used to refinance Origin's previous loan facilities.

(c) A A$3.7bn refinancing by AquaSure of its senior and mezzanine facilities used to fund the construction of a desalination plant in Australia's south east under a PPP arrangement with the State of Victoria.

(d) A A$1bn three-year syndicated cash facility for Leighton Holdings Ltd replacing an existing facility. Twenty-two financiers participated, including Australian and international banks.

Clayton Utz had roles in some of the above transactions.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Such guarantees are quite common. The general principle is that directors of the subsidiary must exercise their powers for the benefit of the company and for a proper purpose. Relevant factors to consider in assessing corporate benefit include:

(a) Does the entry into the guarantee benefit the guarantor in its own right, not just the corporate group as a whole? Section

187 of the Corporations Act 2001 (Cth) (the "**Corporations Act**") does provide that the wholly-owned subsidiary of a company may include in its constitution provisions permitting the subsidiary directors to act in the best interests of the holding company, provided that:

i. the directors act in good faith in the best interests of the holding company; and

ii. the subsidiary is not insolvent at the relevant time and does not become insolvent as a result of the directors' act.

(b) Is the guarantor a parent giving a guarantee for a subsidiary?

(c) Will the provision of funds to the borrower have a positive impact on the guarantor?

(d) Is the borrower solvent?

(e) What is the likelihood of default by the borrower?

(f) What is the extent of the guarantee? Is it "all-moneys", or limited to a fixed sum?

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

If it is found that the guarantor's directors have breached the duty to exercise their powers for the benefit of the company and for a proper purpose, the guarantee may be challenged at the instance of the guarantor.

Recent case law in Australia (in particular, *Westpac Banking Corporation v The Bell Group Limited (in liquidation)*) has indicated that the test to be applied is an objective one: whether any reasonable and prudent director charged with this duty would have appreciated that entry into the transactions in question was not in the best interests of the company. The duties are fiduciary in nature.

In addition, a lender may be found to have either knowingly assisted in, or knowingly received property as a result of, a breach of these fiduciary duties, and will therefore be liable as a constructive trustee, on the basis of their actual or constructive knowledge, wilful blindness, wilful and reckless failure to inquire.

2.3 Is lack of corporate power an issue?

Typically, the authority of the company to provide a guarantee will flow from the exercise by the directors of powers given to them under section 198 of the Corporations Act (to "manage the business" of the company), or by the company's constitution.

Lenders' counsel will typically seek to ascertain corporate power through examining the guarantor's constitution and various corporate authorisations; for example, extracts of authorising minutes. If the constitution contains provisions which may cause problems for the particular transaction, the lender should require the amendment of the constitution as a condition precedent to the provision of finance.

To a certain extent, the need to examine the constitution and other corporate authorisation materials has been reduced by the existence of certain "statutory assumptions" in the Corporations Act on which company "outsiders" (such as the beneficiaries of a guarantee) may rely, unless the outsider knew or suspected that the assumption was incorrect – for example, an outsider may assume that the company had complied with its constitution in entering into the particular transaction.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

There are no specific formalities associated with the granting of a corporate guarantee. The general law of contract applies to contracts of guarantee. However, where a guarantee agreement includes a secured right for the guarantor to recover from the borrower's assets any loss arising out of a call on the guarantee, it is prudent to register that security interest on the national register established under that PPS Act (the "**PPS Register**") to improve the guarantor's prospects of recovery from an insolvent borrower.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

The parties to a corporate guarantee may agree to impose limitations on the amount of a guarantee, for example a restriction on the guarantor's liability to a certain fixed amount. There are no such statutory limitations.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, there are not.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Security can be taken over virtually all types of asset – land, receivables, plant and equipment, rights, etc.

The registration of security interests over collateral is governed by the PPS Act. It applies to security over "personal property", which for these purposes means any property, asset or right other than land, structures on and fixtures to, land and certain statutory rights.

A broad range of interests constitute a "security interest" for the purposes of the PPS Act, including transactions that may not traditionally have been regarded as "security" – for example, retention of title arrangements.

The PPS Act establishes the PPS Register for registration of such security interests. A security interest is enforceable against a third party if it "attaches" to the relevant collateral and is perfected.

Attachment arises if the grantor has rights in the secured property and receives value for granting the security interest or performs an act that gives rise to the security interest.

Perfection is generally achieved by registering a financing statement in respect of the security interest on the PPS Register (although under the PPS Act perfection can in some instances be achieved by taking possession or control of the relevant collateral).

A financing statement sets out the secured party and the class of collateral (a large number of collateral types are provided for, from "all present and after-acquired property" to "watercraft"). No underlying finance or security document is required for registration. The registered party will be issued with a unique token and registration number. These will be required for any changes to or discharge of a relevant security interest.

Each registration must only relate to a single collateral class. Therefore if a security interest covers more than one collateral class but is not an all-assets security, a separate registration will be required for each class.

The first scheduled review of the PPS Act since its commencement will occur in 2014. Topical areas for consideration may include asset finance, equipment leases and the administrative burden associated with maintaining up to date registrations.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is possible to give asset security by means of a general security agreement. The security interest should then be registered on the PPS Register via a financing statement.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, security can be taken over virtually all assets of a company.

Plant, machinery and equipment are considered to be "personal property" and security interests thereof should be registered on the PPS Register via a financing statement.

The PPS Act does not govern security interests in real property (including buildings or fixtures to land) or where a statute declares that security interests in particular assets are not covered by the PPS Act (for example, petroleum exploration permits, leases, licences and gas pipeline licences under the *Offshore Resources Legislation Amendment (Personal Property Securities) Act* 2011). Real property security is taken by way of a mortgage, which must follow the statutory form prescribed in the State or Territory in which the property in question is situated. The mortgage must be registered at the Land Titles Office of that State or Territory. Priority is substantially governed by the time of registration.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Non-specific security may be taken over a generic category of assets such as accounts receivable or inventory. Perfection of the security interest should be obtained through registration with the PPS Register via a financing statement. Such assets are known as "circulating assets".

It is not a requirement for the purposes of registration that the debtors in question be notified of the security; however it is a prudent measure to do so, and to bank all payments in a separate bank account.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes.

Perfection of the security interest should be obtained through registration with the PPS Register via a financing statement.

The PPS Act gives priority to an account held by an authorised deposit-taking institution if that institution controls the account. Accounts of Australian borrowers held offshore would therefore best be held by an Australian institution operating in that offshore market.

3.6 Can collateral security be taken over shares in companies incorporated in Australia? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes.

Perfection of the security interest should be obtained through registration with the PPS Register via a financing statement (see question 3.1).

If the security in question is not an all-assets general security agreement (see question 3.2), the relevant collateral class is most likely to be "financial property" or "intermediated securities".

"Intermediated securities" includes shares held on the Clearing House Electronic Sub-register System (CHESS), as well as bonds and other financial instruments and assets. Perfection takes place through registration of a financing statement or through taking control of the collateral.

Certificated shares will constitute "financial property". Title to shares is evidenced by share certificates and it is typical for secured parties to take possession of share certificates of secured shares. In addition to registration, this is a form of perfection through possession and control.

It is possible to grant valid security under a foreign-law document, and to effect the registration of such securities under the standard PPS procedure.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Non-specific security may be taken over a generic category of assets such as accounts receivable or inventory. Perfection should be obtained through registration with the PPS Register via a financing statement. See question 3.4 above.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company may grant a security interest in order to secure its obligations as both borrower and/or guarantor under a credit facility. The granting of such security will be subject to the corporate benefit and financial assistance considerations covered in sections 2 and 4.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notarisation is not a requirement for the taking of security in Australia.

A small fee is payable to register a security interest over an asset constituting "personal property" on the PPS Register. The fee increases depending on the period during which the registration is intended to remain valid.

A fee is payable for the registration with the relevant land titles office of a security interest over real property. These fees may be nominal or calculated according to property value depending on the State or Territory in question.

Mortgage duty has been abolished in all Australian jurisdictions except in the state of New South Wales. Although previously slated to be abolished firstly in 2012 and then again in 2013, the abolition of mortgage duty in New South Wales has now been deferred indefinitely. Mortgage duty in New South Wales is calculated based on the value of any secured property situated wholly or partly in New South Wales.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Not typically, as long as the proper procedures (as described in question 3.9) are followed and the correct documents lodged.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

In general, no.

However, in a project financing context, there may be Commonwealth, State or Territory and local licences, consents and permits required for the particular project (for example, projects situated on publicly-owned land or dealings in government-issued leases and licences, including security arrangements).

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

There are no specific documentary or execution requirements for the taking of security. The general law applies with respect to the documentation and execution of contracts of security.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Restrictions are contained in section 260A(1) of the Corporations Act as follows:

> "*A company may financially assist a person to acquire shares (or units of shares) in the company or a holding company of the company only if:*
>
> *(a) giving the assistance does not materially prejudice:*
>
> *(i) the interests of the company or its shareholders; or*
>
> *(ii) the company's ability to pay its creditors; or*
>
> *(b) the assistance is approved by shareholders under section 260B (that section also requires advance notice to ASIC); or*
>
> *(c) the assistance is exempted under section 260C.*"

The "material prejudice" precondition has been held by the courts to be a question of fact. As this is a difficult and uncertain assessment, this limb is not often relied upon.

The shareholder approval limb under section 260B involves a process known as a "whitewash", with:

(a) either:

(i) a special resolution passed at a general meeting of the company, with no votes by the person acquiring the shares of the company or associates of that person; or

(ii) a resolution agreed to, at a general meeting, by all ordinary shareholders;

and

(b) if the company will be a subsidiary of a listed Australian corporation immediately after the acquisition in question, the approval of shareholders of the listed corporation; and

(c) if immediately after the acquisition, the company will have an ultimate Australian holding company, the approval of shareholders of that ultimate Australian holding company.

Exemptions from the financial assistance regime under section 260C include financial assistance in the ordinary course of dealing by a company whose ordinary business includes providing finance, approved employee share schemes and other exceptions.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Australia recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The use of "agents" and "trustees" is customary in syndicated lending arrangements.

The agent may hold security on behalf of the syndicate (in a trust capacity) or a separate "security trustee" may hold that security (more typical).

The security holder's powers are regulated under a trust deed. Provided the action is authorised under the security documents, the security holder will be able to enforce the loan documentation and security and apply the proceeds from the collateral to the lenders' claims.

5.2 If an agent or trustee is not recognised in Australia, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

See the response to question 5.1.

5.3 Assume a loan is made to a company organised under the laws of Australia and guaranteed by a guarantor organised under the laws of Australia. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Loan documents typically permit assignments or substitutions by a lender; the requirements for a valid substitution or assignment are governed by the relevant clauses in the loan document. The question of whether the guarantee is enforceable by Lender B must be determined by examining the scope and terms of the guarantee.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

As a general rule, withholding tax on interest to foreign lenders is deductible at a rate of 10%. Exemptions are available for bonds and other debentures (including loans) issued under section 128F of the *Income Tax Assessment Act* 1936 (Cth) if prescribed "public offer" tests are met, but this is unlikely to be applicable to a syndicated loan.

Some of Australia's double taxation conventions, including those with the US and the UK, prevent interest withholding tax applying to interest derived by:

(a) the government and certain government authorities and agencies in the specified country; and

(b) a "financial institution" which is resident of a specified country and is unrelated to and dealing wholly independently from the relevant issuer.

Enforcement proceeds are entitled to any withholding tax exemptions that would otherwise apply to interest payment in respect of the relevant loan. Payments will also avoid withholding tax if the payor is a non-resident of Australia and the payment is not attributable to a permanent establishment in Australia.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

None, apart from certain venture capital or research and development incentives which typically wouldn't apply to syndicated lending.

6.3 Will any income of a foreign lender become taxable in Australia solely because of a loan to or guarantee and/or grant of security from a company in Australia?

Income of foreign lenders which is in the nature of interest will not be subject to tax in Australia solely because of a loan or guarantee and/or grant of security from a company (other than withholding tax, see question 6.1).

Other income derived from a loan, guarantee or grant of security (such as fees and other charges) may be subject to tax in Australia where it has an Australian source. The fact that the income arises from a loan to or guarantee or grant of security from an Australian company will not be determinative of the source of that income, but will be relevant in determining its source.

The tax treatment of such income is affected by the "business profits" article in many of Australia's double tax conventions. Where applicable, the business profits of a foreign resident are not subject to tax in Australia, regardless of their source (unless they are attributable to a permanent establishment in Australia).

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

See the response to question 3.9.

In addition to this, the only fees of significance are legal fees which would typically be reimbursed by the borrower or covered in the arranger's fee.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Australia's thin capitalisation rules do not distinguish between Australian and foreign debt.

It is possible for the transfer pricing provisions to apply to foreign borrowings. However, where the loan is an ordinary commercial arrangement made on arm's length terms, these provisions are unlikely to be applicable.

7 Judicial Enforcement

7.1 Will the courts in Australia recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Australia enforce a contract that has a foreign governing law?

Yes, provided the choice of law was made on a *bona fide* basis and without the primary purpose of avoiding the laws of any another jurisdiction. Governing law is a question of fact; it is usually provided for in loan documentation with an express choice of law clause.

Australian courts will enforce a contract that has a foreign governing law, provided the enforcing parties prove as matters of fact those parts of the foreign law which are relevant to the enforcement action.

7.2 Will the courts in Australia recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Final foreign judgments will generally be recognised and enforceable in Australian courts without re-examining the merits.

A judgment obtained in specific foreign courts, including English courts, is granted statutory recognition upon registration under the *Foreign Judgments Act* 1991 (Cth) (the "**FJ Act**") provided the judgment:

(a) is for a sum of money;

(b) could be enforced in the relevant foreign jurisdiction;

(c) has not been stayed or satisfied in whole; and

(d) is registered within 6 years of the date on which the foreign judgment is given.

Foreign judgments which fall outside the ambit of the FJ Act, such as judgments obtained in a New York court, will still be enforced at common law without a re-examination of the merits if an action in debt is bought in an Australian Court, provided:

(a) the foreign proceedings did not involve a denial of the principles of natural justice as recognised by Australian courts;

(b) the foreign judgment is not contrary to public policy in Australia;

(c) the foreign judgment was not obtained by fraud;

(d) the foreign judgment does not concern the same issues dealt with in a previous judgment; or

(e) the foreign judgment is not the subject of a declaration or order made by the Attorney General under the *Foreign Proceedings (Excess of Jurisdiction) Act* 1984 (*Cth*).

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Australia, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Australia against the assets of the company?

(a) The time required to file suit and obtain judgment will depend on the Australian court in which proceedings are commenced, but will typically take between 6 and 18 months. Enforcing a judgment could take a further 12 months or more, depending on how readily the secured assets can be liquidated. There is no disadvantage for foreign lenders as compared with domestic lenders, other than logistics.

A fast track commercial list is available in the Federal Court which may shorten the time taken to obtain judgment to around 6 months, but the enforcement process still needs time to occur. Alternative dispute resolution may also be available.

(b) If a foreign judgment is recognised as discussed in our response to question 7.2 and a review on the merits is not required, enforcement may only take 2 to 3 months. If, however, the borrower or guarantor contest the enforceability of the foreign judgment or a merits review is required, enforcement may take 12 months or more.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Enforcement options are regulated by the relevant security documents, the Corporations Law and the PPS Act. The PPS Act contains certain enforcement provisions, but lenders typically require these provisions to be waived by the grantor of the security.

If enforcement results in a change in ownership, control or management of a regulated asset, consent may be required from the regulatory body. Similarly, if the incoming entity has existing interests in the industry or sector, regulatory restrictions such as cross-ownership, ring fencing or merger controls may need to be considered.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Australia or (b) foreclosure on collateral security?

Foreign and domestic creditors are treated the same under Australian law, subject to any foreign investment and ownership restrictions which may prevent a foreign lender from enforcing a security.

7.6 Do the bankruptcy, reorganisation or similar laws in Australia provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

It is common in Australia for companies in financial difficulty to appoint a voluntary administrator. Entering voluntary administration imposes a moratorium on enforcement action by all creditors, expect for a secured party with a security interest in the whole, or substantially the whole of the assets of the company provided the secured party enforces its security within 13 business days of being notified of the administrator's appointment.

There is no other moratorium on enforcement under Australian law, however, notwithstanding that the security document may authorise it to do so, a receiver appointed by a secured party will not be able to carry on the business of the company while a liquidator is appointed.

7.7 Will the courts in Australia recognise and enforce an arbitral award given against the company without re-examination of the merits?

Generally, Australian courts will recognise and enforce domestic and international arbitral awards without re-examination of the merits. Under the uniform *Commercial Arbitration Acts*, which have been adopted in each Australian State jurisdiction except the Australian Capital Territory, arbitral awards must be enforced by a court unless it would run counter to the most basic notions of morality to do so. The *Commercial Arbitration Acts* bring Australian domestic law in to line with the UNCITRAL Model Law with is implemented in Australia under the *International Arbitration Act* 1974 (Cth).

Australian courts will enforce contracts requiring submission of a dispute to arbitration provided the arbitration agreement is broad enough to cover the dispute and the subject matter is arbitrable.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Lenders are not generally restricted from enforcing rights as a secure party during bankruptcy proceedings, except where a voluntary administrator has been appointed. This issue is discussed in response to question 7.6.

Once a liquidator has been appointed, a secured party may still enforce its rights, but is prevented from continuing to run the business.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Clawback rights only exist upon the winding up of a company and may arise in respect of unfair loans, unreasonable director-related transactions, related party transactions, insolvent transactions, uncommercial transactions, transactions providing an unfair preference to one or more creditors and transactions for the purpose of defeating, delaying or interfering with the claims of any other creditors. The applicable time period within which a transaction can be declared void depends on the transaction type, but the transaction may have occurred up to four years before a winding up of the company begins. The preference period for unfair preferences or uncommercial transactions that occur while a company is insolvent, or cause a company to become insolvent, is six months.

Preferential creditors include the Australian Taxation Office and some employee entitlements.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

There are no entities that are excluded from bankruptcy proceedings, but special insolvency regimes do apply to Authorised Deposit-taking Institutions ("**ADIs**") such as banks and insurance companies. These regimes are overseen by APRA which has the power to control the operations of an insolvent institution with the aim of restoring it to financial health.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Self-help remedies are available so that the secured party or a receiver appointed by it can take possession, collect income from, manage and dispose of collateral security without restriction or regulatory consent. There is no requirement for assets to be publicly auctioned, but the secured party must take reasonable steps necessary to obtain a fair value for the assets in the circumstances.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Australia?

Under the FJ Act a party's submission to the laws of a foreign jurisdiction is binding and will be enforceable in an Australian court, so long as the subject of the agreement is not illegal under Australian law and is not contrary to Australian public policy.

Sovereign immunity is addressed by the *Foreign States Immunities Act* 1985 (Cth). Generally, a waiver of immunity will be enforceable.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Australia?

See the response to question 9.2.

10 Other Matters

10.1 Are there any eligibility requirements in Australia for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Australia need to be licensed or authorised in Australia or in their jurisdiction of incorporation?

There are no eligibility requirements to lend to a company in Australia or to be appointed as an agent, security agent or security trustee under a facility. Where loans are syndicated, the lead arranger normally takes on the role of agent and may also act as security agent. Alternatively, a third party security trustee may be appointed.

Where related companies provide loans to each other, financial assistance provisions of the Corporations Act need to be considered (see the response to question 4.1). Also, foreign lenders need to consider whether they are carrying on a business in Australia requiring registration under the Corporations Act or need to register as a Foreign ADI under the *Banking Act* 1959 (Cth).

In Australia, ADIs must be licensed and the consumer credit sphere is heavily regulated.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Australia?

Tax structuring remains one of the most significant considerations. Australian tax law is complex and evolving and it is important to seek tax advice when structuring any loan facilities.

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Various borrowers including CHS Inc, Exego Group, SAF Holland, Attwood and Myer.

Project Finance
Various matters including Griffin Power - Acquisition of Bluewaters 1 & 2 Power Station; Australian Synchrotron - Monash University; Department of Defence - The Phase 2 Single Leap Living Environment and Accommodation Precinct Project and Nighi Son 2 Power Station - Edf and Sumitomo.

Restructuring & Insolvency
Various matters including RED Group Administrator; Agrium Asia Pacific Ltd - Hi Fert Pty Ltd; Hilco Trading - Allans Music Group and Fusion Group and Power-One Energy Solutions - SI Clean Energy, Redset Group, 2BC Energy and Others.

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IFLR 1000: recognised as a leading lawyer in Project Finance (2011-2013).
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Asialaw Leading Lawyers (2013).
ALB Australasian Law Awards: David was nominated as Managing Partner of the Year (2010).

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Bermuda

Jeremy Leese

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Bermuda?

The downturn in the global economy over the last few years has decreased the level of business activity in the lending market in Bermuda. In response, lenders have been renegotiating and extending loans, and protecting their security positions.

This chapter concerns security matters relating to companies regulated by the Companies Act 1981 (*Companies Act*). There are three broad company categories:

Local companies: These provide goods or services in the local marketplace to Bermudians. They are subject to ownership and control restrictions.

Exempted companies: These are not permitted to conduct business in the local marketplace except in limited circumstances or under a licence issued on application to the Minister of Finance (MOF). The majority of foreign-owned companies that are incorporated in Bermuda are registered as exempted companies.

Overseas or permit companies: These are foreign companies that are entitled to do business in Bermuda under a permit issued by the MOF.

1.2 What are some significant lending transactions that have taken place in Bermuda in recent years?

There has been activity with regard to the tourism section, in terms of provision of funds for hotel redevelopment and acquisition financing for purchases, as well as continuing borrowing by multi-national groups whose holding company is incorporated in Bermuda, such as large shipping groups.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Guarantees are commonly used in financing transactions in Bermuda. The borrower's parent company or shareholders typically gives guarantees to the lender. There is no equivalent in Bermuda to the English Statute of Frauds 1677, and no requirement that a guarantee obligation be evidenced in writing.

Guarantees can be created in a loan or facility agreement, provided that the guarantor is also a party to that agreement, or in a separate document. The guarantee can be limited to a pre-determined maximum amount or, in the case of guarantees given by regulated entities (for example, insurance companies), by reference to their statutory capital and liquidity requirements.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Generally, a Bermudian company can (unless its memorandum of association or bye-laws provide otherwise) guarantee the debts of another party. However, the directors of the company must exercise their powers in the best interests of the company. When meeting to consider a transaction, the directors should specifically discuss and form a view as to whether the proposed transaction is in the company's best interests. The minutes of the meeting should reflect that discussion and view.

Clearly the issue of whether any benefit ensues to the company as a result of giving a guarantee is a part of this discussion. However, it is not the only factor and absence of direct benefit would not alone rule out a guarantee being validly given by a Bermudian company.

2.3 Is lack of corporate power an issue?

It should not be, as Bermudian companies now have, by statute, the capacity, rights, powers and privileges of a natural person and their memoranda of association and bye-laws will generally be drafted widely enough to cover most obligations to be imposed thereon in a secured lending transaction.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental or other consents or filings are needed for a Bermudian company to give a guarantee. However, guarantees in connection with loans to the following are prohibited without the consent of shareholders holding 90% of the voting shares:

(i) directors;

(ii) spouses and children of directors; and

(iii) directors of certain related companies.

This general prohibition does not apply to guarantees that a company gives in the ordinary course of its business.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

None specifically, but the directors must always act in what they consider to be the company's best interests. Clearly, if a company is in severe financial difficulty or even technically insolvent, it is hard for the directors thereof to justify that it is in its best interests to enter into a multi-million dollar guarantee.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are currently no restrictions in Bermuda on the making of payments by a company (local or exempted) to a foreign lender under a guarantee, and exempted companies have never been subject to foreign currency controls. However, Bermuda's exchange control legislation has not been repealed.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

There are very few restrictions on the types of collateral available to secure lending obligations under Bermuda law – real estate, shares in companies, plant and machinery, aircrafts, ships and cash deposits are among the assets which can be used as security.

Certain assets may be incapable of assignment, for example, the company's rights under a licence granted by a governmental or regulatory body. Certain assets may also contain covenants against assignment without third party consent.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Security can usually be granted by a general security agreement, such as debenture-style security documents which set out, and cover, all assets of a company and provide for fixed and floating charges, as appropriate.

Certain types of asset require special consideration. Security can be granted over future assets – it is possible to create a fixed charge over specifically identified future assets, provided that safeguards are put in place to ensure that when the future assets come into existence, the assets are under the control of the chargee. Generally, it will not be possible to create a fixed charge over all future property, and it is likely that only a floating charge will be available.

Taking security over fungible tangible assets requires that the assets be appropriated to the agreement. It is possible to take charge over a class of assets, even where those assets are pooled and later changed, provided that the chargee has a sufficient degree of control over the changes and has the ability to decide that changes will not be made to the asset pool. To take effective security over a company's intangible fungible assets, it is necessary to identify those assets.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Real Property

Real estate is comprised of:

(i) land, including land covered by water;

(ii) immovable items located on land, for example:

- buildings;
- pools;
- fixtures;
- walls;
- fences; and
- improvements; and

(iii) any estate, interest, right or easement in or over any land or building.

Title to land is unregistered. Estates in land include freehold and leasehold. Leases can be long (typically 99 or 999 years) or short (typically three to five years).

Specific rules apply to companies acquiring land in Bermuda:

Local companies can:

- Acquire and hold land in Bermuda if:
  - permitted to do so under its memorandum of association;
  - it has obtained the MOF's authorisation; and
  - the acquisition or holding is required for the purpose of the company's business.
- Enter into a lease of land in Bermuda:
  - for a term not exceeding 50 years, provided that land is required for the purpose of the company's business; or
  - for a term not exceeding 21 years, with the MOF's consent, to provide accommodation or recreational facilities for its officers and employees.

Exempted companies cannot acquire land in Bermuda. Exempted companies can enter into leases not exceeding 50 years for business purposes or, with the MOF's consent, for a term not exceeding 21 years to house employees and officers (*section 129, Companies Act*).

The following forms of security are commonly used:

Legal mortgage. A legal mortgage transfers the legal interest from the borrower (mortgagor) to the lender (mortgagee), subject to the borrower's right to redeem the property. The lender holds the legal title and the borrower retains possession.

Equitable mortgage. An equitable mortgage is a contract that can be enforced under a court's equitable jurisdiction. The borrower transfers the beneficial or equitable interest to the lender and retains the legal interest and possession.

Equitable charge. An equitable charge does not involve the transfer of the legal or equitable interest in, or possession of, property. It is an encumbrance on the borrower's property giving the lender the equitable right to sell the property for payment. A charge can be either fixed (attaches immediately to the borrower's asset) or floating (that is, a charge over a class of assets, which can later "crystallise" when certain events occur) and can potentially cover a rental lease forming part of the company's assets.

The following formalities must be complied with:

Legal mortgage. The mortgage must be created by a deed, and validly executed by the parties. The deed attracts stamp duty (*see question 3.9 below*). The deed (and prescribed memorandum setting out the mortgage particulars) must be submitted to the Office of the Registrar General (*section 1(1), Mortgage Registration Act 1786* (MRA)). An entry is made in the book of mortgages maintained by the Registrar General in relation to land and the deed returned with the registration details noted on it. Priority is governed by the order in which mortgage deeds are deposited for registration. The lender then holds the title deeds.

Equitable mortgage. The mortgage must be in writing (a deed is

not required). It is commonly created by a memorandum of deposit of deeds outlining the terms under which the title deeds are deposited, which creates the equitable mortgage. All other formalities are the same as for a legal mortgage.

Charge. The charge must be in writing and registered under the MRA, and the MRA determines the charge's priority. Charges usually must be registered with the Registrar of Companies (ROC) under section 55 of the Companies Act to protect priority over assets relating to property (such as lease payments).

Most mortgages over Bermuda real estate are held by Bermuda banks. An overseas company (which, for this purpose, includes an exempted company) can hold a mortgage over land in its corporate name in the same way as a local company. However, if the total sum secured exceeds BD$50,000, the MOF's consent is required (*section 144(1), Companies Act*). If the overseas company takes title to the property as part of the enforcement, the land must be sold within five years of taking possession. An overseas company also requires the approval of the MOF to enter into a mortgage or charge over land, as the company is considered a restricted person (*section 80, Bermuda Immigration and Protection Act 1956*), unless the company is either:

- licensed under the Banks and Deposit Companies Act 1999; or
- a non-resident insurance undertaking under the Non-Resident Insurance Undertaking Act 1967.

Plant, machinery and equipment

There is no statutory definition of tangible property. Common law principles determine whether something is tangible personal property. However, it is generally accepted that plant, machinery and equipment fall within the ambit of what constitutes tangible movable property.

The Companies Act defines the expression "charge" in very broad terms, and any interest created in property by way of security, including any mortgage, charge, assignment, pledge, lien or hypothecation of the assets of a company can be registered with the ROC. The nature of the specific tangible movable property determines the most suitable form of security. The most common form of security for plant, machinery and equipment is a fixed charge created by a debenture or a general security agreement.

Charges by Bermudian companies over Bermuda property do not need to be registered to be valid and enforceable. However, the date of the registration of security documents determines the priority of charges or mortgages or other security documents, and therefore they are usually registered. Most charges are registered at the ROC under section 55 of the Companies Act for a local or exempted company and section 61 for an overseas company granting security over Bermuda property. The following must be filed with the ROC:

- an original of the security document (certified copies will generally be accepted);
- a Form 9 (particulars of a mortgage or charge); and
- the appropriate fee (*see later*).

The registration is effective as at the time of filing, and not the time the certificate of registration is issued. Special registration requirements apply to certain assets such as aircraft and ships (*see below*).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

The benefit of contractual rights claims under insurance policies and debts are the most common types of claim or receivable over which security is granted in Bermuda legal practice. In certain limited circumstances, it is possible to assign a cause of action, but in practice such assignments are very rare because of the public policy rules against maintenance and champerty. The proceeds of a cause of action may be assigned.

Contractual rights may be mortgaged by way of assignment, and an "all assets" debenture will typically provide a mechanism for taking security over the benefit of the security provider's interest in specific "material contracts". In addition, rights under insurance policies and the proceeds of any claims thereunder may be assigned. In both instances, the assignment is perfected by giving notice in writing of the assignment to the counterparty to the material contract or the relevant insurer, and the secured creditor may also require that its interest in the proceeds of an insurance policy is noted on the policy by the insurer.

Debts may be mortgaged by way of assignment, in which case the secured creditor becomes the owner of the debt. Alternatively, debts may be charged where security is being taken over a large pool of receivables, the security will usually take the form of a floating charge.

Security over large individual debts, such as inter-company loans, is usually granted through a mortgage of the debt, effected by assignment to the secured creditor, with a proviso for reassignment to the mortgagor when the secured obligations have been discharged.

The Supreme Court Act 1905 provides that a legal assignment (an unconditional assignment of the debt for the time being not by way of charge only) may be made by giving the debtor notice in writing of the assignment. An equitable assignment may be made without any requirement for notice or other formalities.

A legal assignment entitles the assignee to enforce the debt directly against the debtor. Where there has been an equitable assignment, the assignee may convert it into a legal assignment by giving the debtor written notice of the assignment.

Both assignments and charges are generally registered with the ROC to protect the second creditor's priority.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

In 1990, Bermuda enacted special legislation to deal with the uncertainty caused by the decision in Re Charge Card Services Ltd. [1987] Ch. 150. The Charge and Security (Special Provisions) Act 1990 expressly provides that a bank may take security over its own indebtedness to its customers.

The most common form of security over cash deposit is a "charge back" whereby a bank takes security over cash deposited with it, or otherwise over indebtedness which it owes to the chargor. A 'charge back' is perfected by attachment without further act.

Where security is created in favour of a foreign bank over a deposit with a Bermuda bank, the most common form of security is a control agreement whereby the Bermuda bank agrees it will not exercise any rights of set off against the relevant account and will not permit any withdrawals from the relevant account without the consent of the foreign bank. The security provider and the foreign bank will agree that the security provider is not permitted to make withdrawals from the relevant account or otherwise exercise any of its rights as beneficial owner of the cash deposit until the secured obligations have been discharged, with the result that the security provider's cash deposit becomes a "flawed asset".

Charges over deposits are normally registered with the ROC.

3.6 Can collateral security be taken over shares in companies incorporated in Bermuda? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

The most common types of collateral over which security is granted is shares issued by privately held companies.

Bermudian companies are prohibited from issuing bearer shares. The usual security granted over certificated shares is an equitable mortgage. Legal mortgages of shares are rare in Bermuda.

Where shares are uncertificated, it is generally advisable to require that the shares be certificated for the purposes of obtaining an equitable mortgage, failing which, a fixed charge may be taken over uncertificated shares.

Where a Bermudian company gives security over dematerialised securities traded in a market outside Bermuda the usual practice is that security will be created in accordance with the laws of the place where the securities are situated and transferred.

On the other hand, where the relevant dematerialised securities are traded electronically on the Bermuda Stock Exchange (BSX) within the Bermuda Securities Depositary (BSD), then the BSD regulations apply. All securities held in the BSD are registered in the name of BSD Nominee Ltd., which is a subsidiary of the BSX. All of the Bermuda banks are member participants in the BSD ("Member Banks"). When a Member Bank proposes to make a loan secured by the security provider's interests in securities held within the BSD, the security provider as beneficial owner ("BO") will instruct its broker to deliver the relevant securities within the BSD to the Member Bank as custodian on an intra-member basis.

The BO will also grant the Member Bank authority to sell the securities on an event of default, and thereby realise its security. For its part, the Member Bank as custodian will agree to re-deliver the securities to the BSD's broker when the BO discharges its obligations to the Member Bank.

It is not mandatory for Bermuda law to govern a charge over the shares of a Bermudian company, although it is recommended. A charge over shares governed by Bermuda law will typically be executed as a deed. A share charge generally requires the delivery of ancillary documents to the chargee, including:

(i) executed but undated share transfer forms and share certificates;

(ii) undated letters of resignation, letters of authority, and powers of attorney from the directors, and an irrevocable proxy from the shareholder;

(iii) evidence of approval of the directors of the company whose shares are being charged, if the bye-laws of that company so require;

(iv) certified copies of directors' resolutions approving the granting of the charge; and

(v) an undertaking from the company, in the form of a deed, that it will register the share transfer form.

Share charges generally are registered with the ROC to protect priority.

Except in the case of shares listed on an appointed stock exchange, prior permission must be obtained from the Bermuda Monetary Authority (BMA) for the transfer of shares of an exempted company or a local company owned by a non-Bermudian. However, the BMA has granted a general permission under the Exchange Control Regulations 1973 for the granting of a charge to a licensed bank or licensed lending institution in Canada, the US, Australia, EU countries, Bermuda, Hong Kong, Singapore, Norway, Switzerland and Japan (*Notice to the Public dated 1 June 2005*). This permission extends to transfers to those licensed lenders on enforcement of the charge.

The general permission does not extend to:

(i) charges over shares of Bermuda insurance companies; and

(ii) sales by the licensed lenders to third parties as part of the enforcement process.

BMA permission is not required where the securities being charged either do not carry the right to vote, or appoint one or more directors of the issuer, or are not by their terms convertible into securities carrying such rights.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Inventory falls within the ambit of what constitutes tangible property, which can be secured under Bermuda law. The most common form of security for inventory is a floating charge, which can be registered with the ROC.

Charges by Bermudian companies over Bermuda property do not need to be registered to be valid and enforceable. However, the date of the registration of security documents determines the priority of charges or mortgages or other security documents, and therefore they are usually registered. Most charges are registered at the ROC under section 55 of the Companies Act for a local or exempted company and section 61 for an overseas company granting security over a Bermuda property. The following must be filed with the ROC:

- an original of the security document (certified copies will generally be accepted);
- a Form 9 (particulars of a mortgage or charge); and
- the appropriate fee (*see later*).

The registration is effective as at the time of filing, and not the time the certificate of registration is issued.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, these are both very common circumstances in which a Bermudian company will grant a security interest over its assets.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The Stamp Duties (International Business Relief) Act 1990 abolished stamp duty on most documents (including loan and security documents) executed by "international businesses" (including exempted and overseas companies). However, this exemption does not extend to stamp duty payable on instruments involving Bermuda real estate.

A legal mortgage attracts:

(i) stamp duty at the rate of 0.25%, where the sum secured is no more than BM$400,000; and

(ii) stamp duty at the rate of 0.5%, where the sum secured is more than BM$400,000.

Local companies are liable for stamp duty on the execution of most documents unless the relevant transaction can be brought within the

relatively narrow statutory exemptions in section 46(c) of the Stamp Duties Act 1976.

The following registration fees are payable for a charge against a company at the ROC:

(i) over exempted or overseas companies, BM$328 where the amount secured is less than BM$1 million and BM$574 where the amount secured is greater than BM$1 million (*sections 55 and 61, Companies Act*); and

(ii) over local companies: BM$164.

The fees for registration of an aircraft mortgage:

(i) where the amount secured by the mortgage does not exceed BM$5 million, the fee is BM$200;

(ii) where the amount secured by the mortgage does not exceed BM$20 million, the fee is BM$400; and

(iii) where the amount secured by the mortgage does exceed BM$20 million, the fee is BM$800.

Stamp duty in the amount of BM$25 is payable on all notarial acts, except for protests on bills of exchange or promissory notes. If there are exhibits to the document, an additional BM$25 must be affixed to each exhibit.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Usually, provided all documentation required to be filed or registered is provided promptly, filings and registrations can be completed quickly after security has been executed, and notifications received as to their acceptance for filing or registration, and any certificates of registration, returned in a matter of a few days.

As for expense, please see the answer to question 3.9. However, it is worth pointing out that stamp duty generally is not payable when security is granted over the assets of an exempted company, so there is no need to structure a transaction to minimise Bermuda tax consequences. Where local companies are granting security, there may be ways to minimise the stamp duty payable, such as using one composite security document to cover various assets. It is also possible to minimise registration fees by using a single document. However, registration fees usually are not a material issue in determining the structure of security arrangements.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Subject to the specific circumstances highlighted above with regard to the BMA's consent being required for the granting of security over the shares of certain types of companies or over the assets of certain regulated entities (such as insurance companies), no such consents are required for a Bermuda company to grant security over its assets.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There are no specifically Bermudian concerns to note, but the usual issues about ensuring that there is sufficient collateral to secure the variable amount outstanding under the credit facility and that the definition of secured obligations is drafted widely enough to encompass all amounts so borrowed subsist.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

As long as documents are executed in accordance with a Bermudian company's memorandum of association and bye-laws, the Companies Act and authorising board resolutions, there is no need for Bermuda law purposes for anything more than execution under hand by one authorised signatory (who does not have to be, although usually is, a director of the company). For foreign law governed security documents, one needs to ensure compliance with any requirements of such laws with regard to enforceability, security filing/registration and admissibility into evidence in court proceedings.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

(a) Shares of the company

The statutory rule against financial assistance being given by Bermudian companies was abolished by amendments to the Companies Act passed in 2011.

(b) Shares of any company which directly or indirectly owns shares in the company

See above.

(c) Shares in a sister subsidiary

See above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Bermuda recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The concept of both agency and trustee is well recognised in Bermuda.

The agent bank is often the arranger of the facility, and is normally chosen by the syndicate members. An agency arrangement governed by foreign laws will be recognised by Bermuda courts. Typically, the agent acts as a conduit for payments, and for dissemination of information to syndicate members. In a pre-insolvency situation, the agent bank usually represents the syndicate members in dealing with the enforcement of the lenders' remedies. On the liquidation of the debtor company, each lender bank may submit proof of debt or the agent bank may do this on behalf of the syndicate members, provided that the agent bank is able to submit a proof of debt on its own account.

With regard to security trustees, generally, only the security trustee can enforce the security on the creditors' behalf, and the borrower's individual creditor is precluded from taking independent action against the borrower. By virtue of the UK Recognition of Trusts Act 1987 (Overseas Territories) Order 1989, trusts from other common law jurisdictions and certain types of similar concepts that apply in civil law jurisdictions generally are recognised in Bermuda.

5.2 If an agent or trustee is not recognised in Bermuda, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable in Bermuda.

5.3 Assume a loan is made to a company organised under the laws of Bermuda and guaranteed by a guarantor organised under the laws of Bermuda. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

There are no special requirements to ensure a transferred loan is enforceable by the new lender. However, to ensure priority of registration of any related security, notification of the transfer of the secured obligations should be notified to the Registrar of Companies on the appropriate form.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

No Bermudian company is required or entitled under Bermuda law to make any deduction or withholding in respect of any Bermuda taxes from or with respect to any payment to be made by it under a facility agreement it has entered into, whether of principal, interest, fees or otherwise.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

No foreign lender will be deemed to be resident, domiciled or carrying on business, or subject to any tax, in Bermuda by reason only of the execution, delivery, performance and/or enforcement of any loan facility agreement or related security document where the borrower or guarantor is incorporated in Bermuda.

6.3 Will any income of a foreign lender become taxable in Bermuda solely because of a loan to or guarantee and/or grant of security from a company in Bermuda?

Please see the answer to question 6.2 above.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

None, other than the fees set out in answer to question 3.9.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

The fact that the lenders are overseas makes no difference to a Bermudian borrower's position.

7 Judicial Enforcement

7.1 Will the courts in Bermuda recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Bermuda enforce a contract that has a foreign governing law?

The express choice of the applicable foreign governing law as the governing laws of any loan facility agreement or related security document would be deemed a proper, valid and binding choice of law, and would be recognised and given effect to in any action brought before a court of competent jurisdiction in Bermuda, except for those laws:

(i) which such courts consider to be procedural in nature;

(ii) which are revenue or penal laws; or

(iii) the application of which would be inconsistent with public policy, as that term is interpreted under Bermuda law.

7.2 Will the courts in Bermuda recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

A foreign judgment given by a New York court or an English court (a "foreign court") is not of itself enforceable in Bermuda, but a final and conclusive judgment *in personam* obtained in a foreign court against any Bermudian company based upon any loan facility agreement or related security document under which a sum of money is payable, (other than a sum of money payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty) may be enforced by separate action before a Bermuda court, provided that:

(i) the foreign court had jurisdiction in relation to the subject matter of the dispute under all applicable laws and Bermuda conflicts of laws rules (and an express, contractual submission to jurisdiction is sufficient for these purposes);

(ii) the judgment was not obtained by fraud or in a manner opposed to natural justice;

(iii) the relevant obligor received notice of the proceedings and was afforded an adequate opportunity to present its defence;

(iv) the enforcement of the judgment would not involve the enforcement of foreign revenue, penal or other public laws or otherwise be contrary to Bermuda public policy;

(v) there has been due compliance with the provisions of the Judgments (Reciprocal Enforcement) Act 1958, as amended, where applicable (it applies to English courts, and those of most of the commonwealth countries, but not the courts of the United States);

(vi) enforcement of the judgment is not precluded by the Protection of Trading Interest Act 1981, as amended (which prohibits the enforcement of judgments for multiple damages and certain other foreign judgments); and

(vii) the proceedings to enforce the judgment of the foreign court are commenced within six years of the date of such judgment.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Bermuda, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Bermuda against the assets of the company?

The court system in Bermuda is efficient and responsive. A liquidated money claim for recovery pursuant to obligations set out in a loan agreement or guarantee is normally issued in the Commercial Court of the Supreme Court by way of a writ of summons under Order 6 Rules of the Supreme Court 1985. If the company is registered in Bermuda, the Defendant must file a memorandum of appearance through its attorneys within 14 days of service of the writ of summons in accordance with Order 12 Rules of the Supreme Court 1985. The time limit is extended if it is necessary to serve proceedings on a Defendant out of the jurisdiction.

If the Defendant does not enter an appearance within the period allowed, the Plaintiff may have a judgment entered for the liquidated claim in accordance with Order 13 Rule 1 Rules of the Supreme Court 1985.

If a notice of appearance is served but it is considered that the Defendant has no legal merit in defending the claim, an application for Summary Judgment can be made by the Plaintiff under Order 14 Rules of the Supreme Court 1985. This application is made by summons and supported by affidavit.

If the application is not defended then judgment can be entered on the first return date which would be approximately 4-5 weeks from the issue of proceedings. If the application is defended then directions are given at the application return date and the Defendant will have leave to serve an affidavit in answer and the Plaintiff a further affidavit in reply. The application is then relisted for a hearing which would normally take place 12-14 weeks after the original proceedings were served on the Defendant.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There are no significant restrictions other than following due process in any proceedings to enforce judgment, obtain possession of property or obtain an order for the sale of the property.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Bermuda or (b) foreclosure on collateral security?

There are no specific restrictions that apply to a foreign lender in the event of filing suit against a company in Bermuda or foreclosing on collateral security. However, it should be noted that the Defendant to any writ of summons or Court controlled enforcement process by a foreign lender can apply for security for costs pursuant to Order 23 Rules of the Supreme Court 1985 on the basis that the Plaintiff is ordinarily resident out of the jurisdiction. Following application for security, the Court may order the granting of an appropriate security for the payment of the Defendant's costs as a condition of the Plaintiff continuing with the litigation. The grant of such an order is intended to protect the Defendant in the event that the Defence to the Claim is successful. The security is released if the Plaintiff is ultimately successful at trial or prior summary determination of the claim.

7.6 Do the bankruptcy, reorganisation or similar laws in Bermuda provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

In a compulsory winding up of a company in Bermuda, following the presentation of a petition, the company or a creditor or contributory may apply to Court under s.165 Companies Act 1981 to have any creditor's claim stayed. The Court may stay the proceedings on such terms as it thinks fit. Following the grant of a winding up order or the appointment of a provisional liquidator, no action or proceeding may be commenced or continued without the leave of the Court pursuant to section 167(4) of the Companies Act. The generic rationale is for the claims of unsecured creditors to be stayed to allow an orderly distribution to creditors *pari-passu* following the winding up of the company.

The position of a secured creditor is largely unaffected by the insolvency regime as the security interest is normally a property right of the secured creditor and as such stands outside the insolvency regime which is designed to effect the orderly distribution of the company's assets. If, on the basis of the security documents, the lender is entitled to take possession of and title to the secured property, he may after realising the security prove in the liquidation for the balance of any debt as an unsecured creditor. In the event that the assistance of the Court is needed to enforce the security then an application has to be made to the court for permission to proceed.

Under Rule 98 of the Companies (Winding-Up) Rules 1982, the liquidator may require a creditor to give up security on payment of the estimated value of the security plus a 20% uplift.

7.7 Will the courts in Bermuda recognise and enforce an arbitral award given against the company without re-examination of the merits?

An arbitration award made in a foreign country other than the United Kingdom that is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 19 June 1958 (the "New York Convention") in respect of any loan facility agreement or related security document for a definite sum obtained against the Bermudian company may be enforced with the Bermuda courts and judgment entered in the terms of the award. The Bermuda courts may only exercise its discretion to refuse leave if:

(i) a party to the arbitration agreement was, under the law applicable to him, under some incapacity;

(ii) the arbitration agreement was not valid under the governing law of the arbitration agreement;

(iii) the Bermudian company was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;

(iv) the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration, subject to the proviso that an award which contains decisions on matters submitted to arbitration which can be separated from those matters was not so submitted;

(v) the composition of the arbitral authority was not in accordance with the agreement of the parties or, failing such agreement, with the foreign governing law;

(vi) the award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority, either pursuant to the foreign governing law, or pursuant to the law of the arbitration agreement;

(vii) the subject matter of the award was not capable of resolution by arbitration; or

(viii) enforcement would be contrary to public policy.

An award made pursuant to an arbitration agreement in a foreign country including the United Kingdom that is not a party to the New York Convention may be registered under the provisions of the Arbitration Act (Cap 6) and enforced as a judgment of the Bermuda courts. There is no statutory test for the exercise of the courts' discretion in relation to registration in this manner, but in our view the court would be likely to exercise its discretion in a similar matter to the requirements for enforcing awards under the New York Convention where the award was made in a jurisdiction which is a signatory of the New York Convention.

If any such final and conclusive monetary award in an arbitration has the force of a judgment under the foreign governing law, then it may be registered and enforced as a judgment of the Bermuda court as set out above.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The start of insolvency proceedings against a Bermudian company may affect a creditor's ability to enforce its rights. All or part of a transaction may be attacked as constituting a fraudulent conveyance or a fraudulent preference. In certain circumstances, floating charges can also be attacked. Please see the answer to question 8.2 below.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Security created within six months of the start of a Bermudian company's winding up can be set aside on the application of the liquidator where the purpose of creating the security was to give a secured creditor preference over other creditors (*section 237, Companies Act*). Section 237 cross-references Bermuda's bankruptcy law regime, and section 47 of the Bankruptcy Act 1989 reproduces section 44 of the English Bankruptcy Act 1914. English or Commonwealth cases on the meaning and effect of those provisions will be relevant to their interpretation in Bermuda courts.

The start of the winding up is either:

(i) the date that the company resolves that it be wound up; or

(ii) if there is no such resolution, the time of presentation of the petition that led to the winding up.

The legislation's intention is to avoid preferences at the expense of unsecured creditors. The presence of "fraud" on the company's part or the person who is being preferred is not required. However, it is necessary to show that the company's "dominant intention" was to prefer one creditor over other creditors. The burden of proof is on the liquidator, although the court can draw inferences about intention from all the relevant facts. Payments to secured creditors are normally not preferences. However, the granting of security may be a preferential transaction that can be set aside if the relevant intention exists.

Floating charges that are created within 12 months before winding up commences can be set aside (*section 239, Companies Act*). This provision takes automatic effect, and is not dependent on the liquidator or creditor applying to set the floating charge aside. Floating charges are valid if the creditor provided new value (cash paid) at the time of, or in consideration for, the security. Otherwise, they are void to the extent that the creditor did not provide new value, unless the creditor can prove that the company was not insolvent at the time of the charge. The creditor is entitled to recover interest on the amount of money paid to the company at a statutory rate.

Notwithstanding the above, secured creditors with fixed charges may realise their security outside the winding up regime. Secured creditors also may recover the full proceeds of realisation without deductions other than for enforcement expenses. Other creditors are usually paid in the following order on an insolvency:

(i) secured creditors with fixed charges;

(ii) preferred creditors set out in section 236(1) of the Companies Act, including the government and municipalities' claims over taxes and rates;

(iii) employees, for up to BM$2,500 of wages or salary relating to the four months before the liquidation or winding up, and accrued holiday pay;

(iv) all amounts due in respect of:

- contributions payable by the company for the preceding 12 months under the Contributory Pensions Act 1970;
- any contract of insurance;
- any accrued compensation; or
- liability for compensation under the Workmen's Compensation Act 1965;

(v) secured creditors with floating charges; and

(vi) unsecured creditors.

The ranking of subordinated creditors depends on the nature of the subordination. A junior secured creditor is paid after a senior secured creditor, but before unsecured creditors. However, an unsecured subordinated creditor normally ranks after other general unsecured creditors. The priority of security depends on the registration date of the security document, priority notice or, in the case of aircraft, the notice of intention to file a mortgage.

The registration of security is not mandatory and is not essential to the creation of valid security. On insolvency, the failure of a secured creditor to perfect its security or register it as a charge does not entitle a liquidator to have the security set aside for the benefit of the company's unsecured creditors. The general position is that registration does not constitute perfection and so the method of perfection for a particular asset class is a matter of common law. Where a creditor has failed to perfect their security, there is a risk that a subsequent creditor with a security interest in the same asset may be able to achieve priority by being the first to register their security as a "charge".

On insolvency, secured creditors with fixed charges have priority over all other secured and unsecured creditors. Registration affects priority between secured lenders. If no secured creditor has registered their security, priority is determined by the time of creation.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The insolvency regime contained in the Companies Act generally applies to all Bermudian companies. The insolvency of individuals

is dealt with by the Bankruptcy Act 1989 and the Bankruptcy Rules 1990. The insolvency of partnerships is governed by the Bankruptcy Act 1989 and sections 33-40 of the Partnership Act 1902.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

The mechanisms for enforcement depend on the remedies contained in the security documents:

(i) **Powers of sale**: Mortgages (over land or other assets) or charges generally contain powers of sale. In the case of mortgages over land, the Conveyancing Act provides for limited rights of sale and foreclosure.

(ii) **Appointment of receiver**: The terms of the security may enable the lender to appoint the receiver. Alternatively, it may be possible to apply to the court for the appointment of a receiver.

(iii) **Possession of assets**: A lender may be able to take possession of charged assets or be noted as the registered owner in the case of a security interest over shares (see section 3 above).

What is the best enforcement action depends on the particular circumstances at the time.

An alternative to enforcement is a scheme of arrangement, which is available under section 99 of the Companies Act. A scheme may be used to effect the reorganisation of a company. There is a substantial body of English case law on schemes to effect the reorganisation of a company and on the relevant provisions of the Companies Act. Bermuda applies English law principles to the interpretation and implementation of schemes. A scheme must be approved by a 75% majority in value and a number majority of each distinct class of creditors (and shareholders, if the scheme also involves shareholders) and sanctioned by the court.

The court has wide powers under section 102 of the Companies Act to deal with various ancillary matters under the scheme.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Bermuda?

The submission by any Bermudian company in any loan facility agreement and related security document to which it is a party to the jurisdiction of the relevant foreign courts would be deemed valid and binding upon such Bermudian company and would be recognised as such by the Bermuda courts, if such submission is accepted by the relevant foreign courts and is valid and binding under the foreign governing law.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Bermuda?

The signature, delivery and performance of any loan facility agreement and related security document to which it is a party by any Bermudian company constitutes private and commercial acts by such company rather than public or governmental acts and, accordingly, such company is subject to suit under private commercial laws. Neither it nor any of its property has any right of immunity on any grounds from suit or from jurisdiction or execution of judgments.

10 Other Matters

10.1 Are there any eligibility requirements in Bermuda for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Bermuda need to be licensed or authorised in Bermuda or in their jurisdiction of incorporation?

There is no eligibility requirement for a lender to a Bermudian company, nor is it necessary for any foreign lender to be licensed, authorised or establish a place of business in Bermuda in order to enforce any provision of any loan facility agreement and related security document where the other party thereto is a Bermudian company.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Bermuda?

None that are material.

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After studying at Oxford University and the College of Law (York), Jeremy was admitted as a solicitor of the Supreme Court of England and Wales (now non-practising) in 1995, and called to the Bermuda Bar 2003. He was also admitted as a solicitor of the Eastern Caribbean Supreme Court (BVI Circuit) in 2008, and as a solicitor of the Eastern Caribbean Supreme Court (Anguilla Circuit) in 2011.
Following qualification with a magic circle firm in the UK, Jeremy practised corporate law there for four years before a move in 1999 to a leading offshore law firm and working in their Bermuda, Hong Kong, Jersey and British Virgin Islands offices. After a spell heading the Corporate team at a firm in Anguilla, Jeremy returned to Bermuda with MJM in August 2012.

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MJM BARRISTERS & ATTORNEYS

MJM is one of Bermuda's leading law firms. We have a broad ranging practice with an emphasis on civil and commercial litigation, banking and finance, general corporate, trusts, insolvency and restructuring. We also offer advice and services to international individual and commercial private clients.

MJM is regularly retained by leading international law firms. We offer practical, common sense advice based on an in-depth knowledge of the legal, regulatory and commercial environment in Bermuda. We also offer a high degree of partner involvement in the work that we do. Each practice area is led by a partner who is recognised as a leading practitioner in Bermuda in their respective field of specialisation. Three of our partners are ranked 'Leaders in their Field' by Chambers Global for 2013: Peter Martin for Corporate & Finance; Andrew Martin for Dispute Resolution; and Alan Dunch for Dispute Resolution. Our collective knowledge and experience across practice areas enables us to offer a comprehensive and thorough service to our clients.

Corporate & Finance

Our highly experienced team advises on all aspects of corporate and business law. Key practice areas include: aviation and ship finance; corporate borrowing and bank lending; mergers & acquisitions; joint ventures and shareholder agreements; global equity offerings and listings (IPOs); investment funds; international real estate finance; and regulatory compliance.

We have extensive experience in forming Bermuda local and exempted companies and partnerships. Our Quorum group provides a full range of corporate management and secretarial services to local and international clients.

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Bolivia

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Bolivia?

During 2013 the global economic environment continued to be turbulent, leading in Bolivia to a lower growth in demand for exports, an interruption of price increases and, in some cases, even a decrease in prices. The slow credit payments which contributed to generating the financial crisis in several countries in the euro area, a high level of uncertainty about the worsening economic situation in some of those countries and policy responses in developed economies have meant an increase in global liquidity and a slowdown of some major Asian economies. Another important factor, from a positive perspective, has been the U.S. economic recovery.

In Latin America, another trend which characterised 2013 was macroeconomic policies, which were clearly defined in order to avoid creating economic imbalances. The region, with certain exceptions, has important strengths to address economic challenges: high international reserves; low external public debt; and low inflation levels. While this gives some room for monetary and fiscal policy to moderate transient external shocks, slow global growth, as expected, has led to the adoption of a structural change in order to increase competitiveness and enhance long-term growth factors.

The dependence of Latin America in recent years on the growth of emerging countries, mainly China, still does not seem to affect the regional economical substantially. Expectations of growth in the region remain strong, with growth projections of three per cent in relation to the previous year. Given the sluggish external demand, the main source of growth is still increasing consumption, albeit with slower growth in 2013 than in 2012, while the contribution of investment will be further reduced and the negative contribution of net exports is expected to rise.

In the short term, the region will continue to benefit from favourable external financing conditions and relatively high commodity prices. The highly favourable external conditions, however, will not last forever. The prices of commodities will remain at the same level or decline slightly in the coming years, and global interest rates will eventually increase as the situation improves in advanced economies. The main challenge for policymakers in the region is to set the foundations for sustained growth in the future, under less favourable external conditions.

In 2013 the Bolivian government enacted a new Financial Services Law to regulate the financial system, protect consumers and regulate interest rates for loans, home construction and saving.

In banking and financial activities, some adjustments have been made to try and improve conditions for those people using the services, taking into account the specific realities and scenarios related to the economic situation in Bolivia. In this sense, the new financial services law respects consumers' rights and also protects banking customers. If we compare the previous law and the new Bolivian financial services law, it could be said that the previous law was more protective of financial institutions, while in the new law the protective role of the State towards clients and people is noticeable.

The new law establishes the creation of the Financial Stability Board (FSB), which will set a ceiling/floor for interest rates for housing loans and also regulate production and deposit rates for savings. Unconventional guarantees, such as lands, will also be accepted. These measures, which tend to encourage customers to pay on time, are part of a whole system of rewards to good clients introduced by the new law. The new Bolivian Financial Services Law also regulates the contracts signed by financial institutions and their customers.

The objectives of the new Financial Services Law are:

a) To protect financial consumers and introduce an investigation procedure for complaints.

b) To promote universal access to financial services.

c) To ensure that financial institutions provide safe and efficient financial transactions and facilitate economic activity and meet the needs of financial consumers.

d) To provide financing for construction, particularly for micro, small and medium urban and rural enterprises.

e) To promote financing to meet the need for housing, in particular social housing for the low-income population.

f) To encourage the equitable geographical distribution of financial services to economic and social development departments and municipalities in order to reduce inequalities.

g) To ensure the provision of financial services with quality care.

h) To protect the savings placed with authorised financial intermediaries, strengthening public confidence in the Bolivian financial system.

i) To contribute to the continuing stability of the financial system.

Aspects that have been incorporated in the new law to regulate the activities of financial intermediation and complementary financial services are:

- The development of banks to fund development, particularly for rural activities and excluded sectors and regions.

- A national financing system in order to encourage the development of communities through public and private efforts, channelling resources to finance long-term investments and promote agricultural production. This development also applies to micro, small and medium rural and urban enterprises.
- Financial support which encourages investment in capital financing, machinery, equipment, production, infrastructure and technological change.
- The inclusion of urban and rural financial services with regional, sectoral, gender and generational equity productive community partnerships.
- Universal access to financial services.
- Control system of interest rates and fees.
- The obligation of financial institutions to monitor the prices of financial services in rural areas.
- A prohibition on financial institutions unilaterally changing the interest rates or terms and conditions agreed in contracts.
- The obligation of financial institutions to promptly inform the general public about interest rates, holidays, commissions and other charges related to the products and services they offer.
- Financial institutions must provide rural financial services in order to promote sustainable integrated rural development, prioritising the promotion of agricultural production, healthy development, industrialisation and commercialisation of renewable natural resources and all economic community enterprises.
- Widening the base of securities for rural producers with alternative non-traditional collateral such as: documents in the custody of property; rural properties and vehicles; machinery subject to registration without displacement; micro warrants for SMEs; commitment documents; future sales or contracts for sale in the domestic market or for export; transfers of collection rights; guarantees or certificates of belonging to community organisations or unions; social bases; or many other alternatives.
- The allocation of resources required for production financing.
- Extended geographical coverage in order to provide all Bolivians effective access to financial services and to avoid excessive concentrations of financial institutions in certain parts of the urban geography – for example in the main cities.
- The possibility for financial institutions to develop financial innovations to achieve greater presence in rural areas.
- The obligation of new financial institutions to create incentives and to develop risk mitigation schemes that promote economic development, food security and sovereignty.
- The financing of new initiatives.
- New governance and risk management, constantly supervised by the Supervisory Authority.
- The incorporation of additional financing activities.
- The protection of the rights of financial consumers.
- The definition of illegal financial activities and financial crimes.
- Consolidated supervision of financial conglomerates.
- The expansion of the depositors' protection fund.
- The definition of the legal regime applicable to the institutions of the Regulatory Body – the Financial System Supervisory Authority (ASFI).
- Monitoring the social role of financial institutions.

1.2 What are some significant lending transactions that have taken place in Bolivia in recent years?

Compared with 2012, the Bolivian international reserves increased by US$1.156 million and reached a level of US$13.409 million in 2013, strengthening the national financial stability and functioning of the Central Bank of Bolivia (BCB) as an ultimate lender.

Regarding the financial system, credit growth remained solid at 20%, which allowed increased funding for new productive investments with positive effects on economic growth. In December 2013 the financial system approved Bs. 47.771 million (US$ 6.864 million) of new loans, which implies an increase of over Bs. 7.219 million (US$ 1.037 million) in loans granted compared to the same period in 2012. In this sense, the portfolio of credit given in Bolivian currency (rather than in dollars) increased by 8.6 percentage points and reached 86%. The most dynamic placements were directed towards micro enterprises, in line with the dynamism of deposits, which were led by specialised microfinance institutions.

Companies and households obtained more funding from financial intermediaries. The financing for microenterprises and SMEs has increased by 27.2% and 20.4% respectively in the last twelve months. An increase of credit to the productive sector was also registered, mainly to the manufacturing sector, as in previous years. This shows that the appropriation is intended for the productive sectors, with a significant impact on generating employment, and demonstrating its relevance to the implementation of policies in this sector.

Housing loans, meanwhile, reached Bs. 25,330 million (US$ 3.692 million) with an annual growth of 21%. Most of these loans were concentrated in housing loans (61%) and consumer loans (39%). However, it should be noted that the share of housing loans was more important in the mid-2000s and the involvement of consumer loans is gradually growing, despite the restrictive measures taken by the authorities in relation to this type of credits.

The majority of households in Bolivia borrowed money at lower interest rates compared to the last administration. Interest rates for housing and consumer loans remained stable, which allowed Bolivian families access to purchasing homes, home improvement and home construction.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

In Bolivia, companies within a corporate group can secure loans from their companies provided that they belong to the same group and the same category (e.g. electricity); however, the companies that belong to a different business group cannot guarantee loans to any of their members. On the other hand, companies which belong to financial groups are prohibited from securing loans unless they are companies dedicated to investments.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

If the company is dedicated to guaranteeing investment, the responsibility lies with the people who have approved the

transaction. In general, however, directors also have responsibility as the operation is guaranteed by the goods of the company.

If directors of a company ensure an operation and such directors do not have the authority to perform such act, they are also responsible with their own assets.

2.3 Is lack of corporate power an issue?

Indeed, the lack of a power enabling a person or persons to act on behalf of a company is a grave and a serious problem. There are certain powers which enable people to carry out these activities and business of the company, and any person who acts without such power is liable to penalties which are provided by law. All further acts performed by those people and the company might be void or voidable.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Bolivian law does not provide for state authorisation and credit approval for the creation of securities, except in cases of state enterprises.

However, when a company applies for a loan the application must have the appropriate support, such as financial analysis of the company demonstrating the need for a loan, and, overall, approval of the shareholders of the company.

In the stock market, it is necessary to have the approval of shareholders in order to issue bonds.

For the granting of guarantees, such guarantees must be fully sanitised and free from all liens. If the security has a lien, the creditor will require permission for the property to be used as security for other creditors.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

It depends on the amount requested. If the company has some financial indicators that are not in line with the credit policy of the entity, it may request the granting of additional collateral to support the operation.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

For the enforcement of a security there are no exchange controls. The main obstacle is the time it takes to enforce a guarantee in the judicial system; such time frame depends on the individual case (please see the answers in section 8).

For the enforcement of a security with no exchange controls, the obstacles encountered are the extended time frames required for the judicial system and the processing of guarantees.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

In Bolivia lending obligations are secured by mortgages, collateral and unsecured personal.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

The creation of securities depends on the type of loan requested. The procedure is to sign a contract, and each contract must be guaranteed. The contract also specifies the kind of guarantee given by the borrower, its characteristics, its value, its usefulness and for how long the collateral will be in force.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, once the loan has been approved, the borrower delivers all relevant documents pertaining to the guarantee. These documents remain in the custody of the lender, which is usually a bank. The appropriate authorities then keep track of whether the property is collateral for a bank or institutional lender. However, this does not mean that the borrower transfers his ownership of the property to the bank, except where there is breach of property ownership, in which case it will be transferred to third parties to honour the debt.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Bolivian law does not provide for this.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Generally not, but loan agreements provide that the company has to keep a bank account where there is enough money to cover the monthly loan instalments; if the account is declared to have no money, the bank has the power to debit the money from other accounts that the company has with the bank, after communicating these actions to the debtor.

3.6 Can collateral security be taken over shares in companies incorporated in Bolivia? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Bolivian law does not allow companies to give its shares in warranty as in other countries. What is usually done is that the shareholders of a company must agree to be guarantors of the credit operations of the company and they guarantee the loan with their shares.

In Bolivia shares have to be issued certificates and such certificates must be registered in the books of the company's shareholders.

As part of a loan agreement a clause allowing the resolution of disputes and enforcement of a security to be resolved under the laws of another country may be included. This is not a usual practice in Bolivia, but it is allowed, depending on the terms of the agreement between parties.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes it can. Collateral may be taken over goods in process, finished goods or raw materials. The debtor must request a warrant from the

company storing the materials. The bank has control of such materials and each time the company needs to access the materials it has to apply for the bank's authorisation. In this way, the bank has control over the debtor's production and is satisfied that the debtor will honour its debt.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

No it cannot. In Bolivia it is regulated by the Supervisory Authority of the Financial System (ASFI) and is punishable under the law.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notary fees on guarantees are 4/1000 of the loan amount for warranty registration in the office of real rights. Further legal costs of around USD 150 also apply, along with the cost of registration at the Commercial Register in Bolivia which is USD 25.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

For the registration of a guarantee, on average a time period of 30 to 45 days is required. On top of this notary processes will also take between 10 and 15 days. A total of 60 days, on average, is required, and the costs vary in relation to the amount of each loan.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No consents are required for the creation of a security.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

The priority on the enforcement of a guarantee is given by the number of loans that were requested in that line, taking into account that the line of credit has a limit and that limit defines how many loans can be requested. This also dictates if the warranty covers all of the borrowing in that line.

The priority is given predominantly by the order in which the loans were requested; if the guarantee is executed, the amount collected will first cover the oldest operations and then operations that were requested at a later date.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

For the enforcement of a security, financial institutions have to give their representatives power of attorney, enabling them to pursue the enforcement of the security. These powers must be registered in the Commercial Register of Bolivia, which is also responsible for their validation.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

Bolivian law does not provide prohibitions or restrictions for any of the three alternatives as the financial market and does not perform such operations.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Bolivia recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Bolivia recognises a trustee as long as it is a financial institution, authorised by the Financial System Authority (ASFI). The trustee may have the ability to obtain documentation, such as the enforcement of security, in order to manage the portfolios of banks and borrowers which have the backing of the system and the borrowers.

5.2 If an agent or trustee is not recognised in Bolivia, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

In Bolivia agents are recognised as long as they have a clear mandate from the Bolivian financial institutions, so they are responsible for performing the collection and enforcement of security granted by banks to borrowers. This does not mean, however, a transfer of the portfolio of the banks to the agent.

5.3 Assume a loan is made to a company organised under the laws of Bolivia and guaranteed by a guarantor organised under the laws of Bolivia. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

No, because the lender has cancelled the amount due. The requirement for this transfer is that Lender A has to lift the lien on the collateral so that Lender B can record the loan and have the right to charge his debt and the guarantee.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

No, since the legislation does not provide this figure, the only thing that sets the tax law is that if a borrower is foreign, payments made

by the debtor for interest are taxed at a rate of 12.5%, as long as the loan agreement was signed in Bolivia. If there is a loan agreement not signed in Bolivia, the rate of 12.5% applies to the total amount including principal and interest as it is considered a remittance abroad.

The debtor is liable to pay agent retention and replacement of tax liability.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Bolivian tax legislation does not provide any tax incentives or benefits; taxes that apply are detailed in question 6.1.

6.3 Will any income of a foreign lender become taxable in Bolivia solely because of a loan to or guarantee and/or grant of security from a company in Bolivia?

Applicable taxes are detailed in question 6.1.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No, just those listed in question 3.9.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

If the loan agreement is made under the laws of a foreign country (e.g. USA), and under such legislation consequences exist for lenders, such adverse consequences apply in Bolivia.

On the contrary if the loan is carried out under Bolivian legislation there are no consequences because Bolivia does not have experience and jurisprudence in such cases.

7 Judicial Enforcement

7.1 Will the courts in Bolivia recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Bolivia enforce a contract that has a foreign governing law?

Bolivian courts recognise and enforce contracts subject to a foreign law provided they contain two elements: first, that the benefits arising out of these contracts are to be utilised in Bolivia; and second, that the foreign law under which the contract was created is not contrary to Bolivian laws.

7.2 Will the courts in Bolivia recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The courts in Bolivia execute foreign judgments as long as there is a treaty in place with the country concerned. Following the principle of reciprocity, and in the absence of treaties on the matter, Bolivian courts will grant these judgments the same force that the nation in question gives to Bolivian judgments. However, if a foreign judgment was enforceable, it would be necessary to follow a procedure in which the concerned party must seek the enforcement of the judgment at the Supreme Court, and later request for the answers of the other party within 10 days. With or without such answers, and after a fiscal opinion (which involves additional time), the court will determine whether or not to enforce the judgment. The enforcement of the judgment shall correspond to the tribunal which would have been the case at first instance in Bolivia.

The new Bolivian Procedure Code (which will come fully into force in August 2014) maintains the same principles and procedure on this matter. However, it specifies that even though it is not necessary for courts in Bolivia to re-examine the merits of the case, it is necessary for the Supreme Court to recognise the foreign judgment (to determine whether the judgment meets the requirements and procedural basic principles), in order to proceed to its execution (only if the judgment concerns the compliance of an obligation or if it is the intention of a party to validate its probative effects).

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Bolivia, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Bolivia against the assets of the company?

A suit for non-payment can be filed as soon as the deadline the parties have agreed has expired. Generally, it will be possible to act by the way of an executive process, which is quite quick (the suit is filed, the judge examines the procedural requirements of executive judgment, and if appropriate he shall issue a formal notice to be fulfilled within three days, besides having the injunction of the debtor's assets). The executive process should take about a month (depending on which exceptions shall be made, counting also the evidence term which will take 10 additional days). In the case the loan agreement included a waiver clause regarding the executive procedure, the obligation may also be required by way of coercive procedure, which takes less time than the executive procedure. In all cases, the enforcement of the judgment will depend on if is enforceable and if it is enforceable, the court will execute the judgment within the time established or, failing that, within three days.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

It depends on the guarantee. In general, a public auction is required. This involves a procedure which might take over a month.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Bolivia or (b) foreclosure on collateral security?

No. If the requirements are met, there is no restriction on the lender to filing a lawsuit against the borrower or the guarantee it has granted.

7.6 Do the bankruptcy, reorganisation or similar laws in Bolivia provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Please see the answer to question 8.1.

7.7 Will the courts in Bolivia recognise and enforce an arbitral award given against the company without re-examination of the merits?

Bolivia has signed and ratified the New York Convention on the enforcement of arbitral awards. In this sense, the Bolivian courts do recognise such decisions without needing to re-examine their merits. Moreover, the new civil procedure code prescribes that arbitral awards enable a lender to initiate a coercive enforcement of a debt, and it is not necessary for the judge to re-examine the merits of such arbitral award.

The procedure to enforce a foreign arbitral award is the same described in question 7.2 for foreign judgments.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The ability of a lender is affected because the entire bankruptcy process is handled by a judge. In this sense, the affected lender cannot seek the enforcement of its security as freely as in the case of not being subject to the debtor company's bankruptcy. However, bankruptcy does not involve any other violation of the right of the lender to make a debt enforceable and the debt shall be paid by means of the security given by the debtor.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

All guarantees have priorities on the enforcement of the goods or assets given as such. However, tax debts and employee claims are always taken as preferential creditors' rights in the case of bankruptcy of the borrower.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Yes financial intermediaries, for example, are only subject to a process of "intervention", after which it is to be decided whether to give it a solution or to proceed to compulsory liquidation.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

The only way other than court proceedings to seize the assets of a company in enforcement is a process called "*dación en pago*", which consists of a new transaction between the creditor and the debtor through which the creditor receives a new asset, or the asset given as a guarantee, as a payment of his credit.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Bolivia?

Please see the answer to question 7.1. However, a party cannot submit to a foreign jurisdiction on his own, for it takes both parties to choose the jurisdiction that will rule the contract and its enforcement.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Bolivia?

If the sovereign immunity was awarded to a party in Bolivia, it would be by means of a law; therefore it would not be a disposable right, which implies that a party's waiver of sovereign immunity would not be legally binding and enforceable under the laws of Bolivia. Nevertheless, in the event a party's sovereign immunity was awarded in a country the laws of which allow the waiver of sovereign immunity, then it would be legally binding and enforceable in Bolivia.

10 Other Matters

10.1 Are there any eligibility requirements in Bolivia for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Bolivia need to be licensed or authorised in Bolivia or in their jurisdiction of incorporation?

Bolivian law provides that a bank or financial institution is that of domestic or foreign origin, dedicated to perform financial intermediation and financial services to the public, both in the country and outside the country.

The financial intermediation and auxiliary financial services will be carried out by financial institutions authorised by the Supervisory Authority of the Financial System (ASFI). No person, natural or legal, will perform regularly in the territory of Bolivia the activities of financial intermediaries and financial auxiliaries services described in the law, without prior permission of incorporation and operation granted by ASFI, with the formalities established in the law.

Any natural or legal person, domestic or foreign, domiciled in the country or not, who does not meet the requirements and formalities concerning the organisation and functioning of financial intermediaries and financial auxiliaries services under the Act is prohibited from making announcements, publications and circulating papers, written or printed, the terms of which imply that such person has legal authorisation to perform activities reserved by law to the said banks. In the same way, any natural or legal person may not use in its name, in Spanish or another language, terms that may lead the public to be confused with legally authorised financial institutions.

The requirements for the establishment of a financial institution in Bolivia and for obtaining the operating licence are as follows:

A) Founders may not:

1. Be declared legally incapable to engage in commerce.
2. Have an indictment or conviction for committing crimes.
3. Have outstanding debts related to the financial system or running off loans.

B) In order to obtain an operating licence, a financial institution must:

1. Have conducted a study of economic and financial feasibility.
2. Have drafted articles of incorporation and bylaws of a corporation.
3. Have a certified personal history for individuals – issued by competent authority.
4. Have a certificate of fiscal solvency and disclosure of assets of the founders.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Bolivia?

Considerations to be taken into account are those that are provided by law and detailed in this report.

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Working more than 11 years in the Bolivian financial sector managing loan portfolios that exceed US$ 20 million, he has also participated in several specialised seminars in the banking, insurance and stock exchange sectors. His last work in the area was managing securities investment funds close to US$ 45 million.
Carlos joined Criales, Urcullo & Antezana in June 2012 as an associate to participate in the expansion projects of the company, advising on matters of administration and finance.

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Botswana

Khan Corporate Law

Shakila Khan

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Botswana?

The bank lending sector has seen strong competition in the corporate lending markets from the non-bank sector in recent years (statutory financial institutions, insurance companies and pension funds). There has also been a corresponding tendency to raise capital from the capital markets and this has similarly put pressure on the bank corporate lending sector.

1.2 What are some significant lending transactions that have taken place in Botswana in recent years?

Significant lending transactions have been in the area of project finance and there has been increasing interest in public-private partnerships that involve bank finance.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes it can.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

No there are not.

2.3 Is lack of corporate power an issue?

Not in general, the Companies Act, CAP 42:01 of the Laws of Botswana provides that "*a company has, both within and outside Botswana- (a) full capacity to carry on or undertake any business or activity, do any act which it may by law do, or enter into any transaction; and (b) for the purposes of paragraph (a), full rights, powers and privileges. (2) The constitution of a company may contain a provision relating to the capacity, rights, powers, or privileges of the company if the provision restricts the capacity of the company or those rights, powers and privileges.*"

The following types of documents as applicable would need to be reviewed to see if they contain any restrictions on a particular entity:

1. Articles of Association or Constitution of the company (or enabling statute in the case of a statutory corporation);
2. any licence that the company may require (e.g. a banking licence, or pension fund licence); and
3. any internal rules and regulations of the company concerned.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

The Articles of Association or Constitution might specify if shareholder approval is required for entry into a guarantee. Otherwise for a guarantee in the absence of any other security or charge on the guarantor's assets, no other consents or filings are generally required.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no statutory limitations, save for those in the Companies Act on financial assistance, please see section 4 below.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange controls in operation in Botswana. There is still legislation on exchange control in the statute books, which has not been repealed. However, it has not been operative since 1998 when the Minister of Finance declared that exchange controls would be abolished in the Budget Speech. The fact that the legislation has not been repealed is treated as a technicality. As such there are no restrictions on the repatriation of funds. There are no other obstacles to the enforcement of a guarantee provided that the guarantee refers to an underlying and primary obligation that the guarantor is guaranteeing and that is owed to the lender.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

A wide range of assets may be used to secure lending obligations – moveable and immovable property, intangible property (such as

shares), receivables, cash in bank accounts, stock in trade, machinery, etc.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is not possible to pass security over all asset classes by means of a general security agreement. The widest security is afforded by the general notarial bond and by a statutory pledge called a Deed of Hypothecation, both of which can only be passed over moveables. Therefore, other security must be passed over immoveable property (explained in question 3.3 below).

A general notarial bond is a mortgage by a borrower of all of its tangible movable property in favour of a lender as security for a debt or other obligation. However, a general notarial bond does not (in the absence of attachment of the property before insolvency) make the lender a secured creditor of the borrower, it only offers a limited statutory preference above the claims of concurrent creditors in respect of the free residue of the estate on insolvency. A general notarial bond is required to be registered with the Deeds Registry, it must be prepared by a notary public and is subject to prescribed notarial fees.

The Deed of Hypothecation is a form of statutory pledge by a borrower and can cover both tangible and intangible moveables. A Deed of Hypothecation provides a first ranking security. It can only be granted to a creditor who has been approved by the Minister for Finance and Development Planning under the Hypothecation Act, CAP 46:05 of the Laws of Botswana. A Deed of Hypothecation can secure all, or certain specified, moveable assets of the borrower and can include future assets (such as receivables). In addition, with a Deed of Hypothecation, a creditor is deemed to be in possession of the secured assets at all material times, that is to say, that the creditor is not obliged to take steps to attach the secured assets in order to perfect the hypothecation, and so in a liquidation, the assets remain secured in terms of the Deed of Hypothecation without the requirement of an attachment being effected by the creditor prior to the winding up order, or delivery of a statement of the book debts. A deed of Hypothecation requires registration at the Deeds Registry Office to be perfected. A Deed of Hypothecation cannot be transferred. The Deed of Hypothecation must be prepared by a conveyancer or notary public and is subject to prescribed notarial fees.

As a Deed of Hypothecation affords secured creditor status, it is much more widely used than the general notarial bond in Botswana.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Immovable property, such as land held by freehold, and land held by way of long term interest (exceeding 10 years) which interest is registered in the Deeds Office, and all improvement made thereon (e.g. buildings) can be secured by way of a mortgage bond. A mortgage bond grants a real right of security in insolvency/bankruptcy. A mortgage bond, may be ceded as between creditors, provided that the cause of debt and amount of debt necessary remains the same. Mortgage bonds are generally enforceable in accordance with their terms. A mortgage bond is perfected by registration at the Deeds Registry Office must be prepared by conveyancer and is subject to prescribed conveyancing fees.

Machinery and equipment are not able to be secured by a mortgage bond and a separate Deed of Hypothecation is required to secure these and any other tangible moveables.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, in terms collateral security can be taken over receivables either by way of a Deed of Hypothecation (described in question 3.2) or by way of a cession.

In terms of an out and out cession, where title to the property is transferred to the cessionary (chargor), subject to the cedant's right to have the property transferred back to it by the cessionary once the debt owed to the cessionary has been discharged. A cession does not require registration and is not subject to conveyancing or notarial fees. (There is a risk of recharaterisation of the agreement by the courts, and this point has not been judicially tested in Botswana.)

(There are two types of cession recognised in Botswana law, an out and out cession and a cession in security (*cession in securitatem debiti*). The cessionary would not be free to collect the receivables in the absence of a default with a cession *in securitatem debiti*. A cession *in securitatem debiti* which is granted in respect of receivables (book debts, rentals, etc.) does not require registration but does require delivery for its perfection. Such delivery has in case law been interpreted to mean delivery of documents evidencing the debt. A cession *in securitatem debiti* requires a court order for enforcement.)

Debtors are not required to be notified of the security, registration of a Deed of Hypothecation at the Registrar of Deeds satisfies the notification requirement and all charges on property must be recorded in the statutory register of charges of a company and details of the charge lodge with the Registrar of Companies – again the registration satisfies the notification requirement.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, by way of cession *in securitatem debiti* or by way of a Deed of Hypothecation (explained in question 2.1 above).

3.6 Can collateral security be taken over shares in companies incorporated in Botswana? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Security can be taken over certificated shares by way of a pledge. A pledge is granted in respect of tangible moveables and requires possession or delivery for its perfection. The fact of delivery and of the nature of the possession must be demonstrated to any third party which may have a competing interest. (In respect of a private company therefore, the pre-emptive right of other shareholders must be considered and if possible, waived on entry into the pledge.) Delivery is effected by delivery of the original share certificates, notation of the pledge on the share register (as the share register represents *prima facie* evidence of title) and delivery of share transfer forms signed by the transferor and left blank as to the transferee. A pledge requires a court order for enforcement. There are no registration fees associated with a pledge.

It is also possible to pass a Deed of Hypothecation over shares, both certificated or uncertificated.

Uncertificated shares are held in respect of publicly listed entities and these shares are held in accounts with the Central Securities Depository of Botswana (CSDB). A security interest over an intangible right (uncertificated securities) that is not the subject of a Deed of Hypothecation would be by way of a cession *in securitatem debiti*. The cession in security is concluded on the understanding that the intangible property or right will be retained by the cessionary until such time when the debt secured by the cession has been extinguished. Again the cession requires delivery to be effective. The incorporeal property will then revert back to the cedent. There is no statutory provision, nor is there Botswana precedent as to what constitutes delivery of an intangible right and or especially of uncertificated shares in particular. The CSDB participants with whom entities open accounts have the ability to note a cession on the account, and this, together with a transfer instruction relating to the account should be secured for any cession of uncertificated shares.

Security, in terms of a pledge or a cession can validly be granted under a New York or English law governed document, however the local law perfection requirements must be incorporated into the document.

Where a Deed of Hypothecation is opted for, this must be according to Botswana law.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, by way of a pledge or a Deed of Hypothecation, as described above.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes to both, please see responses below on financial assistance.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

There is no stamp duty in Botswana. A pledge or a cession does not need to be registered or prepared by a notary and therefore attracts no registration fees. A special or general notarial bond (passed over tangible moveables), Deed of Hypothecation (passed over tangible or intangible moveables) and a Mortgage Bond (passed over immoveable property) all attract notary/conveyancing fees according to a prescribed tariff. The fees are calculated on an *ad valorem* basis.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

In order for a Lender to have a Deed of Hypothecation passed in its favour, it must be an Authorised Creditor approved as such by the Minister of Finance and Development Planning. Where not already approved, an application for Authorised Creditor status can take in the region of 2 to 4 months.

Registration for notarial bonds, Deeds of Hypothecation and Mortgage Bonds can take anywhere from 10 days to 3 weeks depending on the volume of registrations pending at the Deeds Registry Office at any one time.

As discussed above, notarial bonds, Deeds of Hypothecation and Mortgage Bonds are subject to a prescribed tariff in terms of the fees payable to the conveyancer and/or notary public. The fees are calculated on an *ad valorem* basis and therefore the cost of these forms of security can be significant.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

In respect of plant, machinery and equipment, where a Lender seeks to have a Deed of Hypothecation passed in its favour, it must first be approved by the Minister of Finance and Development Planning as an Authorised Creditor. Authorised Creditor status once gazetted can be used in respect of transactions with different Borrowers, i.e. it is not specific to a single transaction.

Apart from registration formalities, provided that the Borrower has registered title to land, no further consents are required.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

These are explained in questions 3.2 and 3.3 above, where applicable.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Section 76 of the Companies Act places the following restrictions on a company giving financial assistance to purchase its own shares:

"*(1) A company shall not give financial assistance directly or indirectly to any person for the purpose of or in connection with the acquisition of its own shares, other than in accordance with this section.*

(2) A company may give financial assistance for the purpose of, or in connection with, the acquisition of its own shares if the Board has previously resolved that -

(a) giving the assistance is in the interests of the company;

(b) the terms and conditions on which the assistance is given are fair and reasonable to the company and to any shareholders not receiving that assistance; and

(c) immediately after giving the assistance, the company will satisfy the solvency test.

(3) If the amount of any financial assistance approved under subsection (2) together with the amount of any other financial assistance given by the company which is still outstanding exceeds

10 per cent of the company's stated capital, the company shall not give the assistance unless it first obtains from its auditor or, if it does not have an auditor, from a person qualified to act as its auditor, a certificate that -

(a) the person has inquired into the state of affairs of the company; and

(b) the person is not aware of anything to indicate that the opinion of the Board as to the matters in paragraph (b) of subsection (2) is unreasonable in all the circumstances."

Subsection 76 (5) provides that "*the term "financial assistance" includes giving a loan or guarantee, or the provision of security*".

(b) Shares of any company which directly or indirectly owns shares in the company

The Companies Act does not specify the same restrictions on the giving of financial assistance for the acquisition of shares in a holding company, but a board resolution following the above is recommended. Any assistance cannot result in a subsidiary owning shares in its holding company, as this is prohibited except in the limited instance of a percentage of treasury shares.

(c) Shares in a sister subsidiary

As above, except there is no restriction on holding shares in a sister company.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Botswana recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Whilst a trustee or agent can enforce the loan documentation, the use of a security trustee or agent to enforce security is problematic. Botswana law recognises the concept of a trust, however, where the security to be held is mortgage bonds over immoveable property, or notarial bonds the security trustee arrangement is prevented by statute in that the Deeds Registry Act, CAP 32:02 of the Laws of Botswana provides that "no bond shall be passed in favour of any person as the agent of a principal". In respect of other types of security such as a pledge or cession in security, in terms of common law these require an underlying legally valid and primary obligation owed by the grantor of the security to the recipient. The security trustee would not have this nexus with the grantor of the security.

5.2 If an agent or trustee is not recognised in Botswana, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Parallel debt obligations and the security SPV structure have been used in jurisdictions with similar laws to Botswana and there is precedent for the security SPV structure being used in Botswana. (The security SPV is where the security is transferred to an SPV that holds the security constituting the security package. The SPV would then issue guarantees and indemnities to the various lenders on the basis that such claims be limited to the value of the security held and the particular Lender's relative exposure to the Borrower from time to time. The SPV's obligation to the Lender is in turn guaranteed and indemnified by the Borrower. The SPV is usually managed by one of the members of the lending group or consortium as the case may be.)

5.3 Assume a loan is made to a company organised under the laws of Botswana and guaranteed by a guarantor organised under the laws of Botswana. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

There will be no special requirements to make the loan and guarantee enforceable by Lender B so long as Lender A had the right to cede its rights under both the loan agreement and the guarantee without any further formalities.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

There is a withholding tax on the remittance of interest payments to a foreign entity. In general, and subject to any Double Taxation Avoidance Agreement that may be in place, payments of interest to non-residents are subject to a 15% withholding tax. Payments of interest to a resident are subject to a 10% withholding tax.

There are no requirements to deduct or withhold tax from proceeds from a payment under a guarantee or the enforcement of a security.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax or other incentives for foreign lenders specifically. Tax incentives provided to foreign investors are in respect of the International Financial Services Centre, which offers tax and other benefits to investors (both domestic and foreign) that seek to set up Botswana companies that will provide financial services outside of Botswana. The term "financial services" has been widely construed and includes International Business Companies (IBCs). These IBCs are companies that cut across sectors and have operations/projects in several Sub-Saharan countries and are typically structured as Investment Holding companies or Regional Head quarter operations.

The following table summarises the tax advantages of the Botswana IFSC:

Tax	Botswana IFSC Company	Other Companies
Capital Gains Tax	Exempt	15%
Withholding Tax	Exempt	15%
Corporate Tax Rate	15%	22%
Value-Added Tax	Zero rated	12%

Other tax incentives are offered to companies established in Botswana that are involved in the manufacturing and/or export sectors. In addition to this, Botswana has entered into a network of DTAAs that reduce the tax withheld in Botswana on remittances to companies in those jurisdictions. DTAAs are in place with the following countries at present: Barbados, China, France, India, Lesotho, Mozambique, Namibia, the Russian Federation, Seychelles, South Africa, Swaziland, Sweden, the United Kingdom, Zimbabwe and Zambia. DTAAs with at least nine other countries are in various stages of negotiation.

Taxes: There are no taxes that apply to foreign investments, loans, mortgages or other security documents specifically for the purposes of effectiveness or registration. Withholding taxes on the remittances of interest have been discussed above.

6.3 Will any income of a foreign lender become taxable in Botswana solely because of a loan to or guarantee and/or grant of security from a company in Botswana?

Outside of the withholding tax considerations on interest payments, the income of a foreign lender will not become taxable in Botswana solely because of a loan to, or guarantee or grant of security from, a company in Botswana.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are no costs that pertain to foreign lenders that would not apply to local lenders. The main costs are around registration and notarial fees of security such as notarial bonds, mortgage bonds and Deed of Hypothecation.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there will be no such consequences for the borrower.

7 Judicial Enforcement

7.1 Will the courts in Botswana recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Botswana enforce a contract that has a foreign governing law?

Choice of foreign law and jurisdiction clauses are upheld by the courts in Botswana. Where the law of a foreign jurisdiction is chosen, the court will require expert evidence on the foreign law to be applied but in the event that no expert evidence is adduced before the court as to the effect of the foreign law, the court will determine the dispute between the parties in terms of Botswana law.

7.2 Will the courts in Botswana recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The Judgments (International Enforcement) Act CAP 11:04 of the Laws of Botswana allows for the enforcement of foreign judgments in Botswana where reciprocal treatment is given to Botswana judgments in that country. The President must declare by statutory instrument in the Gazette, the countries, which are deemed to give reciprocal treatment to Botswana judgments.

However, there are no Orders made pursuant to this Act that have been published in the Laws of Botswana in recent years (as to which countries are recognised as giving reciprocal treatment to orders of the Botswana Courts), there is only a published order relating to reciprocal countries in respect of maintenance orders. However, the Act also recognises those countries that were recognised as affording reciprocal treatment under the United Kingdom Judgments Act that was in force in 1981, prior to commencement of the Botswana Act.

There is also a procedure at common law whereby a fresh application for summary judgment is brought before the High Court. The foreign judgment is then submitted as evidence in a hearing that hears the matter afresh before the High Court of Botswana. Certain conditions must, however, be satisfied by a litigant who proposes to take advantage of that procedure. The main points to be satisfied are that the judgment must be final and conclusive. In addition all documents necessary to prove the judgment must be in order and the judgment relied upon as a cause of action should be annexed to the application. A Botswana court order is thus obtained and can be executed.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Botswana, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Botswana against the assets of the company?

(a) The answer to question 7.1 is yes, and the estimated timeline to obtain judgment and enforce the judgment is anywhere from 3 weeks to 3 months where there is no legal defence. (b) Enforcement of a foreign judgment can take anywhere from one month if the procedure in statute is followed to up to 6 months if the matter is to be heard afresh. Where urgent matters are brought, time periods can be reduced for obtaining the order; enforcement proceedings by way of a sale in execution will still take a few weeks.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Botswana law does not recognise self-help when it comes to enforcement of security, and all real security must be enforced through the courts, where an order for a public auction will be sought. This procedure can result in delay and the value of the asset that is being secured may differ significantly upon a forced sale.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Botswana or (b) foreclosure on collateral security?

There are no such restrictions.

7.6 Do the bankruptcy, reorganisation or similar laws in Botswana provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Court blocking procedures are available upon presentation of the petition for winding up of a company, by the company itself, any shareholder or creditor. Once the winding up by court has commenced no execution or attachment order for the enforcement of collateral security may be made. The same applies upon a petition to place the company under judicial management.

7.7 Will the courts in Botswana recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes, The Recognition of Foreign Arbitral Awards Act CAP 06:02 of the Laws of Botswana provides that an arbitral award made in any country which is a party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards shall be binding and may be enforced in Botswana in accordance with the Convention and in such manner as an award may be enforced under the provisions of the Arbitration Act. This means that on application to the High Court, a foreign arbitral award (as with a local award) maybe made an order of the Court.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Once winding up or judicial management proceedings have commenced, a secured creditor cannot commence enforcement or attachment proceedings and a creditor holding movable or immovable property as security cannot realise that security itself, but must deliver it to the liquidator for realisation. Secured creditors are paid out before other creditors and will be paid in respect of the realisation proceeds of the sale of the asset that is the subject of the security, after the deduction of liquidation costs. The creditor is responsible for those costs, which represent the costs of maintaining, conserving and realising the property. Where secured creditors have security over the same asset, the creditor granted security earlier in time has a higher-ranking claim in respect of that asset. Secured creditors include holders of a mortgage bond, deed of hypothecation, cession in security and pledge. A notarial bond does not afford secured creditor status, merely a preference in respect of the free residue.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In respect of suspect periods and clawback rights, the liquidator may challenge the following type of transaction, and apply to the court to have these transactions set aside:

(a) Transactions at undervalue: where in a period of one year before the commencement of the winding up, the company entered into a transaction where the value of the consideration or benefit received by the company was less than the value of the consideration provided by the company or the company received no consideration or benefit; and when the transaction was entered into the company:

(i) was unable to pay its due debts;

(ii) was engaged or about to engage in business for which its financial resources were unreasonably small; or

(iii) incurred an obligation knowing that the company would not be able to perform the obligation when required to do so; and

(iv) when the transaction was entered into the other party to the transaction knew or ought to have known of whichever of the above applies. Or where the company entered into a transaction as for above, but where because of the transaction, the company became unable to pay its debts.

(b) Voidable preferences: where within six months before the commencement of winding up proceedings, the company made a disposition and immediately after the disposition, the liabilities of the company exceeded its assets (unless the person to whom the disposition was made proves it was done so in the ordinary course of business and did not prefer one creditor over another).

(c) Undue preferences: where on any disposition, notwithstanding any number of years having passed between the disposition and the commencement of winding up proceedings, the company's liabilities exceeded its assets, and the disposition was made with the intention of preferring one creditor over another.

(d) Collusive practices: where within three years of the commencement of proceedings to wind up the company, a transaction was entered into by the company, and the transaction was for either inadequate consideration in respect of a disposal, issue of shares to or provision of services to a director or other related party, or where the transaction was for excessive consideration in respect of an acquisition or the provision of services by the director or related party.

(e) Where a transaction that is proved by the liquidator to be at undervalue or as a result of collusive practices, the liquidator may recover from any other party to the transaction any amount by which the value of the consideration provided by the company exceeded the value of the consideration received by the company.

(f) Where a liquidator has proved a voidable or undue preference, the transaction will be set aside and the court may order any one or more of the following orders: an order requiring a person to pay to the liquidator in respect of benefits received by that person as a result of the transaction or charge such sums as fairly represent those benefits; an order requiring property transferred as part of the transaction to be restored to the company; an order requiring property to be vested in the company where such property represents either the proceeds of sale of property or of money which has been paid and transferred where such property or money is in the hands of the person against whom the transaction or charge is set aside; an order releasing in whole or in part a charge given by the company; an order requiring security to be given for the discharge of an order made under this section of the Companies Act; and/or an order specifying the extent to which a person affected by the setting aside of a transaction or by an order made under this provision is entitled to claim as a creditor in the liquidation.

There are preferential creditors' rights such as the costs of the liquidator in administering the estate, the claims of employees for up to 3 months unpaid salaries and the claim of the Commissioner of Taxes for unpaid taxes. These are paid after the secured creditors but before any preferment creditors in respect of the free residue and concurrent creditors.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

There are no entities that are explicitly excluded from bankruptcy proceedings, however many statutory corporations are protected from bankruptcy through a *de facto* guarantee from Government.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No, please see response to question 7.4 above.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Botswana?

Yes it is.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Botswana?

Yes it is.

10 Other Matters

10.1 Are there any eligibility requirements in Botswana for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Botswana need to be licensed or authorised in Botswana or in their jurisdiction of incorporation?

No, the only eligibility requirement is as an Authorised Creditor, where a lender wishes to take security by way of a Deed of Hypothecation in their favour.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Botswana?

No, the central issues have been discussed above.

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Shakila Khan is a corporate attorney and Managing Partner of a specialist corporate law firm in Botswana. Shakila has been ranked as a leading lawyer in Chambers Global Guide 2013.
Shakila is a citizen of Botswana and was called to the Bar in England and Wales in 2004 and admitted as an Attorney of the High Court of Botswana in 2007. Shakila has an LL.M. in Legal Theory and History with a special emphasis on Law and Development from the University of London.
Shakila's areas of practice include the following sectors: M&A, debt and equity capital markets, structured finance, banking and financial services regulation, financial regulation, securities and derivatives advice (particularly enforcement opinions), competition law and general corporate (ranging from the establishment of foreign companies in Botswana, IFSC advice, to private equity and restructuring deals, as well as general compliance advice for a number of listed entities). Shakila also practises in the energy and natural resources sectors and has completed key mandates in these sectors.

KHAN CORPORATE LAW
RESULTS DRIVEN

Khan Corporate Law ("KCL") is a specialist corporate law firm in Botswana that focuses on providing legal services to banking and finance institutions, corporate advisory firms, large corporates, multinationals, private equity funds, government and parastatals.

KCL firm is led by Shakila Khan (Citizen of Botswana), recognised as leading lawyer by Chambers Global Guide. She is assisted by our Senior Associate, Mary Maeda who has 10 years' experience practising law in Botswana and two junior attorneys.

KCL has handled some significant transactions since it was established and as a result, domestic and international market recognition for its strengths continues to grow. KCL has continued to complete key capital markets mandates, and has completed a significant mandate in the mining and minerals sector in 2011. KCL has acted for leading South African Banks active in the capital markets and derivatives sectors in Botswana.

In addition, KCL has completed structured finance transactions of BWP 480 million in 2012, and has considerable expertise in advising on, drafting and implementing appropriate security in Botswana. KCL also has a growing focus on projects work and has recently completed a key mandate in the minerals sector for the Government of Botswana.

Brazil

TozziniFreire Advogados

Antonio Felix de Araujo Cintra

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Brazil?

The Brazilian financial market is quite sophisticated, with large Brazilian and international retail banks and a number of smaller specialised financial institutions.

In recent years, with the stabilisation of the Brazilian economy and the trend towards lower interest rates, home finance became a reality in the Brazilian market, with a very substantial increase in the volume of transactions.

Corporate lending also increased not only in the form of direct loans and financings but also in the form of debentures (long term debt securities) issued in the local market and purchased by investment funds and other institutional investors.

Alternative forms of financing have also developed in recent years. Among other instruments, companies in Brazil used mechanisms to securitise revenues arising from real estate property, agribusiness and general trade transactions.

1.2 What are some significant lending transactions that have taken place in Brazil in recent years?

There have been some large lending transactions related to infrastructure projects in Brazil (for instance the IFC financing for the BTP Port Terminal), some transactions entered for the financing of the airports of Sao Paulo and Viracopos, the operation of which has recently been transferred by concession to the private sector, and some large transactions involving Petrobras. It should be noted, however, that in recent years the major lender in Brazil was BNDES (the Brazilian Federal Development Bank) and the success of the bank's lending policies have taken some space from the private sector banks in long term financing in Brazil.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

As a general rule, a Brazilian company is free to guarantee borrowings of one or more other members of its corporate group. There are restrictions, however, in the case of publicly held corporations, since such type of guarantees may be seen as giving an undue benefit to the controlling shareholders of the relevant guarantor.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Provided that all corporate authorisations are duly obtained by the relevant guarantor in the form provided in its by-laws or articles of association, there should be no enforceability concerns with respect to guarantees granted in relation to borrowings of other members of a company's corporate group.

If the guarantor is a publicly-held corporation, however, a guarantor or controlling shareholder may be held responsible if it is proven that the guarantee may cause a loss to the minority shareholders and benefit the controlling shareholders of the company.

2.3 Is lack of corporate power an issue?

Any transactions entered into by a Brazilian company must be entered in compliance with the provisions of their by-laws or articles of incorporation. Therefore, any guarantee signed by persons not duly empowered pursuant to the by-laws or articles of incorporation (and any relevant powers of attorney) may be declared invalid by a court decision.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Companies controlled by the public sector (either at the Federal, State or Municipal levels) are not free to sign guarantees without proper authorisations.

Private sector companies are free to execute guarantees, provided that they comply, as the case may be, with their by-laws or articles of incorporation. In addition, companies may also be subject to contractual restrictions resulting, for instance, from financing and similar agreements signed with banks or concession or similar agreements signed with the government aimed at operating some public services as concessionaires.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No. The law does not provide any net worth, solvency or similar tests on the amount of a guarantee. Companies that are giving fixed assets as collateral must present a certificate of no indebtedness

issued by the Brazilian Social Security Authorities to the relevant Registry (Real Estate or Deeds and Documents) where the agreement will be registered.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

As a general rule, any company or person may remit money abroad to comply with any obligation incurred by it. The laws and regulations, however, impose a duty on the relevant Brazilian bank through which the remittance will be made to verify the validity of the underlying transaction. In other words, although there are no legal obstacles, it is normally advisable for a guarantor to speak to its bank to make sure that it will be able to make the remittance in the future without further discussions.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

The basic types of collateral that are available to secure lending obligations in Brazil are the following: (i) mortgage of real estate properties; (ii) pledge over movable assets and rights; and (iii) fiduciary transfer of title over real estate, movable assets and rights.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is not possible in Brazil for a company to create a collateral over all of its existing or future assets to secure a debt. Any security agreement has to include a description of the relevant assets that are being given as collateral.

Mortgages have to be implemented by means of a public deed and must describe in detail the property being given as collateral. The agreement must also be registered in the competent Real Estate Registry with jurisdiction over the location of the property.

Pledge Agreements must identify all assets given as collateral thereunder and must be registered with the Registry of Deeds and Documents in the place of the headquarters of the grantor of the collateral. In case the assets are to be kept in the possession of the debtor, then the pledge agreement has to be registered with the Real Estate Registry with jurisdiction of the place where the assets are located.

Fiduciary transfer of title agreements follows the same procedures as above. It is important to note that foreign creditors and Brazilian non-financial institutions may to be secured creditors under fiduciary property agreements over credit and other rights or over fungible goods.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Please see the answer to question 3.2 above.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. Collateral security may be taken over receivables.

The actual procedure may vary, depending on the type of security or on the status of the relevant secured creditor.

One alternative is for the company to sign a pledge over all amounts deposited in a bank account and instruct debtors to make all relevant payments into that bank account.

If the creditor is a Brazilian financial institution it may require that the borrower enters into a fiduciary assignment of rights covering all receivables subject to the agreement.

In any circumstance the general rule is that the debtors should be notified of the agreement (although, unless there are specific contractual provisions to that effect, there is no requirement of consent from the debtors).

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. In that case the bank has to be notified and normally the agreement provides that the bank will transfer the amounts deposited in the relevant account pursuant to instructions of the secured creditor or a collateral agent appointed for such purpose.

3.6 Can collateral security be taken over shares in companies incorporated in Brazil? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares in companies incorporated in Brazil may be given as collateral by the relevant shareholders. In this case the lien has to be registered in the Share Registry Book of the company or with the relevant custodian/registrar. Although the law allows the issuance of certificates of shares, virtually all shares exist only as book entry records in the Share Registry Books of private companies or registrars of publicly-held companies.

Quotas of limited liability companies may also be pledged to secure debts. In this case the procedure involves the execution a quota pledge agreement, which must be registered with the Registry of Deeds and Documents. It is normal practice have an amendment to the company's Articles of Incorporation to include a provision reflecting the existence of the pledge over the quotas.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes. Inventory may be subject to a pledge agreement, which must be signed by the parties and registered with the Real Estate Registry with jurisdiction over the place where the goods are kept. The agreement must describe the relevant goods given as collateral and include the number of goods that are subject to the pledge agreement. In this case the pledge extends automatically to any new goods that replace the goods that have been sold, up to the number of goods initially pledged.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes. This possibility will be subject to the provisions of the relevant by-laws or articles of incorporation of the relevant company. There may also be limitations due to negative covenants that may exist in financial and other agreements entered into by the company.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The fees related to the notarisation and registration of security agreements are not relevant. There are no stamp duties in Brazil.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Generally speaking, the taking of security does not involve a significant amount of time or expense. If a property that is being given as collateral under a mortgage is located out of the Brazilian major urban centres then the process may take longer due to less efficient Registries.

If the security agreements are signed in a foreign language they will have to be translated into Portuguese by a sworn translator and this may add some additional timing and costs to a transaction.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Not as a general rule. Companies that operate under concessions granted by the government to operate public services (for instance in the energy, telecom, toll roads and similar sectors) may need authorisation from the relevant granting authority to create a security interest over the assets and credit rights.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

There are no particular documentary or execution requirements, except for agreements related to real estate properties, which have to be entered by means of public deeds.

As a general rule the creditor will want to make sure that the agreement is entered in accordance with the provisions of the by-laws or articles of incorporation of the relevant companies. These provisions will usually require approval from the shareholders or the board of directors of the company and the document to be executed by at least two duly appointed officers or attorneys in fact.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

No, there are not.

(b) Shares of any company which directly or indirectly owns shares in the company

No, there are not.

(c) Shares in a sister subsidiary

No, there are not.

It should be noted, however, that publicly-held companies may not offer collateral to secure the obligations of a third party, especially if such third party is in any way related to the controlling shareholders of the publicly-held company.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Brazil recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

As a general rule, Brazil will recognise the role of an agent or trustee, provided that such agent or trustee acts as an attorney in fact duly appointed by each of the relevant creditors under the relevant syndicate of creditors.

5.2 If an agent or trustee is not recognised in Brazil, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Please see the answer to question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of Brazil and guaranteed by a guarantor organised under the laws of Brazil. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Assignments of credits are valid in Brazil and are enforceable against the debtor provided that the debtor is duly notified of the assignment. As a general rule, the collateral securing the loan, as an ancillary obligation, follows the assignment of the credit. Notwithstanding such fact, in order to simplify enforcement of collateral it is recommended that the registration of the security interest be amended to reflect the amendment of the credit.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Yes. Interest paid to foreign lenders is subject to withholding tax in Brazil at the rate of 15% (or 25% for lenders domiciled in tax haven jurisdictions). The same rate applies to fees charged by the lender to the borrower (such as commitment or structuring fees).

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives granted specifically to foreign lenders.

Loans related to export financing for Brazilian exporters are exempt from withholding tax.

Certain investments made by foreign companies in securities issued in Brazil related to infrastructure projects may also benefit from a withholding tax exemption.

6.3 Will any income of a foreign lender become taxable in Brazil solely because of a loan to or guarantee and/or grant of security from a company in Brazil?

No, it will not.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No, there will not.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in Brazil recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Brazil enforce a contract that has a foreign governing law?

Although there are a few conflicting decisions, we are of the opinion that the courts of Brazil should recognise a foreign law chosen by the parties to govern their agreement. The law provides expressly that the law that governs an agreement is the law of the place where the agreement is executed. In our opinion, this provision should apply only in case of the absence of an express choice of law provision in the agreement.

7.2 Will the courts in Brazil recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes. A foreign judgment or a foreign arbitral decision will be enforced in Brazil after being ratified by the Brazilian Superior Court of Justice, without a re-examination of the merits of the case. In order to be ratified, the decision must be final and not subject to further appeal, the parties thereto must have been properly served of process and the decision must be translated into Portuguese by a sworn translation.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Brazil, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Brazil against the assets of the company?

Since the court system in Brazil is federative, the court efficiency may vary substantially throughout the country. As a general rule one may say that in case (a) above the time may be between 2 to 3 years and in the case of (b) the time may be between 1 and 2 years.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

As a general rule, provided that the agreement contains such provision, the creditor may enforce collateral by means of a private sale. Mortgages over real estate properties, however, must be enforced by court-led auctions.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Brazil or (b) foreclosure on collateral security?

A foreign resident that files a lawsuit in Brazil must post a bond to secure the court and legal fees. The value of the bond is determined by the judge and normally varies from 15% to 20% of the value of the claim.

Such bond is not required in case of enforcement proceedings in connection with extrajudicial collection instruments ("*títulos executivos extrajudiciais*"), which comprise, among other instruments, promissory notes, bills of exchange and agreements signed by two witnesses.

7.6 Do the bankruptcy, reorganisation or similar laws in Brazil provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes. In case of the bankruptcy of a Brazilian company all collection and enforcement lawsuits against the bankrupt company are suspended. In the case of a judicial recovery the suspension may not exceed 180 days as of the approval of the judicial recovery by the court.

7.7 Will the courts in Brazil recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. Please see the answer to question 7.2 above.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

There are two main bankruptcy proceedings in Brazil: (i) judicial recovery; and (ii) bankruptcy.

In the case of judicial recovery, all creditors have the right to vote to approve a recovery plan submitted by the company. After the filing of the recovery, there is a stay of enforcement of 180 days during which the creditors are not able to enforce their collateral. This rule is applicable to creditors under pledge and mortgage arrangements.

Creditors under fiduciary transfer of title arrangements are not subject to the judicial recovery and therefore may enforce their rights when the relevant credits become due and payable.

In the case of bankruptcy, all lawsuits are suspended and the company goes into a court-led liquidation, after which the creditors are paid in accordance to the ranking of their respective credits.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The Brazilian bankruptcy code provides that certain acts, if performed by the debtor within the so-called "suspect period" are not effective *vis-à-vis* the bankruptcy estate, irrespective of the absence of intention of the parties thereto to defraud third parties.

The most relevant of such acts are: (i) the payment of an obligation before its due date; (ii) the payment of a debt in a manner not specified in the relevant agreement; and (iii) the granting of a security interest in relation to indebtedness that existed prior to the suspect period. In any of these situations the trustee of the bankruptcy may set aside the relevant actions and claw the payments back.

The suspect period is fixed by the judge at the time of the declaration of the bankruptcy and may not retroact more than 90 days prior to the bankruptcy date or the date the judicial recovery is accepted by the court.

In addition, any actions taken with the purpose to defraud creditors may be set aside by the bankruptcy court.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Financial institutions are subject to special rules governing intervention and extra judicial liquidation; such actions carried out by the Central Bank of Brazil. Depending on the circumstances, the extra-judicial liquidation may be converted into bankruptcy, governed by the general law.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No, but as mentioned above, the agreement may provide that the creditor has the right to sell the collateral in a private sale in case of default of the borrower.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Brazil?

Yes, but any such submission will be no exclusive. Pursuant to the Brazilian Code of Civil Procedure Brazilian courts will have jurisdiction whenever (i) the defendant is domiciled in Brazil, (ii) the obligation has to be performed in Brazil, or (iii) the lawsuit originates from an event which occurred and/or an act which was performed in Brazil.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Brazil?

Yes. Entities of the public sector controlled by the Federal, States or Municipalities Governments may waive sovereignty when entering into transactions which are not essentially related to a public duty. So, as a general rule, such entities may waive sovereign immunity when entering into loan and financing agreements.

10 Other Matters

10.1 Are there any eligibility requirements in Brazil for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Brazil need to be licensed or authorised in Brazil or in their jurisdiction of incorporation?

Any individual or legal entity may be a lender in Brazil. The performance of banking transactions (including raising funds from the market to fund loans to third parties, on a regular basis) are restricted to Brazilian financial institutions duly authorised by the Central Bank of Brazil.

In addition, any foreign loans to Brazilian companies must be registered in the ROF System of the Central Bank of Brazil. Such registration is necessary for the borrower to be able to purchase the foreign currency necessary to make any payments of principal, interest or fees under the relevant loan agreement.

Prior to registration the foreign lender will have to obtain a Tax Number (known as CNPJ) from the Brazilian Federal Tax Authorities and a Cademp Number from the Central Bank of Brazil. Obtaining such numbers is a simple procedure that should not take more than two or three days.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Brazil?

No, there are not.

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TOZZINIFREIRE
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Since 1976, TozziniFreire has distinguished itself as a premier, full-service law firm by consistently providing legal services to domestic and international companies in a wide variety of business sectors. Over the years, we have played a major role in many of the most significant transactions in the Brazilian market, becoming one of the largest and most prestigious firms in Latin America.

TozziniFreire's long history of representing local and international financial institutions in the negotiation and execution of loan agreements provides its banking practice with extensive knowledge in structuring all types of complex corporate finance transactions. In addition, its highly qualified professionals regularly advise clients on commercial transactions designed to finance imports and exports, such as pre-export financing and securitisation of receivables. As a leading advisor to those participating in the reorganisation of the Brazilian banking industry, we assist international banks in setting up their Brazilian operations, as well as local banks in their relationships with foreign partners.

Chapter 26

British Virgin Islands

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in the British Virgin Islands?

The British Virgin Islands continues to be a jurisdiction of choice for corporate vehicles entering into secured finance transactions, and remains a markedly creditor friendly jurisdiction. Amendments to the key corporate legislation, the BVI Business Companies Act, 2004 (the "**Act**") have enhanced the system for the public registration and priority of security. The creation of security over shares remains popular and, following the amendments to the Act, a chargee may enforce a British Virgin Islands law governed share charge immediately upon an event of default (the former mandatory grace/notice periods having been removed). For an English law governed charge over shares in a British Virgin Islands company which provides for appropriation of the shares, the Privy Council has also recently provided more guidance on the rights of the parties, including the application of equitable relief, in *Cukurova Finance International Limited and Cukurova Holdings A.S (Appellants) v Alfa Telecom Turkey Ltd (Respondent)* [2013] UKPC 20.

1.2 What are some significant lending transactions that have taken place in the British Virgin Islands in recent years?

British Virgin Islands obligors continue to feature prominently in financed holding structures and joint ventures, notably: in the oil and gas and mining sectors; in development finance and infrastructure projects throughout Africa and Eastern Europe, CIS, Latin America and elsewhere; in high end property developments in Moscow; and in shipping, drillships and other asset finance facilities.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

The giving of a guarantee by a British Virgin Islands company is governed by the Act, and the company's memorandum and articles of association. Subject to its memorandum and articles of association, the powers of a company include (among other things) the power to guarantee a liability or obligation of any person and secure any obligations by mortgage, pledge or other charge of any of its assets for that purpose.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Under the Act, and subject to its memorandum and articles of association, a company has, irrespective of corporate benefit, full capacity to carry on or undertake any business or activity, do any act or enter any transaction and, for those purposes, full rights, powers and privileges.

The directors of a company have fiduciary and statutory duties to act honestly and in good faith and in the best interests of the company. A director who is in breach of his duties may be liable to the company for the resulting loss to the company.

In the event that there is a disproportionately small (or no) benefit to the company, the transaction may be open to challenge, for example as a transaction at an undervalue, in the event of the insolvency of the company (see below).

2.3 Is lack of corporate power an issue?

Under the Act, no act of a company and no transfer of an asset by or to a company is invalid by reason only of the fact the company did not have the capacity, right or power to perform the act or to transfer or receive the asset.

It should be noted that members' remedies have been codified in the Act, and, for example, if a company or a director of a company engages in, proposes to engage in, or has engaged in conduct that contravenes the Act or the memorandum or articles of the company, the British Virgin Islands court may, on the application of a member or a director of the company, make an order directing the company or director to comply with, or restraining the company or director from engaging in conduct that contravenes, the Act or the memorandum or articles.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

It is not necessary to ensure the legality, validity, enforceability or admissibility in evidence of a guarantee that any document be filed, recorded or enrolled with any governmental authority or agency or any official body in the British Virgin Islands. Shareholder

approval would be required only in the event the company's memorandum and articles of association require it.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

To the extent that under the applicable governing law the guarantee is characterised as a debt incurred on behalf of a member of the company, it may be deemed to be a distribution and accordingly be subject to the requirement on the directors to determine that the company will pass the basic solvency test immediately after the deemed distribution. Under the solvency test, the company's assets must exceed its liabilities and the company must be able to pay its debts as they fall due. For former International Business Companies that still have a share capital, the requirements for satisfying the solvency test differ.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There is no exchange control legislation under British Virgin Islands law and accordingly there are no exchange control regulations imposed under British Virgin Islands law.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

There are no limits under British Virgin Islands law on the types of collateral that a company may give.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

A company may enter into a general security agreement such as a debenture.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

It should be noted that assets would typically be held outside the British Virgin Islands and collateral instruments would typically be governed by a governing law relevant to the jurisdiction in which the asset is sited. In the event that the company holds an interest in real estate or other assets physically located in the British Virgin Islands, there are certain licensing, registration and stamp duty considerations.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

British Virgin Islands law does not make statutory provision for an assignment by way of security. An assignment of receivables governed by British Virgin Islands law would require the written agreement of the debtor in order to take effect as a legal assignment, failing which the assignee would likely take an equitable assignment only.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A company may give security over cash held in its bank accounts in any jurisdiction. British Virgin Islands law does not make statutory provision for collateral security over cash deposited in bank accounts located in the British Virgin Islands, and the cooperation of the account holding branch would be required.

3.6 Can collateral security be taken over shares in companies incorporated in the British Virgin Islands? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Collateral security may be taken over shares in companies incorporated in the British Virgin Islands and this is a popular and frequently used type of security. Such security can validly be granted under a foreign law governed document, and New York or English law governed security is common. In the case of an English law governed document the application of the Financial Collateral Arrangements (No 2) Regulations 2003 to shares in a British Virgin Islands company has been confirmed by the Privy Council in *Cukurova Finance International Limited and Cukurova Holdings A.S (Appellants) v Alfa Telecom Turkey Ltd (Respondent)* [2013] UKPC 2. Shares are in registered form and share security is typically taken by way of an equitable mortgage. The Act provides a mechanism for particulars of a charge over shares to be noted on the register of members, a copy of which the company may file publicly at the Registry of Corporate Affairs in order for a person carrying out a company search to be on notice of the equitable security. The Act was amended in October 2012 to enable a chargee to enforce immediately upon an event of default. The Act also provides for the powers of the chargee or a receiver which may be modified or supplemented by the security instrument.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

A company may give security over inventory. The applicable procedure would be driven by the jurisdiction in which the inventory is located.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Subject to its memorandum and articles of association, a company may grant a security interest to secure its obligations as a borrower, or the obligations of others.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

No steps are required as a matter of British Virgin Islands law to perfect a security interest where assets are not located in the British Virgin Islands. It is a requirement of the Act that a company keep a register of all relevant charges created by the company, either at the company's registered office, or at the office of the company's registered agent. For the purposes of priority, an application may

be made to the British Virgin Islands Registrar of Corporate Affairs to register the charges created, providing an advantage to secured creditors that is not available in some offshore jurisdictions. Subject to such registration, and any prior security interests registered on the applicable register, the security interest will, as a matter of British Virgin Islands law, have priority over any claims by third parties (other than those preferred by law) including any liquidator or a creditor of the company, subject in the case of a winding up of the company in a jurisdiction other than the British Virgin Islands to any provisions of the laws of that jurisdiction as to priority of claims in a winding up. A floating charge will rank behind a subsequently registered fixed charge unless the floating charge contains a prohibition or restriction on the power of the company to create any future security interest ranking ahead in priority to or equally with the floating charge.

No taxes, fees or charges (including stamp duty) are payable (either by direct assessment or withholding) to the government or other taxing authority in the British Virgin Islands under the laws of the British Virgin Islands in respect of the execution or delivery, or the enforcement, of security documentation. In the event that the company holds an interest in real estate or other assets physically located in the British Virgin Islands, there are certain perfection, licensing, registration and stamp duty considerations.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The Registry fee for registering a register of charges is US$100. A small amount of time will be required for the preparation of the register.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No, they are not.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

No, there are not.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Subject to its memorandum or articles, the powers of a company include the power to give financial assistance to any person in connection with the acquisition of its own shares.

(b) Shares of any company which directly or indirectly owns shares in the company

There are no restrictions on the giving of financial assistance to any person in connection with the acquisition of shares of any company which directly or indirectly owns shares in the company.

(c) Shares in a sister subsidiary

There are no restrictions on the giving of financial assistance to any person in connection with the acquisition of shares in a sister subsidiary.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will the British Virgin Islands recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The British Virgin Islands courts will recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders, where that is provided for pursuant to the provisions of the applicable security documentation.

5.2 If an agent or trustee is not recognised in the British Virgin Islands, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not necessary in the British Virgin Islands.

5.3 Assume a loan is made to a company organised under the laws of the British Virgin Islands and guaranteed by a guarantor organised under the laws of the British Virgin Islands. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

This would be dependent on the applicable governing laws of the loan and the assignment documentation. British Virgin Islands law does not make statutory provision for the assignment of intangibles. An assignment of receivables governed by British Virgin Islands law would require the written agreement of the debtor in order to take effect as a legal assignment, failing which the assignee would likely take an equitable assignment only. A deed of novation would more typically be used to transfer a loan governed by British Virgin Islands law.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

No taxes are required to be deducted or withheld under the laws of the British Virgin Islands from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a

guarantee or the proceeds of enforcing security. The British Virgin Islands complies with the EU Taxation of Savings Directive through the automatic exchange of information on savings income with tax authorities in EU Member States.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

No taxes are payable to the government or other taxing authority in the British Virgin Islands under the laws of the British Virgin Islands in respect of the execution or delivery, or the enforcement, of security documentation. In the event that the company holds an interest in real estate or other assets physically located in the British Virgin Islands, there are certain perfection, licensing, registration and stamp duty considerations.

6.3 Will any income of a foreign lender become taxable in the British Virgin Islands solely because of a loan to or guarantee and/or grant of security from a company in the British Virgin Islands?

No income of a foreign lender will become taxable in the British Virgin Islands solely because of a loan to, or guarantee and/or grant of security from, a company in the British Virgin Islands.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are no significant costs such as notarial fees which would be incurred by foreign lenders in a loan to or guarantee and/or grant of security from a company in the British Virgin Islands.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in the British Virgin Islands recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in the British Virgin Islands enforce a contract that has a foreign governing law?

The British Virgin Islands courts will recognise a governing law that is the law of another jurisdiction, subject to the considerations applicable generally to choice of law provisions.

The British Virgin Islands courts may decline to exercise jurisdiction in relation to substantive proceedings brought under or in relation to a contract that has a foreign governing law in matters where they determine that such proceedings may be tried in a more appropriate forum.

7.2 Will the courts in the British Virgin Islands recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Any final and conclusive monetary judgment obtained against a company in the courts of England and Wales, for a definite sum, may be registered and enforced as a judgment of the British Virgin Islands court if application is made for registration of the judgment within 12 months or such longer period as the court may allow, and if the British Virgin Islands court considers it just and convenient that the judgment be so enforced. Alternatively, the judgment may be treated as a cause of action in itself so that no retrial of the issues would be necessary. In either case, it will be necessary that in respect of the foreign judgment:

(a) the foreign court issuing the judgment had jurisdiction in the matter and the judgment debtor either submitted to such jurisdiction or was resident or carrying on business within such jurisdiction and was duly served with process;

(b) the judgment given by the foreign court was not in respect of penalties, taxes, fines or similar fiscal or revenue obligations of the company;

(c) in obtaining judgment there was no fraud on the part of the person in whose favour judgment was given, or on the part of the foreign court;

(d) recognition or enforcement of the judgment in the British Virgin Islands would not be contrary to public policy;

(e) the proceedings pursuant to which judgment was obtained were not contrary to natural justice; and

(f) the judgment given by the foreign court is not the subject of an appeal.

Any final and conclusive monetary judgment obtained against a company in the courts of New York, for a definite sum, may be treated by the British Virgin Islands courts as a cause of action in itself so that no retrial of the issues would be necessary, provided that in respect of the foreign judgment:

(a) the foreign court issuing the judgment had jurisdiction in the matter and the company either submitted to such jurisdiction or was resident or carrying on business within such jurisdiction and was duly served with process;

(b) the judgment given by the foreign court was not in respect of penalties, taxes, fines or similar fiscal or revenue obligations of the company;

(c) there was no fraud on the part of the person in whose favour judgment was given or on the part of the court, in obtaining judgment;

(d) recognition or enforcement of the judgment in the British Virgin Islands would not be contrary to public policy; and

(e) the proceedings pursuant to which judgment was obtained were not contrary to natural justice.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in the British Virgin Islands, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in the British Virgin Islands against the assets of the company?

There is no set timetable for such proceedings, and the time involved will depend on the nature of the enforcement proceedings

(for example, an application to appoint liquidators on the ground of insolvency may be quicker than an action to judgment on the debt claim). If there is no defence to the claim and it is unopposed, judgment may be obtained in proceedings against a British Virgin Islands company in approximately one month from the commencement of proceedings. If the proceedings are defended, then the time involved will depend upon the facts and circumstances of the case. Broadly the same considerations apply to an application to enforce a foreign judgment in the British Virgin Islands.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

No, there are not.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in the British Virgin Islands or (b) foreclosure on collateral security?

There are no restrictions applicable to foreign lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in the British Virgin Islands provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

The appointment of liquidators against a company under the BVI Insolvency Act, 2003 (the "**Insolvency Act**") brings about a moratorium on claims against the company, but this does not prevent the enforcement of security.

7.7 Will the courts in the British Virgin Islands recognise and enforce an arbitral award given against the company without re-examination of the merits?

An award resulting from arbitration in accordance with the terms of the applicable document may be sued upon in the British Virgin Islands courts by action at common law, or by means of an application under the Arbitration Act, 1976, which provides that an arbitral award may by leave of the British Virgin Islands High Court be enforced in the same manner as a judgment or order of a British Virgin Islands court to the same effect, and where leave is so given, the British Virgin Islands High Court may enter judgment in the terms of the award.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "Convention"), has been implemented in the British Virgin Islands by the Arbitration Act, 1976 although the British Virgin Islands is not a party to the Convention. Therefore, a British Virgin Islands court will enforce, without re-examination of the merits of the case or re-litigation of the matters arbitrated upon, a Convention award. However, enforcement of a Convention award may be refused if the person against whom it is invoked proves:

(a) that a party to the arbitration agreement was, under the law applicable to him, under some incapacity;

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;

(e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, with the law of the country where the arbitration took place; or

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award. A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

The British Virgin Islands is about to pass a new Arbitration Act, which is expected to come into force in the first half of 2014. The new Arbitration Act is not expected materially to change the enforcement regime described above. The British Virgin Islands is also going to become a signatory to the Convention, which is also expected to happen at some point in the first half of 2014.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Security over the assets of a company in liquidation may be enforced by the chargee directly over those assets, which fall outside the custody and control of the liquidator.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In the event of the insolvency of a company, the rights of a creditor may be affected by the Insolvency Act as follows:

1. Unfair Preferences: Under section 245 of the Insolvency Act, a transaction entered into by a company, if it is entered into at a time when the company is insolvent, or it causes the company to become insolvent (an "**insolvency transaction**"), and which has the effect of putting the creditor in a better position than it would have been, will be deemed an unfair preference and void if within six months (or two years in the case of a connected person) a petition is presented to the courts for the winding-up of that company. A transaction is not an unfair preference if the transaction took place in the ordinary course of business. It should be noted that this provision applies regardless of whether the payment or transfer is made for value or at an undervalue.
2. Undervalue Transactions: Under section 246 of the Insolvency Act, the making of a gift or the entering into of a transaction for no consideration or where the value of the consideration for the transaction, in money or money's worth, is significantly less than the value in money or money's worth, of the consideration provided by the company will (if it is an insolvency transaction) be deemed an undervalue transaction and void if within six months (or

two years in the case of a connected person) a petition is presented to the courts for the winding-up of the company. A company does not enter into a transaction at undervalue if it is entered into in good faith and for the purposes of business and at the time the transaction was entered into there were reasonable grounds for believing the transaction would benefit the company.

3. Voidable Floating Charges: Under section 247 of the Insolvency Act, the creation by a company of a floating charge is voidable if it is an insolvency transaction and takes place within six months (or two years in the case of a connected person) of a petition being presented to the courts for the winding-up of the company. A floating charge is not voidable to the extent that it secures, amongst other things, money advanced or paid to the company, or at its discretion, at the same time as, or after, the creation of the charge or the value of assets sold or supplied, or services supplied, to the company at the same time as, or after, the creation of the charge.
4. Extortionate Credit Transactions: Under section 248 of the Insolvency Act, an insolvency transaction entered into by a company for, or involving the provision of, credit to the company, may be regarded as an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit, the terms of the transaction are or were such to require grossly exorbitant payments to be made in respect of the provision of the credit, or the transaction otherwise grossly contravenes ordinary principles of fair trading and such transaction takes place within six months (or two years in the case of a connected person) of a petition being presented to the courts for the winding-up of the company.

There are limited preferential creditors under British Virgin Islands law.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Certain sovereign entities and treaty based organisations are protected. For example, the State Immunity (Overseas Territories) Order 1979 extended the State Immunity Act 1978 to the British Virgin Islands, and the International Finance Corporation Order 1955 extends to the British Virgin Islands.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Enforcement of a charge over the shares in a British Virgin Islands company could be effected without recourse to the courts, where the necessary documentation has been provided by the chargor, the issuer company and the registered agent prior to the date of enforcement. As stated above, the remedy of appropriation that may be contained in an English law governed share charge has been upheld by the Privy Council as applicable to shares in a British Virgin Islands company.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of the British Virgin Islands?

The British Virgin Islands courts will recognise that a foreign jurisdiction may be the more appropriate forum for enforcement.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of the British Virgin Islands?

A relevant entity may waive immunity pursuant to the State Immunity Act 1978.

10 Other Matters

10.1 Are there any eligibility requirements in the British Virgin Islands for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in the British Virgin Islands need to be licensed or authorised in the British Virgin Islands or in their jurisdiction of incorporation?

No, there are not.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in the British Virgin Islands?

The British Virgin Islands is a dependable common law jurisdiction, and other attractions for lenders not mentioned above include the statutory recognition of netting, set off and subordination arrangements, and the ability for a creditor to restore a dissolved company where it is just to do so.

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Canada

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Canada?

Canadian banks have been widely recognised internationally as well-capitalised, well-managed and well-regulated, and a major contributing force in the Canadian economy, remaining healthy and strong despite the international financial crisis. The lending market in Canada is characterised by a wide range of domestic banks, pension funds, credit unions and insurance companies, as well as major foreign banks and finance companies, offering a range of commercial lending services and financial products on a par with those offered anywhere else in the world. In recent years, a thriving Canadian high-yield bond market has developed. With recent changes in Canadian tax law, cross-border financing by US and other foreign lenders in Canada has become more favourable generally.

1.2 What are some significant lending transactions that have taken place in Canada in recent years?

While there are numerous examples, some notable transactions include the government-led financial restructurings of GM and Chrysler's Canadian businesses and Air Canada, and the Canadian banks' dip financings of Canwest Media and Canwest LP, the acquisition credit facility for Barrick Gold's acquisition of Equinox Minerals Ltd., the acquisition financing of ING Real Estate's Canadian real estate portfolio by a Canadian bank-led syndicate and the acquisition financing of the Toronto Stock Exchange (TMX) by a syndicate of Canadian banks.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, it can.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

While there is no bright line test for adequate consideration or benefit, under such circumstances, the enforceability of a guarantee could be challenged on the basis that it was granted in a manner that was oppressive, unfairly prejudicial or that unfairly disregards the interest of creditors or minority shareholders under the oppression provisions of applicable corporate legislation, or subject to challenge under provisions of applicable insolvency legislation dealing with transactions at under value or preference claims. Directors and officers would only be subject to personal liability in such cases if specific facts were pleaded which could justify such a remedy (e.g. wrongdoing).

2.3 Is lack of corporate power an issue?

If the guarantor is a corporation, it must have the corporate power to give guarantees; however, most corporations have the powers of a natural person and it is unusual to see restrictions on that power in the constating documents.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Other than typical corporate authorising resolutions, no formal approvals are generally required. Where a corporation provides financial assistance by way of guarantee or otherwise, in some provinces the corporation is required to disclose the financial assistance to its shareholders after such assistance is given.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Not for corporations incorporated federally or under the laws of most provinces. However, the corporate laws in a few maritime provinces and in the territories continue to prohibit financial assistance to members of an intercompany group if there are reasonable grounds to believe that the corporation would be unable to meet prescribed solvency tests after giving the assistance, subject to specific exceptions.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, subject to the provisions of applicable Canadian federal anti-terrorism legislation.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Most types of personal property and real property are available to secure lending obligations, subject to certain limitations by contract (e.g. contractual restrictions on assignment) or by law (e.g. government receivables, permits, licences and quotas).

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

A general security agreement is generally used to grant security over all of the debtor's existing and after-acquired assets; however, it typically does not extend to real property as separate technical provisions apply to ensure registerability against land.

Provincial legislation generally governs the creation and enforcement of security. (A notable exception is security granted to banks under the federal *Bank Act*). Most Canadian provinces have adopted comprehensive personal property security legislation (PPSA) resembling Article 9 of the United States *Uniform Commercial Code* (UCC). The PPSA regulates the creation, perfection and enforcement of a security interest in a debtor's personal property, and creates a system for determining the priority of competing interests in collateral. The act applies to any transaction that creates a security interest in personal property, regardless of the form of document used to grant the interest.

Under the PPSA, "security interest" is defined generally as an interest in personal property that secures payment or performance of an obligation. "Personal property" encompasses virtually all types of personal property. In most cases, the creditor perfects the security interest by registering a financing statement under the PPSA filing regime in the applicable province. Conflict of laws rules in the PPSA determine which filing jurisdiction is applicable and in which jurisdiction the registration must be made. Certain types of property are also subject to federal regulation and filing regimes (for example, intellectual property, shipping, aircraft and railways).

Québec, Canada's only civil law jurisdiction, has a European style Civil Code (the *Québec Civil Code*) that codifies the province's general principles of law. The hypothec, Québec's only form of consensual security, may be granted by a debtor to secure any obligation, and may create a charge on existing and after-acquired movable (personal) or immovable (real) property. It may be made with or without delivery, allowing the grantor of the hypothec to retain certain rights to use the property.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

A lender may take collateral security over land or real estate (i.e. real property) by way of a mortgage of the land, a mortgage of lease, a debenture, or, if the real property charged is in Québec, an immovable deed of hypothec. Interests in real property are registered in the land registry system of the relevant province. In Québec, the immovable hypothec is usually registered by filing a hard copy of the deed of hypothec at the registry office for the relevant registration divisions.

It should be noted that a higher rate of interest on amounts in arrears secured by a real estate mortgage may not be enforceable under the *Interest Act* (Canada).

The procedure for taking security over plant, machinery and equipment that constitutes personal property under the PPSA or movables under the *Québec Civil Code*, is described in question 3.2 above.

Personal property may include materials that become fixtures but if the security interest has not attached prior to affixation, the creditors registered against the land gain priority, with limited exceptions. What constitutes a fixture affixed to the land is a factual question and the common law has taken a contextual approach. To protect the priority of its interest in a fixture, a secured party must both perfect its security interest under the PPSA and also register its interest in the land registry system. Under the *Québec Civil Code*, the rules for determining what constitutes movable or immovable property are different – but the end results are similar.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. The procedure for taking security over receivables is described in question 3.2 above.

Notice to account debtors is not required to create a perfected security interest in accounts receivable under the PPSA. However, account debtors for the receivables are only obligated to pay the receivable directly to the secured party after receiving notice from the secured party directing them to do so. In addition, an assignment of receivables constitutes a "security interest" regardless of whether it secures any obligations.

Under the *Québec Civil Code*, an assignment of receivables must be registered to be set up against third parties (i.e. perfected) if the assigned receivables constitute a "universality of claims". If the receivables do not constitute a universality of claims, the assignment may be perfected with respect to Québec obligors only by actual notice of the assignment to such obligors.

Under Canadian federal legislation, subject to prescribed exceptions, receivables owed by the federal government can be assigned only absolutely (not as security) and only with appropriate notice to the government, which must be acknowledged. Some provinces have similar legislation covering receivables owed by the provincial government. In Canada, asset-based lenders frequently exclude government receivables from the borrowing base.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

The PPSA and *Québec Civil Code* permit a lender to take security over deposit accounts. Deposits in bank accounts are treated as receivables owed by the depository to the debtor owner. Accordingly, security interests (or hypothec) in deposit accounts are perfected by registering a financing statement (or application for registration) in the province where the debtor's chief executive office (or domicile) is situated (see question 3.2 above). Traditionally, a bank lender that operated deposit accounts for a debtor and wished to take cash collateral in such accounts would do so by way of set off and a "flawed asset" approach, however in light of recent Canadian case law, the lender should also register a PPSA financing statement against the debtor. Unlike the UCC, there is no concept of perfecting security in deposit accounts by "control" in Canada, however, the Ontario government has announced its

intention to amend the PPSA to adopt an approach similar to Article 9 of the UCC, which, if the legislation were to pass, would introduce this concept in Ontario.

3.6 Can collateral security be taken over shares in companies incorporated in Canada? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

A pledge of shares may be documented by way of a standalone pledge agreement or included in a general security agreement. While the jurisdiction governing validity, perfection or non-perfection of the pledge will be determined under applicable conflict of laws rules, the pledge may be granted under a document governed by New York or English law, subject to the principles discussed in question 7.1 below.

Under the PPSA and the *Securities Transfer Act, 2006* (STA), versions of which are in force in most Canadian jurisdictions (harmonised legislation is in force in Québec), a secured party can perfect its security interest in shares by registering under the PPSA or by taking control under the STA (or both). An interest perfected by control has priority to one perfected only by registration.

Shares may be either certificated or un-certificated. For certificated shares, taking physical possession of the share certificates (endorsed, if applicable) meets the STA requirement for control. Control in other forms of investment property, such as book-based securities, can be achieved by other means, such as a control agreement with the relevant intermediary. A private company's constating documents must include a restriction on the right to transfer its shares. This restriction usually states that each transfer of the company's shares requires approval by the company's directors or shareholders.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes. The procedure is described in question 3.2.

The PPSA also provides that secured parties that have financed the purchase of inventory (either as sellers or by way of third party financing) may obtain priority in the financed inventory and its proceeds over any other security interest in the same collateral given by the same debtor, even if that other security interest was registered first. A purchase money security interest (PMSI) receives super-priority in inventory if, before the debtor (or a third party) obtains possession of the collateral, the secured party: (i) perfects its security interest by registration; and (ii) gives notice in writing to every other prior registered secured party with an interest in inventory or accounts. The *Québec Civil Code* does not offer a comparable regime. Hence, to ensure that the supplier/vendor of inventory has a first ranking security on such inventory in Québec requires obtaining a subordination or cession of rank from any prior ranking secured creditor.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, it can.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Registration fees are payable in connection with the filing of PPSA financing statements, increasing with the length of the registration period.

A modest tax is payable upon registering real property security in certain Canadian jurisdictions. The tax is based on a fee and where the face amount of the registration exceeds the value of the lands, one is permitted to pay on the basis of a percentage of the property value.

In Québec, if a notarial deed of hypothec is used, the notary will generally charge a fee for execution, keeping it in their notarial records and for issuing copies, however there is no additional material cost.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The registration requirements in most cases are relatively uncomplicated and inexpensive.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

For certain special types of regulated property, consents or approvals may be required by governmental authorities or quasi-administrative bodies for both the creation and enforcement of security. Governmental licences, permits and quotas are subject to specific regimes requiring notice or consent in many cases. See question 3.4 regarding government receivables.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

A security interest and hypothec in personal property or moveable property can secure present and future advances.

Generally, advances on a mortgage made without actual notice of a subsequent claim will typically have priority over such subsequent claims and, accordingly, mortgages securing revolving credit normally provide that subsequent liens are prohibited. Certain priority exceptions apply such as in respect of construction liens. Mortgages securing revolving credit should be properly worded to address situations where the borrowing is fully or partially repaid and thereafter readvanced.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

In Québec, security over immovable property or in favour of a collateral agent on behalf of multiple secured parties requires execution of the deed of hypothec before an authorised Québec notary.

Each province has different requirements with respect to real property including specific registration forms, evidence of corporate authority, affidavits and, in some jurisdictions, originals for registration.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Most Canadian corporations are not subject to such restrictions, except those created under the laws of a few maritime provinces (New Brunswick, Prince Edward Island and Newfoundland) and the territories (the Northwest Territories, the Yukon and Nunavut).

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Canada recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes. The agency concept is recognised in Canadian common law and agents are commonly used in syndicated lending for both administration of loans and holding collateral security in Canada. Indenture trustees are typically used in public bond transactions.

5.2 If an agent or trustee is not recognised in Canada, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

For purposes of holding collateral security in the province of Québec, the mechanism commonly used requires the appointment of the collateral agent as a "*fondé de pouvoir*", together with the issuance of a bond to the agent secured by a notarial deed of hypothec.

5.3 Assume a loan is made to a company organised under the laws of Canada and guaranteed by a guarantor organised under the laws of Canada. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Assignments of debt, guarantees and security can be effected by contract pursuant to a standard assignment and assumption agreement. Where the assignor is also the secured party of record (whether as collateral agent or otherwise), PPSA financing statements (and the Québec equivalent) are typically amended to recognise the assignment. Mortgage or security assignments are required to be filed under the applicable land registry to give effect to the assignment.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

There are generally no requirements to deduct or withhold tax on payments of interest by a debtor or guarantor (whether by voluntary payment, enforcement or otherwise) made to domestic lenders.

Conventional interest payments made to arm's length lenders that are non-residents of Canada are generally not subject to Canadian withholding tax, regardless of their country of residence. In addition, conventional interest payments made to certain non-arm's length US resident lenders may qualify for an exemption from Canadian withholding tax under the Canada-US Tax Treaty. In the absence of these or other applicable exemptions under treaties or under the *Income Tax Act* (Canada), withholding tax on interest payments may apply at rates of up to 25%.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Generally, there are no material tax or other incentives provided preferentially to foreign investors or creditors and no taxes apply to security documents for the purposes of effectiveness or registration.

6.3 Will any income of a foreign lender become taxable in Canada solely because of a loan to or guarantee and/or grant of security from a company in Canada?

While each lender's tax position must be examined individually, generally the non-resident lender's income should not be taxable in Canada solely because of a single secured loan transaction in the absence of a fixed presence in Canada or other connecting factors.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

(See questions 3.9 and 3.10 for the filing and notarial fees.) There are no stamp taxes, registration taxes or documentary taxes that are generally applicable in connection with authorisation, delivery or performance of loans, guarantees or security.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Thin capitalisation rules under the *Income Tax Act* (Canada) determine whether a Canadian corporation may deduct interest on the amount borrowed from a "specified non-resident shareholder" of the corporation or from a non-resident person who does not deal at arm's length with a "specified shareholder" (collectively "specified non-residents"). A "specified shareholder" of a corporation is, in general terms, a person who, either alone or together with persons with whom they do not deal at arm's length, owns 25% or more of the voting shares, or the fair market value of the issued and outstanding shares of the corporation.

Under the thin capitalisation rules, Canadian corporations are effectively prevented from deducting interest on the portion of loans from specified non-residents that exceeds one and a half times the corporation's specified equity (in highly simplified terms, retained earnings, share capital and contributed surplus attributable to specified non-residents). In addition, any interest expenses that are disallowed under these rules are deemed to be dividends paid to

the lender for non-resident withholding tax purposes, and subject to withholding tax.

Furthermore, recently enacted amendments to these rules, extend their application (with appropriate modifications) to (i) Canadian resident trusts, (ii) non-resident corporations or trusts that carry on business in Canada (in respect of loans that are used in the course of that Canadian business), and (iii) partnerships in which a Canadian resident corporation or trust or a non-resident corporation or trust is a member.

7 Judicial Enforcement

7.1 Will the courts in Canada recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Canada enforce a contract that has a foreign governing law?

Subject to certain exceptions and conditions, Canadian courts will recognise and apply the parties' choice of governing law.

Canadian courts will not apply the foreign law if it is contrary to public policy. Additionally, Canadian courts will apply Canadian procedural law and certain provincial and federal laws that have overriding effect, such as bankruptcy and insolvency statutes, federal crime legislation, employment legislation and consumer protection legislation.

7.2 Will the courts in Canada recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

A foreign judgment may be enforced in Canada if the judgment is final and the foreign court properly assumed jurisdiction. As long as these requirements are met, a Canadian court will not examine whether the foreign court correctly applied its own substantive and procedural laws.

In considering the issue of jurisdiction, Canadian courts will examine whether there was a "real and substantial connection" between the foreign court and the cause of action or the defendant. While the test is often applied generously and flexibly by the courts, a fleeting or relatively unimportant connection will not substantiate a foreign court's assumption of jurisdiction.

There are certain limited defences which preclude recognition related to circumstances under which the foreign judgment was obtained and whether there is any reason it would be improper to recognise the foreign judgment.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Canada, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Canada against the assets of the company?

(a) In Ontario, if no defence is filed in response to a claim, default judgment may be obtained 20 days following the commencement of an action. After any judgment is obtained, and subject to it being stayed by the filing of a notice of appeal, enforcement proceedings may be commenced immediately.

(b) An application hearing to enforce a foreign judgment in Ontario may generally be obtained within approximately two to three months.

Procedural and substantive law differs by province, but the timing described above is similar in most other provinces.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

A secured creditor must give the debtor reasonable time to pay following demand, before taking action to enforce against its collateral security (even if the debtor purported to waive these rights).

Where a secured creditor intends to enforce security over substantially all of an insolvent debtor's inventory, accounts receivable or other property used in relation to the debtor's business, in addition to delivering a demand, the secured creditor must also deliver a notice of intention to enforce security in the form prescribed under the *Bankruptcy and Insolvency Act* (BIA) at least 10 days before such enforcement, unless the debtor consents to an earlier enforcement.

If a secured creditor intends to deal with the collateral itself or through a privately appointed receiver (where applicable), it must also give advance notice to the debtor and other interested parties of its intention to dispose of the collateral or accept the collateral as final settlement of the debtor's obligations. This notice period is typically 15-20 days depending on the applicable PPSA and can run concurrently with the BIA enforcement notice.

Although there is no requirement for a public auction, a secured creditor (and any receiver) must act in good faith and in a commercially reasonable manner when selling or otherwise disposing of the collateral. However, if a lender wishes to buy the collateral, it may only do so at a public sale, unless otherwise permitted by a court. Generally speaking, no regulatory consents are required to enforce on collateral security.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Canada or (b) foreclosure on collateral security?

(a) To maintain an action in certain provinces, foreign lenders may be required to become extra-provincially registered.

(b) There are no specific restrictions on a foreign lender's ability to enforce security in Canada. However, if the lender chooses to exercise those remedies to either foreclose on the collateral security or to credit bid its debt, such that the foreign lender ends up owning the debtor's Canadian assets, the foreign lender may be subject to restrictions imposed by the *Investment Canada Act* or the *Competition Act*.

7.6 Do the bankruptcy, reorganisation or similar laws in Canada provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, a stay of proceedings may affect the rights of secured and unsecured creditors in some circumstances to the extent set out in question 8.1.

7.7 Will the courts in Canada recognise and enforce an arbitral award given against the company without re-examination of the merits?

Provincial arbitration acts provide for the enforcement of arbitral awards by application to the court. Canadian courts will not re-examine the merits of an arbitral award, however the award may be set aside on specified grounds including, but not limited to, an invalid arbitration agreement, an award outside of the jurisdiction of the arbitrator, or a reasonable apprehension of bias on the part of the arbitrator.

The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and the *UNCITRAL Model Law on International Commercial Arbitration* have been adopted in all Canadian provinces and provide rules for the enforcement of international arbitral awards. Subject to limited grounds on which enforcement of an international arbitral award may be refused, the awards are generally enforceable in Canada.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Bankruptcy and insolvency in Canada is primarily governed by two federal statutes: the BIA; and the *Companies' Creditors Arrangement Act* (CCAA). BIA cases will typically be administered by a third party trustee or receiver, whereas CCAA proceedings are controlled by the debtor and supervised by a court-appointed monitor. Although some aspects of creditors' rights are determined by provincial statutes, bankruptcy and insolvency law is mostly uniform across Canada. Insolvency proceedings under the BIA or CCAA will result in the imposition of a stay of proceedings either by a Canadian court or pursuant to the relevant statute.

If the BIA case becomes a liquidation proceeding, the automatic stay of proceedings imposed upon commencement will not prevent a secured creditor from realising or otherwise dealing with its collateral.

If a debtor files a notice of intention to make a proposal (NOI) or a proposal to creditors under the BIA, a secured creditor's enforcement rights will be automatically stayed during the reorganisation proceeding, unless: (i) the secured creditor took possession of the collateral before the filing; (ii) the secured creditor delivered its BIA enforcement notice more than 10 days prior to the filing of the NOI; or (iii) the debtor consents to the secured creditor exercising its enforcement rights.

Reorganisation proceedings under the CCAA are commenced when an initial order is granted by the court. The CCAA explicitly empowers a court to grant a stay of proceedings against the debtor on any terms that it may impose. The stay provision in the CCAA initial order typically prohibits secured creditors from enforcing their security interests against the debtor's property during the proceeding. In a court appointed receivership, receivership orders also routinely contain substantially similar stay language.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

(a) *Preferential transactions*

Under the BIA and the CCAA, certain transactions, including the granting of security, the transfer of property and other obligations are not enforceable if incurred during specified pre-bankruptcy time periods. Subject to certain conditions and exemptions, if such transactions are made with a view to giving one creditor a preference over others, they may be set aside if entered into during the period that is: (i) three months before the initial bankruptcy event for transactions at arm's length; and (ii) one year before the initial bankruptcy event for transactions not at arm's length.

Transfers in which the consideration the debtor receives is less than the fair market value, subject to certain other conditions and exemptions, may be set aside under the BIA or CCAA if entered into during the period that is (i) one year before the initial bankruptcy event for transactions at arm's length, and (ii) five years before the initial bankruptcy event for transactions not at arm's length.

There is also provincial legislation providing for setting aside other fraudulent conveyances or preferential transactions.

(b) *Statutory priority claims*

In Canada, a number of statutory claims may "prime" or take priority over a secured creditor. Priming liens commonly arise from a debtor's obligation to remit amounts collected or withheld on behalf of the government. Such amounts include unremitted employee deductions for income tax, government pension plan contributions and government employment insurance premiums and unremitted federal goods and services taxes, provincial sales taxes, municipal taxes and workers' compensation assessments. In Ontario, statutory deemed trusts may give rise to a priority claim for certain unpaid claims of employees, including a deemed trust arising upon wind-up of a defined benefit pension plan for any deficiency amounts. In addition, there are a number of statutes that create priming liens in specific industries (for example, repair and storage liens, construction liens and brokerage liens). These priming liens may attach to all of the property of the debtor. In some cases, the priority of statutory claimants and secured creditors is sometimes reversed by the commencement of an insolvency proceeding against the debtor.

(c) *Priority claims – insolvency*

An insolvency proceeding in respect of the debtor may give rise to a number of additional liens that would rank in priority to a secured creditor's claims.

The BIA provides employees of a bankrupt employer or an employer in receivership with a priority charge on the employer's "current assets" for unpaid wages and vacation pay (but not for severance or termination pay) for the six-month period prior to bankruptcy or receivership to a maximum of $2,000 per employee (plus up to $1,000 for certain travelling expenses). The priority charge ranks ahead of all other claims, including secured claims, except unpaid supplier rights.

The BIA also grants a priority charge in bankruptcies and receiverships for outstanding current service pension plan contributions, subject only to the wage earners' priority. The pension contribution priority extends to all assets, not just current assets, and is unlimited in amount.

The pension charge secures (i) amounts deducted as pension contributions from employee wages but not contributed to the plan prior to a bankruptcy or receivership, and (ii) amounts required to be contributed by the employer to a pension plan for "normal costs". The charge does not extend to unfunded deficits arising upon a wind-up of a defined benefit plan and should not include scheduled catch-up or special payments required to be made by an employer because of the existence of a solvency deficiency.

The CCAA and the reorganisation provisions of the BIA expressly

prohibit a court from sanctioning a proposal, compromise or arrangement or a sale of assets, unless it is satisfied that the debtor has arranged to pay an amount equal to the amounts secured by the wage and pension priority charges discussed above.

(d) *Priority Claims – court charges*

In CCAA and BIA reorganisations, debtors may obtain interim financing (often referred to as debtor in possession (DIP) financing). Both the CCAA and the BIA expressly authorise the court to grant fresh security over a debtor's assets to DIP lenders in priority to existing security interests up to a specified amount approved by the court.

In addition to the priming liens noted above, in a CCAA or BIA reorganisation, the court has the authority to order priming charges to secure payment of directors' post-filing liabilities and to secure the fees and disbursements of experts, court-appointed officials and certain other "interested parties" in the court's discretion. The court may also order priming charges to secure payment to designated "critical suppliers", typically, restricted to securing payment for post-filing supply.

The priority of the DIP charge, directors' charge, expense charge and any critical supplier charge in respect of the debtor's assets is determined by the court.

(e) *Unpaid Suppliers' Rights*

The BIA provides certain unpaid suppliers with a right to repossess goods sold and delivered to a purchaser within 30 days before the date of bankruptcy or receivership of such purchaser. The unpaid supplier's right to repossess goods effectively ranks ahead of a secured creditor.

An unpaid supplier claim is rarely successful as the supplier has the burden of demonstrating that all requirements have been met, including: (i) that the bankrupt has possession of the goods; (ii) that the goods are identifiable; (iii) that the goods are in the same state; and (iv) that the goods have not yet been sold.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Banks (including the Canadian business of foreign banks authorised to do business in Canada), insurance companies and trust corporations are excluded from the BIA and CCAA and their wind up is governed by the *Winding-Up and Restructuring Act* (Canada). The BIA and CCAA also exclude railway and telegraph companies. However, in a recent case a court granted a railway company relief under the CCAA. Both the BIA and CCAA apply to income trusts.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Upon default, a secured creditor may exercise "self-help" remedies to take possession and control of collateral individually or through the appointment of a private receiver (if provided in its security documents). Secured creditors may also seek court appointment of an interim receiver to preserve and protect collateral on an expedited basis.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Canada?

The submission by a party to the non-exclusive jurisdiction to the laws of a foreign jurisdiction should be recognised as valid, provided that service of process requirements are complied with.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Canada?

The *State Immunity Act* (Canada) governs sovereign immunity of foreign states and any separate agency of a foreign state (e.g. state trading corporations). Private corporations that are not "organs" of a foreign state are not entitled to sovereign immunity.

Sovereign immunity may be waived if the state or agency submits to the jurisdiction of the Canadian court by agreement, either before or after commencement of the proceedings. Sovereign immunity is subject to certain exceptions (e.g. commercial activities and property damage actions, terrorist activities and certain maritime claims).

10 Other Matters

10.1 Are there any eligibility requirements in Canada for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Canada need to be licensed or authorised in Canada or in their jurisdiction of incorporation?

There are no specific eligibility requirements for lenders solely as a result of entering into a secured lending transaction as lender or agent.

Under the *Bank Act* (Canada), a "foreign bank" is generally not permitted to engage in or carry on business in Canada except through a foreign bank subsidiary, an authorised foreign branch or other approved entity. A "foreign bank" is broadly defined in the Act and includes any foreign entity that (i) is a bank under the laws of a foreign country in which it carries on business or carries on business in a foreign country which would be considered the business of banking, (ii) provides financial services and uses the word "bank" in its name, (iii) is in the business of lending money and accepting deposit liabilities transferable by cheque or other instrument, (iv) provides financial services and is affiliated with a foreign bank, or (v) controls a foreign bank or a Canadian bank.

However, the *Bank Act* would not prohibit a foreign bank from making a loan to a Canadian borrower as long as the nature and extent of its activities in Canada do not amount to engaging in or carrying on business in Canada. Whether a foreign bank would be considered to be engaging in or carrying on business in Canada by reason of making a particular loan to a Canadian borrower will depend on the relevant facts and circumstances.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Canada?

For example, the *Criminal Code* (Canada) makes it a criminal offence to receive interest at a criminal rate, defined as an effective annual rate of interest that exceeds 60 percent. Interest in the *Criminal Code* (Canada) is broadly defined to include interest, fees, fines, penalties, commission and similar charges and expenses that a borrower pays in connection with the credit advanced. This section has arisen almost exclusively in civil, not criminal, cases where the borrower seeks to avoid repayment by arguing that the contract was illegal. Courts have struggled with which, if any, contractual provisions should be enforced when a contract imposes a criminal rate of interest.

Readers are cautioned against making decisions based on this material alone. Rather any proposal to do business in Canada should be discussed with qualified professional advisors.

Note

Please note that the answers in this chapter are up to date as of January 31, 2014 and some laws are due to be updated in the coming year.

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Cayman Islands

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in the Cayman Islands?

There have been no changes to the Companies Law (2013 Revision) of the Cayman Islands in the last 12 months that impact the Cayman Islands' reputation as an influential, innovative and creditor friendly jurisdiction. Financial institutions and corporate borrowers alike continue to rely on the current regime that recognises bi-lateral and multi-lateral set-off and netting upon the insolvency of a Cayman Islands company and statutory provisions allowing secured creditors to enforce their security, without the leave of the court or a liquidator. These legislative provisions continue to support the view that the Cayman Islands is the leading, preferred offshore jurisdiction of choice for any lending and security structure.

We have seen an increased focus on securities principles in the last 12 months, specifically following the introduction of the Basel III Capital Adequacy requirements applicable to lenders in the market. This increased focus has led to increased opinion requirements and extended analysis on security issues, in particular, in relation to perfection and priority of security interests.

1.2 What are some significant lending transactions that have taken place in the Cayman Islands in recent years?

Although there have been a number of significant financings in the local market, in particular re-financings of a number of hotel developments and local property developments, the most significant lending transactions occur in the investment funds space, especially to Cayman Islands domiciled private equity funds. These transactions tend to be governed by New York and English law finance documents with security taken over Cayman Islands assets being governed in many cases by Cayman Islands law (although there is no strict legal requirement for the governing law to be Cayman Islands law as the courts in the Cayman Islands generally recognise foreign law documents).

The main types of security are, in the case of funds established in the form of exempted limited partnerships, security over capital calls and more generally security over Cayman Islands equity interests either in the form of registered shares or limited partnership interests. This is particularly common where there is a "master-feeder" structure or underlying blocker entities are used to hold assets.

In both private equity and hedge funds, borrowings are used for both leverage and liquidity purposes using a variety of different instruments including subscription facilities, variable funding notes and also total return swaps.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, a company can grant a guarantee in these circumstances assuming there is sufficient commercial rationale and benefit to the company.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

The directors of the company providing a guarantee must ensure that any proposed transaction is in the best interests of the company as a whole. Guarantee arrangements may be construed as not being in the best interests of a company (and not for the company's corporate benefit) if the granting company receives no commercial benefit from the underlying financing arrangements.

2.3 Is lack of corporate power an issue?

In accordance with the Companies Law (2013 Revision), the lack of capacity of a company to enter into a transaction by reason of anything in the company's memorandum will not affect the validity of the transaction. However, where the company is acting without the necessary capacity, shareholders may issue proceedings prohibiting the company from performing its obligations under the transaction (including disposing of any property) and proceedings may be brought against present and past directors or officers of the company for loss or damage caused by them binding the company in this manner contrary to the objects in the memorandum.

If a shareholder brings proceedings to restrict the company from performing its obligations, we believe such action would not affect the other party's rights under the transaction. If the company fails to perform, the other party would have the usual remedies.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Subject to any licensing restrictions that may apply to a regulated entity, no authorisations or consents are required by law from any governmental authorities or agencies or other official bodies in the

Cayman Islands in connection with the grant of a guarantee. In addition, it is not necessary to ensure the enforceability or admissibility in evidence of a guarantee that any document be filed, recorded or enrolled with any governmental authority or agency or any official body in the Cayman Islands.

The directors of the company giving the guarantee should approve the terms and execution of the guarantee by way of board resolution in accordance with the company's articles of association. If there is any question of lack of corporate benefit or a potential breach of director's duties, it is recommended that the company also obtain a shareholders' resolution also approving the grant of the guarantee.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no legislative restrictions imposed on the amount of any guarantee due to net worth or the solvency of a company. However, the directors of a company should, as part of fulfilling their fiduciary duties, consider the terms of any guarantee particularly in the context of the company's asset base.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange control regulations imposed under Cayman Islands law that would act as an obstacle to enforcement of a guarantee.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

There are no legislative restrictions on the form of collateral and, accordingly, all property of a company is potentially available as security for lending obligations.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is possible for security to be taken by means of a general security agreement over a range of asset types, such as a debenture. The main types of security under Cayman Islands law are mortgages (legal and equitable), charges (fixed and floating), liens and assignments of rights by way of security (albeit that this is deemed to be a form of mortgage). Formalities and perfection of such security interests will depend upon the nature of the underlying collateral and the applicable *lex situs* of such collateral.

Special regimes apply to the taking of security over certain assets, including ships, aircrafts and land.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Security over land is usually granted by way of legal or equitable mortgage and by way of fixed charge over plant, machinery and equipment. In relation to chattels, security can also be created by a conditional bill of sale which must be recorded in accordance with the Bill of Sale Law (2000 Revision).

A legal mortgage is granted by execution of a mortgage agreement between the mortgagor and the secured creditor. The terms of the mortgage will vary, but essentially a mortgage (i) requires transfer of legal title in the land to the secured creditor, subject to a requirement to re-transfer the land upon satisfaction of the underlying secured obligations, and (ii) grants the secured creditor certain powers to deal with the land upon a default.

An equitable mortgage can be created by (i) the execution of an equitable mortgage, (ii) an agreement to create a legal mortgage, (iii) a transfer of land which is not perfected by registering the secured creditor in the Land Registry in accordance with the Registered Lands Law, and (iv) the deposit of the relevant title deeds by way of security.

Fixed and floating charges are usually evidenced by an agreement between the parties reflecting the grant of the security interest and setting out the commercial terms.

A company must make an entry in its register of mortgages and charges in respect of any security interest created by it in order to comply with section 54 of the Companies Law (2013 Revision). However, failure to comply with this requirement does not invalidate the security interest.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Receivables arising under contract are examples of "choses in action", being a right which can only be asserted by bringing an action and not by taking possession of a physical thing. Receivables can be mortgaged or charged where that mortgage or charge takes the form of an assignment with an express or implied provision for reassignment on redemption. If a chose in action is charged, the charge can be either fixed or floating.

An assignment can be either legal or equitable, depending on the circumstances. The key requirements of a legal assignment are that: (i) it is an absolute assignment of the whole of a present (not future) chose in action; and (ii) the assignment must be both in writing and signed by the assignor and notified in writing to the debtor. An equitable assignment generally only relates to part of a chose in action and/or does not involve the notification of the debtor.

A company must make an entry in its register of mortgages and charges in respect of any security interest created by it.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A security interest over cash deposits is most commonly created by either a fixed or floating charge, depending on the commercial intention of the parties and the level of control maintained over such cash deposits. The secured creditor should ensure that there is an agreement (usually a deed). Cash deposits are classified as chose in action. Accordingly, the analysis in question 3.4 above applies.

In accordance with Cayman Islands conflict of law rules, the appropriate law to govern any security over cash deposited with a bank will be the law applicable where the bank is located (or the location of the bank branch with which the deposit is made).

3.6 Can collateral security be taken over shares in companies incorporated in the Cayman Islands? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Security over shares in Cayman companies, where the register of

members is maintained in the Cayman Islands, is usually taken in the form of a legal or equitable mortgage, depending on whether the secured party wishes to take legal title to the shares prior to a default of the secured obligation. Different rules may apply if the register of members is maintained outside of the Cayman Islands or if the shares are in bearer form.

In accordance with Cayman Islands conflict of law rules, the appropriate law to govern any security over registered shares in a Cayman Islands company is determined according to the law applicable to the location of the register of members. Whilst it is possible to grant security over shares as a matter of other laws, enforcement of such security may prove problematic or difficult.

It is not possible to pledge registered shares under Cayman Islands law because title to the shares cannot be transferred by physical delivery. Any grant of security over registered shares that is called a "pledge" will typically fall into one of the mortgage categories, depending on its terms, or it may be entirely ineffective.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security can be taken over inventory or stock by way of a fixed or floating charge. A floating charge is more common given the changing nature of inventory in the usual course of a grantor's business.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company can grant a security interest in order to secure its obligations as a borrower under a credit facility or as a guarantor of the obligations of other parties. Usual fiduciary duties applicable to directors' actions will apply in each case.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

No stamp duties or other similar taxes are payable, unless the applicable security document is executed in or brought into the Cayman Islands. The amount of any applicable stamp duty will vary depending on the type of security document and the identity of the assets subject to the security interest. Unless the document needs to be executed in the Cayman Islands, it is common practice to execute documents outside of the Cayman Islands so that stamp duty is not levied. Court fees (of a nominal value) will fall due as part of any enforcement process.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

A company must make an entry in its register of mortgages and charges in respect of any security interest created by it in order to comply with section 54 of the Companies Law (2013 Revision). This step is usually undertaken by the registered office service provider of the company and can be completed in a very short time period.

Charges over certain assets, such as land, intellectual property rights, ships and aircraft, need to be registered at other specialist registries related to the asset in question.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Subject to any licensing restrictions that may apply to a regulated entity, no authorisations or consents are required by law from any governmental authorities or agencies or other official bodies in the Cayman Islands in connection with the grant of a security interest.

The directors of the company granting the security interest should approve the terms and execution of the security document by way of board resolution in accordance with the company's articles of association. If there is any question of lack of corporate benefit or a potential breach of directors' duties, it is recommended that the company also obtain a shareholders' resolution also approving the grant of the security interest.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There are no special priority concerns regarding a revolving credit facility.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

A number of key documentation issues exist, each of which depend on the form of the security document, whether the document contains a power of attorney and if they are to be executed by way of deed. The key issues of note are: (i) an agreement to create a legal mortgage over land should be executed and delivered as a deed; (ii) a legal assignment must be in writing and signed by both parties; (iii) any power of attorney or security document containing a power of attorney must be executed by way of a deed to ensure compliance with the Powers of Attorney Law (1996 Revision); (iv) where a deed is required, the relevant execution formalities are set out in the Companies Law (2013 Revision); and (v) in the case of virtual completion conducted by email, certain special execution protocols should be followed in compliance with the Companies Law (2013 Revision), following the recent Mercury case in England.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

(a) Shares of the company

No, there are no legislative prohibitions or restrictions under Cayman Islands law equivalent to the English law financial assistance rule.

(b) Shares of any company which directly or indirectly owns shares in the company

No, there are no legislative prohibitions or restrictions under

Cayman Islands law equivalent to the English law financial assistance rule.

(c) Shares in a sister subsidiary

No, there are no legislative prohibitions or restrictions under Cayman Islands law equivalent to the English law financial assistance rule.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will the Cayman Islands recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Cayman Islands law recognises the role of an agent or trustee, acting on behalf of all lenders, assuming the transaction documents provide for the relevant trust mechanics and the trust is properly constituted.

5.2 If an agent or trustee is not recognised in the Cayman Islands, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

5.3 Assume a loan is made to a company organised under the laws of the Cayman Islands and guaranteed by a guarantor organised under the laws of the Cayman Islands. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

There are no special requirements under Cayman Islands law to make the loan and guarantee enforceable by Lender B, provided that the novation/transfer mechanics in the applicable facility agreement are adhered to as a matter of the applicable governing law.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

The Cayman Islands currently have no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax. Accordingly, no taxes, fees or charges (other than stamp duty) are payable either by direct assessment or withholding to the government of another taxing authority in the Cayman Islands under the laws of the Cayman Islands.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives or other incentives under Cayman Islands law.

6.3 Will any income of a foreign lender become taxable in the Cayman Islands solely because of a loan to or guarantee and/or grant of security from a company in the Cayman Islands?

No income of a foreign lender will become taxable in the Cayman Islands.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Other than the payment of stamp duty and applicable court fees on enforcement, no other significant costs should be incurred by foreign lenders in the grant of any loan or the taking of the benefit of any guarantee or security interest.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Assuming that the lenders are not connected to the borrower, in principle there are no adverse consequences if the lenders are organised in a jurisdiction other than the Cayman Islands.

7 Judicial Enforcement

7.1 Will the courts in the Cayman Islands recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in the Cayman Islands enforce a contract that has a foreign governing law?

The courts of the Cayman Islands will observe and give effect to the choice of the applicable governing law (the "**Relevant Law**") of a contract assuming that the choice of the Relevant Law as the governing law of the applicable contract has been made in good faith and would be regarded as a valid and binding selection which will be upheld by the courts of that jurisdiction and any other relevant jurisdiction as a matter of the Relevant Law and all other relevant laws.

7.2 Will the courts in the Cayman Islands recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Assuming that the choice of the Relevant Law (as defined in question 7.1 above) as the governing law of the applicable contract has been made in good faith and would be regarded as a valid and binding selection which will be upheld by the courts of the applicable jurisdiction (the "**Relevant Jurisdiction**") and any other

relevant jurisdiction (other than the Cayman Islands) as a matter of the Relevant Law and all other relevant laws (other than the laws of the Cayman Islands), then although there is no statutory enforcement in the Cayman Islands of judgments obtained in the Relevant Jurisdiction, a judgment obtained in such jurisdiction will be recognised and enforced in the courts of the Cayman Islands as common law, without any re-examination of the merits of the underlying dispute, by an action commenced on the foreign judgment debt in the Grand Court of the Cayman Islands, provided such judgment is given by a foreign court of competent jurisdiction.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in the Cayman Islands, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in the Cayman Islands against the assets of the company?

Timing of any litigation will inevitably be dependent on a large number of variable factors (such as location of the defendant, defences raised, complexity of the proceedings and resistance to enforcement). Assuming the defendant is in the Cayman Islands and the matter is straightforward and uncontested, it is possible to obtain default or summary judgment within a short time period. Assuming there is no resistance to enforcement, it may be possible to complete the process in six months. If the defendant is outside the jurisdiction, the process may take substantially longer. The timing for enforcement of a judgment is also dependent on a number of variable factors. It may be possible to complete the process in two to three months, but it could take substantially longer.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Whilst there are no legislative requirements for a public auction or similar process in the Cayman Islands, liquidators owe fiduciary duties to the creditors and shareholders of a company to recover the best price possible (usually market value) for all assets of a company upon a liquidation. Recent case law has set a precedent for this in the case of enforcement over land located in the Cayman Islands. Receivers owe their primary duty to the secured party and will seek to recover sufficient funds to repay the debt due; however, they also have a duty to the obligor to recover the best price reasonably obtainable on a sale of the secured assets. Accordingly, public auction or a similar process may be appropriate in certain circumstances. Certain consents may also be required from the Monetary Authority if the obligor is a regulated entity.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in the Cayman Islands or (b) foreclosure on collateral security?

There are no legislative restrictions on foreign lenders filing suit against a company in the Cayman Islands assuming that they can establish that the Cayman Islands court has jurisdiction over the suit. There are no legislative restrictions applicable to foreclosure on collateral security.

7.6 Do the bankruptcy, reorganisation or similar laws in the Cayman Islands provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Under the Companies Law (2013 Revision), there is no formal corporate rehabilitation procedure as in England and Wales or in the United States that would give a company the benefit of moratorium provisions in the payment of its debts, including certain secured debts. A Cayman Islands company is subject to voluntary or involuntary winding up proceedings under the Companies Law (2013 Revision) although it is possible for a court to appoint a provisional liquidator after the presentation of a petition for the winding up of a company but before an order for the winding up of a company is made where, for example, there is an immediate need to take actions to safeguard actions for creditors. There is a growing practice in the Cayman Islands for provisional liquidators to be appointed with the principal objective of preparing a scheme of arrangement with the aim of avoiding a formal winding up. Although there is an automatic stay of proceedings against the company when an order for winding up has been made and there is a discretionary stay on the appointment of a provisional liquidator, the stay does not prevent a secured creditor from enforcing its security interest.

7.7 Will the courts in the Cayman Islands recognise and enforce an arbitral award given against the company without re-examination of the merits?

The courts of the Cayman Islands will recognise and enforce arbitral awards made pursuant to an arbitration agreement in a jurisdiction which is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**").

Although there is no statutory enforcement of arbitral awards made in jurisdictions not party to the New York Convention, the courts of the Cayman Islands will recognise and enforce such arbitral awards provided that (a) the parties have submitted to the arbitration by an agreement which is valid by its governing law, and (b) the arbitral award is valid and final according to the law which governs the arbitration proceedings. The arbitral award will not be regarded as final by a Cayman Islands court unless the arbitral tribunal has disposed of all the issues itself. A Cayman Islands court will not, however, recognise or enforce such arbitral awards if: (a) under the submission agreement and the law applicable thereto, the arbitrators have no jurisdiction to make the award; (b) it was obtained by fraud; (c) its recognition or, as the case may be, enforcement would be contrary to public policy; or (d) the proceedings in which it was obtained were opposed to natural justice.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In accordance with the Companies Law (2013 Revision), when a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court may impose. This prohibition in our view extends to judicial proceedings and does not include security enforcement methods which do not require an order of the court in

the Cayman Islands. Furthermore, subject to any debts preferred by law, the Companies Law (2013 Revision) also provides that secured creditors may enforce their security notwithstanding that a winding up order has been made in respect of the applicable company.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The enforceability of any security document will be subject to general insolvency rules applicable to companies in the Cayman Islands including voidable preferences and transactions effected at an undervalue.

A secured party holding a fixed charge will, notwithstanding that a winding up order has been made, be entitled to enforce his security without the leave of the Cayman Islands court and without reference to the liquidator. However, if the security created by the relevant security document is treated as a floating charge then debts preferred under Cayman Islands law will have priority over the secured party on a liquidation of the company.

In addition, subsequent purchasers, mortgagees, chargees, lienholders and execution creditors in respect of the assets subject to the floating charge are likely to have priority over the secured party, although this will depend upon such factors as the terms of the floating charge, in particular the scope of any restrictions, whether any subsequent purchasers, mortgagees or chargees have knowledge of any restrictions and the circumstances in which any subsequent transactions arise.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Companies incorporated in the Cayman Islands are not excluded from proceedings under the Companies Law (2013 Revision) or any other applicable laws or regulations.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

The Companies Law provides that, at any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may (a) where any action or proceeding against the company, including a criminal proceeding, is pending in a summary court, the Cayman Islands court, the Court of Appeal or the Privy Council, apply to the court in which the action or proceeding is pending for a stay of proceedings therein, and (b) where any action or proceeding is pending against the company in a foreign court, apply to the court for an injunction to restrain further proceedings therein, and the court to which application is made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit. On a voluntary winding up, there is no automatic moratorium. The Cayman Islands court does, however, have discretion to impose a moratorium on a blanket or a case-by-case basis. In practice, the court would only exercise its discretion if there was any doubt about the company's solvency.

A creditor of a company may have a compromise or arrangement imposed upon him under the Companies Law if a majority in number representing three fourths in value of the creditors (or class of creditors including the affected creditor) have approved the compromise or arrangement and it has been sanctioned by the Grand Court of the Cayman Islands. Although this is not a mandatory insolvency provision, it is a circumstance in which a creditor of a company may be made subject to an arrangement or compromise affecting his rights without his consent. It would not, however, affect the enforcement of security rights.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of the Cayman Islands?

The submission by a company in a security document to the jurisdiction of the courts of a particular jurisdiction will be legal, valid and binding on the company assuming that the same is true under the governing law of the security document and under the laws, rules and procedures applying in the courts of that jurisdiction.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of the Cayman Islands?

Companies can, as a matter of contract, waive immunity for any legal proceedings in the Cayman Islands. However, subject to certain exceptions, companies may receive the benefit of sovereign immunity under the State Immunity Act of the United Kingdom, which has been extended to the Cayman Islands by statutory order.

10 Other Matters

10.1 Are there any eligibility requirements in the Cayman Islands for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in the Cayman Islands need to be licensed or authorised in the Cayman Islands or in their jurisdiction of incorporation?

There are no eligibility requirements under Cayman Islands law for lenders to a company. Assuming that the lenders are not incorporated in nor registered under Cayman Islands law and all the activities of such parties have not been and will not be carried on through a place of business in the Cayman Islands, then the lenders will not be required to be licensed in the Cayman Islands solely in order to provide a loan to a company.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in the Cayman Islands?

The questions and answers set out in this chapter cover the main legal considerations for secured financings under Cayman Islands law.

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China

Robert Caldwell

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in China?

Some of the main themes that have driven recent developments in China's lending markets in 2013 and early 2014 include the central government's moves to further liberalise domestic lending rates (with early indications that deposit rates will follow suit) and efforts by regulators to curb the formal banking sector's systemic exposure to "shadow lending".

In July 2013, the People's Bank of China (PBOC) removed the lower limit on lending rates (which was previously set at 70% of the PBOC's benchmark rate). Although this reform was widely seen as symbolic since lending rates were consistently above the lower limit even before it had been removed, it was nonetheless an encouraging sign of continued liberalisation of the bank credit market. Moreover, in March 2014, PBOC governor Zhou Xiaochuan reaffirmed the PBOC's intention to liberalise deposit rates within the next two years, a reform that may well be China's most crucial step in the transformation of the country's interest rate regime.

2013 also saw a surge in lending outside the formal bank sector in China. Regulators have grown increasingly concerned that major domestic banks are exposed to unregulated and high-risk shadow lending activities through a rapidly-growing number of "wealth management products" offered to retail investors. In late June 2013 and mid-February 2014, the PBOC suddenly and without warning restricted funding to domestic banks, causing a sudden spike in interbank rates and sending a strong message that liquidity from the PBOC was not to be taken for granted, particularly if such funds were ending up in the shadow banking sector. These measures appear to have had some effect, significantly reducing the amount of lending outside the formal banking sector in the first quarter of 2014.

1.2 What are some significant lending transactions that have taken place in China in recent years?

Outbound investment activity continues to remain strong and has given rise to several significant lending transactions recently, including China National Offshore Oil Corporation's (CNOOC) US$6 billion financing for its acquisition of Canada's Nexen Inc. Refinancing transactions were also a significant feature of the 2013 lending market due to the availability of competitive US dollar financing, with many major domestic companies taking the opportunity to lower their overall cost of capital. The US federal reserve's tapering in late 2013 has since constrained liquidity.

As China's new leadership begins to assert its policy mandates (through the Third Plenum in November 2013 and the National People's Congress and China People's Consultative Conference meetings in March 2014), it appears that outbound investment activity will continue to grow, particularly with private companies also being encouraged to make acquisitions overseas. In addition, with a reduced focus on fixed-asset investment, lending fuelled by new property development and infrastructure projects is expected to gradually ease in the near future at least. Efforts towards liberalising and reforming the banking sector are expected to continue, though the exact pace remains uncertain (such as removing limitation on deposit rates and increasing lending to private enterprise).

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

According to the PRC Company Law, any guarantee given by a company must be approved by a resolution of its board of directors or its shareholders in accordance with its articles of association (AOA). If the AOA prescribes any limit on the cumulative amount of guarantees, or on the amount of a single guarantee, such limits may not be exceeded. If a company guarantees the liabilities of one of its shareholders or actual controller, such guarantee must be approved by the affirmative votes of more than half of the shareholders at a shareholders' meeting excluding the shareholder whose liabilities are to be guaranteed.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

There are generally no corporate benefit rules *per se* under PRC law. So, generally, there are no concerns about enforceability in these circumstances, so long as the guarantee is provided in accordance with the company's AOA and also complies with applicable law and regulations (as to which see further below).

2.3 Is lack of corporate power an issue?

Please refer to our answer to question 2.1. A lender has the obligations to review a guarantor's AOA and obtain a board

resolution or shareholders' resolution in accordance with the AOA. If the lender fails to do so, the guarantor may claim the guarantee to be ineffective and refuse to perform the guarantee.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental consent or filings are required unless a guarantee is given in favour of a foreign lender – please refer to question 2.6 below. Please also refer to question 2.1 above with respect to approval by the board of directors or shareholders. Except for the forgoing, no other formalities are required for a company to grant a guarantee.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

A company's AOA may set up limitations on the amount of a guarantee. In addition, according to CSRC regulations: (i) the aggregate guarantee amount of a listed company shall not exceed 50% of its net assets as stated in its consolidated financial statement of the previous year; and (ii) a listed company shall not guarantee liabilities of a company whose debt-asset ratio exceeds 70%.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

The provision of security by a PRC entity in favour of a foreign lender is subject to administration by the State Administration of Foreign Exchange or its local branch or sub-branch (SAFE) according to relevant rules. SAFE adopts the following administrative approaches:

(1) Balance administration

A domestic bank may apply to SAFE to obtain a quota for guarantees made in favour of foreign beneficiaries. Within the quota verified by the applicable foreign exchange bureau, banks may, at their own discretion, provide guarantees to foreign beneficiaries without having to apply for verification and approval on an item-by-item basis.

(2) Item-by-item verification and approval

A domestic non-banking enterprise that provides guarantees to foreign beneficiaries must apply to SAFE for verification and approval on an item-by-item basis. Such guarantees must satisfy the following requirements:

a) the secured party must be an enterprise established in China or overseas and whose shares are directly or indirectly held by the guarantor in accordance with the relevant provisions;

b) the amount of net assets of the secured party must be a positive value; and

c) the secured party has made a profit in at least one of the last three years. If the secured party is engaged in a long-term project such as resources development, it shall have made profit in at least one of the last five years. This requirement is not applicable if the secured party has been established for less than three years (for an ordinary enterprise) or five years (resources development enterprise).

With the exception of wholly foreign-owned enterprises (WFOEs), a PRC domestic entity or a foreign-invested enterprise (FIE), is only permitted to provide security to foreign beneficiaries in order to secure its own foreign debt (or the foreign debt of its subsidiaries) and the provision of such security to a foreign beneficiary must be registered with SAFE. If the security is provided to secure a foreign borrower's debt, it may not be possible to obtain the necessary SAFE registration unless the foreign borrower is a subsidiary (it cannot be a parent) of the domestic security provider.

However, the above restrictions no longer apply to enterprises established in the Shanghai Free Trade Zone, which may now provide guarantees in favour of a foreign beneficiary without seeking verification or approval from SAFE. Furthermore, these restrictions are likely to be abolished entirely in the near future. SAFE is currently soliciting public input on a disclosure draft of a new regulation which will abolish most of the above restrictions.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

According to the PRC Property Rights Law and the PRC Security Law, the following collateral (in the form of a mortgage or pledge) are available to secure lending obligations:

(1) land, buildings or other fixtures;

(2) manufacturing facilities, raw materials, semi-manufactured goods and products;

(3) transportation vessels;

(4) drafts, checks, promissory notes, bonds, deposit certificates, warehouse receipts, bills of lading;

(5) transferable shares, fund units;

(6) trademark rights, patent rights, copyright or other property rights in intellectual property that can be transferred;

(7) accounts receivable; and

(8) any other property that is not prohibited by the laws and administrative regulations to be mortgaged, or any other rights that can be pledged as stipulated by laws and administrative regulations.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Under PRC law, there is no such concept as a debenture that creates security over all assets of a company. In China, security over different types of assets is subject to different perfection procedures, such as approval, registration or filing with the competent authorities. Therefore each security document usually creates one type of security. A single security agreement that grants security over all equipment, raw materials and inventory of a debtor is possible (such security being perfected through registration with the applicable branch of SAIC), but the practice is not common and a single security agreement governing several types of assets or assets that belong to certain registrable categories would still be subject to perfection procedures specific to that category.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, all have to be created by a written contract.

Mortgages over real property are common. Land can be mortgaged, whether there are any buildings on it or not. If there are any buildings on it, such buildings must be mortgaged together with the land. A building under construction can also be mortgaged. A

mortgage over real property becomes effective upon registration at the relevant land or building registration authorities (the relevant authority depends on the location of the real property). Registration has to be completed at both the land registration authority and buildings registration authority. In some cities, these two registration authorities are combined into one authority.

Mortgages over plant are in fact a mortgage over buildings, fixtures and personal property (such as HVAC, lighting, plumbing, etc.) associated with the operation of a building or project.

Security interests in machinery and equipment may be granted either as a pledge or mortgage. To create a pledge over machinery and equipment, the pledgee has to take possession of the machinery and equipment. A mortgage over machinery and equipment has to be registered at the local Administration of Industry of Commerce (AIC) where the mortgagor is registered. If the machinery and equipment is under the supervision of the customs authorities, for example equipment imported into China that has yet to receive customs clearance, a mortgage over such machinery and equipment is subject to approval from the relevant customs authority.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

A pledge of receivables was recognised by the PRC Property Rights Law in 2007. A pledge over receivables has to be registered with the online system maintained by the PBOC. This registration is done by the pledgor and pledgee and the PBOC does not conduct any review or impose any other conditions. However, according to PBOC regulations, receivables that are subject to a pledge shall be generated from:

(1) sales of goods;

(2) supply of water, power, gas and heat;

(3) leasing of movable and immovable property;

(4) provision of services; or

(5) toll ways.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A pledge over a bank account is generally accepted by judicial practice, though it is not provided under PRC Security Law or PRC Property Rights Law. No approval or registration is required for a pledge over a bank account. However, to effect the pledge, cash in the bank account must be ascertained and identified at the time of the creation of the pledge. No movement is allowed in the bank account balance, which means a pledge over a fluctuating bank account is not possible under PRC law.

3.6 Can collateral security be taken over shares in companies incorporated in China? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Security can be taken over shares in companies incorporated in China. There is no legal requirement on the form of company shares. If the company is incorporated in China, a document granting security over such shares must be governed by PRC law; otherwise the security interest will not be enforceable in China.

The procedure for creating security (in the form of a pledge) over shares will vary depending on the nature of the companies whose shares are being pledged. For this purpose, companies can be divided into listed companies, unlisted domestic companies and FIEs.

(1) Pledge over shares in a listed company

A pledge over shares in a listed company is registered with the China Securities Deposit and Clearing Corporation Limited.

(2) Pledge over shares in an unlisted domestic companies

A pledge over shares in an unlisted domestic company is registered at the local AIC where the company (whose shares are being pledged) is registered.

(3) Pledge over shares in an FIE

A pledge over shares in an FIE is generally subject to approval from the Ministry of Commerce or its local branch (MOFCOM) and registration with the local AIC. Without such approval or registration, the pledge is invalid. In practice, this can be a time-consuming process if MOFCOM and/or the AIC challenge or require amendments to be made to the security documents.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

The PRC Property Rights Law provides that raw materials and inventory can be mortgaged. This is similar to the concept of a floating charge under common law and as found in Hong Kong SAR, the UK and various other jurisdictions. The security is created by a written contract and has to be registered at the local AIC. Generally speaking, the local AIC accepts a general description of the raw materials and inventory. However, some local AIC may require a specific description of the secured assets and if there is any change, a new registration may be required, which may affect the validity of the floating nature of the security.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes. Please note that the conditions stated in questions 2.1 and 2.6 are also applicable under this scenario.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Generally, no notarisation is required for creating security. If any party to a security document is a non-PRC party, notarisation (by a local public notary) and legalisation (by Chinese embassies and consulates) will be required in respect of that party's execution of the security document.

In respect of registration requirements, please see our answers to questions 3.3 to 3.7. Registration authorities will charge fees for registering each security interest. Registration fees are nominal and different for each type of security, for example, fees for registering a mortgage over commercial real property is 550 Chinese Yuan for each mortgage certificate.

No stamp duty is required to be paid for a security document.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

PRC law requires each registration authority to accept or reject an application for registration within 20 business days from the date it receives the application. In practice, it may take longer because it may not accept the application if the information submitted is incomplete or for any other reason.

Except for registration fees, there are no other governmental charges in respect of the creation of security. As indicated in question 3.9 above, registration fees are nominal.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No, except for those required consents in respect of foreign exchange administration as stated in question 2.6, and in respect of pledges over shares in an FIE, referred to in question 3.6.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

To secure obligations under a revolving credit facility, the security is usually created in the form of a "maximum amount security" because the obligations under a revolving credit facility depend on the borrower's drawdown and repayment within a period of time. A maximum amount security is created to secure obligations incurred within a period of time and the aggregated secured amount is limited to a fixed maximum amount. It will not be enforceable if a maximum amount security document provides that the secured obligations are the loan principal, interest accrued and all fees and costs incurred under the credit facility agreement. When taking a maximum amount security for a revolving credit facility, the lender needs to calculate or estimate the maximum loan amount and interest for the maximum secured amount.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

There are no particular requirements unless the signing party is a non-PRC party – please refer to question 3.9. Execution must be duly authorised (please refer to question 2.3) and, if under seal, the company chop should be used. Execution by a legal representative will bind the company.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

There is no general prohibition on financial assistance. However, the restrictions in respect of granting of a guarantee, as stated in question 2.1, are also applicable for granting security interests. This has in practice led to obstacles in cross-border transactions using conventional leveraged finance structures where FIEs (other than WFOEs) are required to provide upstream guarantees.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will China recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

This is recognised. As a general practice for a syndicated loan, lenders will appoint a facility agent and/or security agent to act for and on behalf of the syndicate. The agent bank will claim the whole amount of the loan from the borrower and distribute the proceeds obtained therefrom to the syndicated banks in accordance with their proportion of participation in the loan.

5.2 If an agent or trustee is not recognised in China, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Generally, an agent or a trustee will be recognised, and, if not, the circumstances would need to be considered on a case-by-case basis.

5.3 Assume a loan is made to a company organised under the laws of China and guaranteed by a guarantor organised under the laws of China. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

According to the PRC Contract Law, unless otherwise provided in a contract, (i) a party to the contract may assign its rights to a third party by notifying the obligor of the assignment of the contractual rights, and (ii) the transfer by one party of its obligations under a contract shall be subject to prior consent of the obligee under the contract.

If Lender A has already disbursed a loan to the borrower, it may assign all its rights in respect of the loan to Lender B by giving a notice to the borrower. Unless otherwise provided in the loan agreement, such notice shall be in writing and shall generally be served by Lender A.

If Lender A has not disbursed a loan to the borrower, it shall get prior written consent from the borrower before transferring the loan to Lender B, unless the loan agreement provides that no such consent is required.

No consent from the guarantor is required in respect of the assignment or transfer of the loan from Lender A to Lender B. Depending on the provisions of the guarantee, usually a notice shall be given to the guarantor in respect of the assignment or transfer.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Profits received by a lender from its loans to a PRC borrower shall be subject to PRC income tax. Interest payable on loans and proceeds (to the extent of indemnifying interest instead of principal) of a claim under a guarantee or of enforcing security is therefore subject to income tax.

For foreign lenders, income tax will be withheld from the domestic borrower's payment.

In principle, the income tax rate is 25% of the interest amount. However, a standard EIT tax rate of 10% on interest income (in the case of a PRC borrower and foreign lender) usually applies and is prescribed as a withholding tax, and this may then be reduced to 5% if a tax treaty applies. The 25% tax rate only applies for pure domestic borrower-lender transactions. This preferential rate will be applied in accordance with treaties entered into by the PRC government and the government of the foreign lender's place of business. As of the end of May 2011, the PRC government has entered into tax treaties with 96 countries (of which 93 have come into force) and Hong Kong and Macau Special Administrative Regions. Most tax treaties provide a preferential rate of 10%. For a Hong Kong lender, and if the conditions provided in the agreement between the PRC and the Hong Kong SAR are satisfied, a preferential rate of 5% will apply.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Since the reform of China's tax laws in 2007, foreign investors or creditors have the same status as PRC investors or creditors in terms of taxes. There are no tax incentives solely applicable for foreign investors or creditors except for those preferential rates provided in tax treaties between the PRC government and foreign governments.

In addition to income tax, stamp duty is payable at 0.05% of the loan amount by both the lender and the borrower. There is no other tax in relation to a loan transaction.

6.3 Will any income of a foreign lender become taxable in China solely because of a loan to or guarantee and/or grant of security from a company in China?

Only the income of a bank from its loan to a PRC borrower is taxable in China.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Except for stamp duty, registration fees and (if applicable) notary costs, there are no other governmental fees or costs.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Under PRC law, the level of foreign exchange loans or debts that an FIE is allowed to borrow is subject to the difference between the "total investment" and "registered capital" of the FIE, and such difference is the maximum amount of foreign exchange loans that the FIE can legally borrow (see further analysis below).

"Registered capital" refers to the total amount of equity or capital contributions to be paid in full by the investors in the FIE. "Total investment" is the projected amount of funds necessary for an FIE to attain production or operational capacity set out in its articles of association.

The Provisional Regulations of the State Administration For Industry and Commerce Concerning the Ratio Between the Registered Capital and the Total Amount of Investment of Sino-Foreign Joint Ventures, promulgated on March 1, 1987 sets the minimum ratios between the registered capital to the total investment of an FIE as the following:

Total Investment	Minimum Registered Capital (% of Total Investment)
US$ 3,000,000 or less	70%
US$ 3,000,001 to US$ 10,000,000	50% or US$ 2,100,000 (whichever is higher)
US$ 10,000,001 to US$ 30,000,000	40% or US$ 5,000,000 (whichever is higher)
US$ 30,000,001 or more	33.3% or US$ 12,000,000 (whichever is higher)

Since total investment is equal to registered capital plus permissible debt, these minimum equity ratios are an indirect expression of the "statutory minimum debt-equity ratios" of an FIE.

7 Judicial Enforcement

7.1 Will the courts in China recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in China enforce a contract that has a foreign governing law?

According to the PRC General Principles of Civil Law, unless otherwise provided by law, the parties to a contract may choose that the contract be governed by foreign laws if there is a foreign element in the contract, for example, if one of the parties to the contract is a foreign party or if the subject matter is located outside of China. The choice of foreign governing law must not violate China's social public interest.

7.2 Will the courts in China recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The PRC Civil Procedure Law prescribes that if a legally effective judgment or written order made by a foreign court requires recognition and enforcement by a Chinese court, the party concerned may directly apply for recognition and enforcement to the intermediate court which has jurisdiction.

If and only if the preliminary examination by the Chinese court reveals (a) that a bilateral judicial assistance treaty exists, (b) that both countries have joined an international convention on recognising and enforcing foreign court judgments or written orders, or (c) that precedents of reciprocity exist, should the court undertake further examination on that foreign judgment or written order to determine whether it can ultimately grant recognition and enforcement.

The Chinese court will not examine the substance of the foreign court judgment or written order. To grant recognition and enforcement, the Chinese court must confirm satisfaction of the following conditions:

(1) A foreign court judgment or written order claiming recognition and enforcement must be a legally effective

judgment or written order in accordance with the law of the applicant's foreign country. After the Chinese court accepts the application, if the court is uncertain as to whether it is legally effective, the applicant should present to the court evidence from the foreign court issuing the judgment or order.

(2) The judgment must not be in contravention of the basic principles of Chinese law, national sovereignty, security and public interest.

(3) Treaty obligations and the relevant provisions of Chinese law must be satisfied in recognising and enforcing judgments or written orders. These conditions normally include: (a) the foreign court had sufficient jurisdiction over that the subject matter; (b) the result of the judgment or written order strictly accords with the procedural requirements of the law of the foreign country, and that the other party had an adequate opportunity to defend; and (c) Chinese courts have not yet accepted or heard the same case, or have neither reached a judgment nor recognised the judgment or written order made by that foreign court.

No framework exists for the reciprocal enforcement of judgments between China and the United Kingdom or the United States.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in China, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in China against the assets of the company?

Depending on the complexity of a dispute, it could take 6 to 12 months or longer to obtain a judgment from a Chinese court and enforce the judgment against the assets of the company.

Since there is no reciprocity of enforcement of judgments between China and United Kingdom or the United States, a New York court or English court judgment may not be enforceable in China and may require a re-hearing on the merits.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There is no concept of "self-remedy" under PRC security law. If a creditor intends to enforce the collateral, it may firstly negotiate with the security provider with a view to agreeing on the realisation of the collateral by conversion to value (in effect an agreement on foreclosure value), auction or sale. Should no agreement be reached or no consent or authorisation be obtained from the security provider, the creditor may, according to the revised PRC Civil Litigation Law (effective since 1 January 2013), file an application with the court of first instance at the place where the secured assets are located or at the place of registration of the security interest. After accepting an application, if the application complies with legal provisions upon examination, the court will issue a ruling to auction or sell the property posted as security, and the parties may, based on the ruling, apply for enforcement to the People's Court; or if the application does not comply with legal provisions, the court shall issue a ruling to dismiss the application, and the party may institute an action in a court.

The trial of a case for enforcing security shall be completed within 30 days after the case is docketed.

If the application for security enforcement is dismissed, the secured party would have to commence litigation proceedings, which, if no foreign element involved, will take 6 months for the first instance trial and 3 months for second instance trial. For proceedings involving a foreign element, there is no statutory time limit and the timeframe may vary on a case-by-case basis.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in China or (b) foreclosure on collateral security?

In general, no additional restrictions apply (other than as mentioned under question 7.4 above) provided the lender has *locus standi* (a recognised right to seek relief), demonstrated by use of loan proceeds to acquire assets in China or a security interest.

7.6 Do the bankruptcy, reorganisation or similar laws in China provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Moratoria apply. After the Chinese court accepts an application for bankruptcy: (a) any preservation measures in respect of the bankrupt company's assets shall be released and enforcement shall be suspended; and (b) any civil action or arbitration in respect of the bankrupt company's assets shall be suspended and may be resumed after the bankruptcy administrator has taken possession of the bankrupt company's assets.

7.7 Will the courts in China recognise and enforce an arbitral award given against the company without re-examination of the merits?

Chinese courts will not examine the substance of the arbitral award and will give effect to and enforce the award provided it is in compliance with the New York Convention.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

According to the PRC Bankruptcy Law (effective as of 1 June 2007), when a bankruptcy proceeding is commenced (i.e. the court has accepted an application to petition a company into bankruptcy), the secured creditor of the company together with unsecured creditors, without exception, need to declare their rights to the bankruptcy administrator, to have their rights ascertained by the bankruptcy administrator and to participate in the distribution of the bankrupt's assets.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

A bankruptcy administrator may apply to the People's Court to revoke any of the following transactions of a debtor incurred within 1 year before the People's Court accepts an application for bankruptcy: (a) transferring the assets free of charge; (b) trading at an obviously unreasonable price; (c) provision of inappropriate security; (d) uneconomical discharge of debts; or (e) waiver of the creditor's right to claim the debt.

A bankruptcy administrator may also apply to the People's Court to claw back any payment made by the debtor, if: (a) the payment was made within 6 months before the People's Court accepts an application for bankruptcy; and (b) the debtor was insolvent when making the payment.

Where the debtor has given security over its assets, the secured creditor has a right of priority payment in respect of such assets. If the value of the security is insufficient to repay the entire obligations due, the creditor can claim for any shortfall as an unsecured creditor.

The secured creditor's rights rank behind any outstanding salaries, pensions for the disabled, basic pension insurance, basic medical insurance or other compensation incurred before 27 August 2006 (the date on which the PRC Bankruptcy Law was adopted and promulgated) and payable to the employees of the bankrupt company according to relevant laws and regulations. These employee's claims, if incurred after 27 August 2006, will rank behind the secured creditor's secured obligations.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The PRC Bankruptcy Law does not apply to financial institutions. The bankruptcy proceeding of a financial institution is subject to special measures promulgated by the State Council.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

A creditor must apply to the court to seize the assets of a company, although in practice, self-help remedies are often deployed. Title retention provisions (romalpa clauses) should be deployed where possible to preserve title to unpaid goods and substantiate seizure rights.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of China?

The submission to a foreign jurisdiction is valid if: (a) the subject matter is not under exclusive jurisdiction of the Chinese courts; and (b) the foreign court has jurisdiction over the subject matter.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of China?

A waiver of immunity is not legally binding and enforceable if it is made by any Chinese governmental body. China adopts the principle of "absolute immunity", which provides complete immunity to the sovereign state and does not have regard to the underlying nature of the transaction. Any waiver of sovereign immunity by any Chinese governmental body is invalid and not enforceable.

10 Other Matters

10.1 Are there any eligibility requirements in China for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in China need to be licensed or authorised in China or in their jurisdiction of incorporation?

In China, a corporate lender must have a financial licence according to the PRC Banking Supervision Law and the Measures for the Administration of Financial Licences. Lending between Chinese enterprises is not permitted. This finance licence requirement, however, does not apply to foreign entities. A foreign entity can lend money to a company without holding a financial licence provided it complies with applicable laws and regulations.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in China?

In addition to all other issues covered in this chapter, it is worth noting the following in relation to foreign lending or equity investments:

(1) On 28 February 2014, the State Administration for Industry and Commerce (SAIC) launched a centralised online database containing searchable information for all existing domestic companies in China (including most foreign invested enterprises). Prior to this, there was no centralised registry for conducting company searches in China, though several local branches of the SAIC had begun to create their own websites publishing information on locally-registered companies.

(2) Foreign investment in China is subject to approval from MOFCOM or its local branch, depending on the amount of investment. MOFCOM together with the National Development Reform Commission has issued a Catalogue of Industries for Guiding Foreign Investment, which lists industries that are encouraged, restricted or prohibited for foreign investors, and this must be complied with.

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DLA Piper is a global law firm with 4,200 lawyers located in more than 30 countries throughout the Americas, Asia Pacific, Europe and the Middle East, positioning it to help companies with their legal needs anywhere in the world. In Asia Pacific, DLA Piper has more than 650 lawyers located in 12 offices spread across six countries. Our lawyers have a wealth of knowledge and understanding of the legislative and administrative systems of the People's Republic of China (the PRC), Australia, Hong Kong Special Administrative Region (SAR), Japan, Singapore, South Korea and Thailand. We have developed country practices that focus on Indonesia, Korea and Vietnam and have experience in other jurisdictions within the Asia Pacific region, including Bangladesh, Cambodia, India, Laos, Macau, Malaysia, Mongolia, Myanmar, the Philippines, Papua New Guinea and Taiwan. Our knowledge of, and close involvement with, Asia Pacific markets enables us to provide strategic and commercial advice to a diverse number of international clients on all aspects of doing business in the region. We can also support our clients with their local, national, regional or international operations. All our lawyers are fluent in English and individuals speak a wide range of Asian languages including Mandarin, Cantonese, Bahasa Indonesia, Japanese, Korean, Thai and Vietnamese.

Costa Rica

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Costa Rica?

During most of 2013 and the first part of 2014, some of the main developments in the lending markets have been transactions related to renewable energies (wind, hydro, solar, biomass) and infrastructure. With the price of electricity going up, there has been plenty of work related to financing deals in these two sectors. In addition, as changes in the electricity law draw closer and electricity prices continue to increase, we are going to see more and more of these deals in the next few months.

During this time, the entire lending sector has also seen more regulatory and legal requirements presented by local supervisory authorities, which have specifically made loans more bureaucratic and process oriented. It is apparent that risk-based regulations are becoming the norm and this has increased transaction costs and paperwork.

1.2 What are some significant lending transactions that have taken place in Costa Rica in recent years?

Some of the most significant lending transactions that have taken place in Costa Rica during last twelve months have been large-scale infrastructure projects related to renewable energies, such as hydro financing currently developed by state-owned *Instituto Costarricense de Electricidad*, wind projects located in the northern part of Costa Rica and several road construction projects currently underway. In addition, several transactions related to biomass have also begun to appear as this trend picks up pace.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, it can. However, there should be no limitation to undertaking such act or contract in the company's corporate statute or by-laws. Notwithstanding the above, and assuming that the corporate statute or by-laws establish no limits, in order to comply with corporate mandate rules established in articles 1262 and 1263 of the Costa Rican Civil Code, the guaranteeing company shall hold an Extraordinary Shareholders' Meeting in which it analyses the terms and conditions of the transaction and authorises its legal representative (or any other person) to guarantee the borrowings of a third party (a member of its corporate group or an independent third party company) on its behalf.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Under Costa Rican laws, in order to guarantee or secure third parties' borrowings, companies are either required to show or justify a benefit or expressly indicate that it shall receive in some way an economical retribution. As indicated in question 2.1 above, in order to comply with corporate mandate rules, the company should analyse such retribution (whether small or significant) and expressly authorise its legal representative, by means of an Extraordinary Shareholders' Meeting, to represent the company in such act or contract.

2.3 Is lack of corporate power an issue?

Yes. All corporate undertakings must be executed by a legal representative of the company with sufficient power or else duly authorised – by the company's shareholders – to execute the corresponding act or contract. If there is a lack of corporate power by the legal representative, then the act or contract may be rendered null and void. In addition, if a guarantee is subject to registration and the legal representative's power or authorisation is not duly recognised, then the guarantee will not be properly recorded and as a result the guaranteed party may be negatively affected. The corporate powers for legal representatives are governed pursuant to Title VIII of the Costa Rican Civil Code.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Under Costa Rican laws, government filings or consents for granting guarantees are not required. With regards to shareholder approval, this will be subject to the limitations (if any) that the company and/or its legal representatives will have in its corporate statute or by-laws. If there are no registered limitations to the corporate statute or by-laws, shareholder approval is not required for guaranteeing its own borrowings as long as the legal representative has the sufficient corporate power to execute the corresponding act or contract. As indicated in question 2.1 above,

this shareholders' approval shall be required for guaranteeing the borrowings of shareholders and/or officers of the Company and it is also required for borrowings of third parties. If there are registered limitations or restrictions to the corporate statute or by-laws and/or limitations or restrictions to the appointment of legal representatives, then the shareholders' approval is required.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Under Costa Rican laws and regulations, this is not requirement. Nevertheless, upon grating a guarantee to a lender, the debtor should not be under a critical financial position that may be considered a technical insolvency affecting other lenders. Any acts or contracts executed under a technical insolvency may render those acts and contracts null and void. Upon the confirmation of a company's insolvency, acts or contracts executed up to six months prior to that confirmation (of insolvency) may be presumed null and void.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No. There are no obstacles of this sort in order to enforce a guarantee.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Based on the definition of collateral as "*property that is pledged as security against a debt or property subject to a security interest*", the following are some collateral available to secure lending obligations in Costa Rica: mortgage or common mortgage ("*hipoteca*"); pledge ("*prenda*"); mortgage certificate ("*cédula hipotecaria*"); trust agreement ("*fideicomiso de garantía*"); and assignment of rights ("*cesión de derechos*"), etc. These types of collateral shall be explained in detail below.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Yes it is possible. In Costa Rica, trust agreements (also referred to as guarantee trust agreements) are usually used as a general security agreement in which real property (fee simple), concession rights, moveable assets, machinery, equipment and assignable rights can be transferred or assigned by the debtor or a third party (also referred to as the "Trustor") to a designated third party identified as a Trustee. The Trustee shall hold the title of the assets or rights placed in trust as a collateral guarantee towards the lender (also referred to as the "Beneficiary") and shall execute the Trust Agreement according to the instructions expressly indicated in such document.

The transfer of assets or rights to the Trustee can be executed by means of a private agreement, with the exception of registerable assets such as real property and certain vehicles and machinery which have to be transferred through a public deed ("*escritura pública*") executed exclusively by a Notary Public.

Upon the occurrence of an event of default by the debtor or Trustor under the Trust Agreement or the other loan documents, and failure to cure or at least take specific actions to cure the default, the Beneficiary shall give written notice of the default to the Trustee and to the debtor and/or Trustor. If the debtor and/or Trustor fail to timely cure the event of default within the term granted in the Trust Agreement for this purpose, the Trustee shall proceed to execute the auction of the Trust Estate.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. Collateral security can be taken over real property (fee simple) and moveable assets such as plant, machinery, equipment and certain assignable rights.

The most common type of collateral security over real property is through a mortgage in which the debtor provides a property as a security to guarantee a specific loan. The lender and debtor agree on all terms and conditions, such as, but not limited to, mortgage grade, lender's name, debtor's name, loan amount, term, advance payment penalty, interest, loan currency, place of payment and the characteristic contractual clauses that will govern the financing. The mortgage lien – granted through a public deed before a Notary Public – is imposed over the registered real property and has to be recorded before the Mortgage Section of the Public Registry. The mortgage entry will be recorded on the property's ownership entry and will be publicly available.

Another type of security over real property is by means of a mortgage certificate. This security has the same legal force as a common mortgage. The Real Property Section of the Public Registry issues the mortgage certificate that identifies the amount for which the certificate is issued and, unlike the common mortgage where there is an established lender, these certificates may be transferred by endorsement. In such cases, the mortgage certificate is also lien on the property's ownership entry.

With regards to moveable assets, the most common type of collateral security is the pledge. All movable assets that are legally subject to an auction and judicial persecution may be pledged to secure or guarantee a loan. Like mortgages, the pledge agreement must include certain terms and conditions such as: lender's name; debtor's name; loan amount; term; advance payment penalty; interest; loan currency; place of payment; and the characteristic contractual clauses that will govern the financing.

The pledge lien imposed over registered or registerable moveable assets shall be granted through a public deed before a Notary Public and recorded at the Moveable Section of the Public Registry. Pledges on any other type of moveable assets can be granted in a private document and such lien may be registered in the above Public Registry.

In addition to the above-indicated collateral security (mortgage and pledge), as indicated in question 3.2 above, another type of security is the trust agreement.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Pursuant to Costa Rican law, a pledge collateral security can be taken over receivables, as well as any other debt or credit. In order for the pledge to have legal value, it is required for the debtor to deliver or assign the receivable to the lender by way of a formal assignment, who is automatically appointed legal depositary (free of charge) of the receivable.

The lender shall not be allowed to dispose or take control of the shares without the express consent of the debtor. Any agreement that violates the above shall be considered null and void. It is customary to execute this pledge before a Notary Public in a public deed and register the security before the Moveable Section of the Public Registry.

In addition, collateral security can be taken over shares through a trust agreement. As established above, the receivable shall be transferred to the Trustee who shall execute the Trust Agreement according to the instructions expressly indicated in such document.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Although a pledge collateral security can be taken over cash deposited in bank accounts in the same way as a receivable (see question 3.4 above), this is not common practice unless the lender is the same bank that grants the loan, manages the bank account and receives such security. The procedure is the same as the one established above.

3.6 Can collateral security be taken over shares in companies incorporated in Costa Rica? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, collateral security can be taken over shares in companies (whether a Corporation ("*Sociedad Anónima*") or Limited Liability Company ("*Sociedad de Responsabilidad Limitada*")). The most common way to take security over shares is through a pledge, which has to be executed according to Costa Rican Law. In the case of Corporations (which have shares in the form of certificates), in order for the pledge to have legal value, it is required for the debtor to deliver the share certificates to the lender, who is automatically appointed legal depositary (free of charge) of the share certificates. In the case of Limited Liability Companies (which shares called quotas are not in a certificate form), in order for the pledge to have legal value, it should be registered in the company's Quota Holders Registry Book and the Quota Holders through a Quota Holders General Assembly should approve it.

The lender shall not be allowed to dispose or take control of the shares without the express consent of the debtor. Any agreement that violates the above shall be considered null and void. Nevertheless, in case there is a non-fulfilment on behalf of the debtor, the lender can enforce the security either through a court of law or through a private executor ("*corredor jurado*") and recover regular and delayed payment interest.

In addition, collateral security can be taken over shares through a trust agreement. As established above, the shares are transferred to the Trustee who shall execute the Trust Agreement according to the instructions expressly indicated in such document.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, collateral security can be taken over inventory. As indicated in question 3.3 above, any moveable asset that is legally subject to an auction and judicial persecution may be pledged to secure or guarantee a loan. Taking into consideration that inventory is a moveable asset, it is subject to a pledge collateral security as indicated above. In addition, inventory can be transferred to a trust agreement as established in question 3.2 above.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, a company can grant a security interest in order to secure both its obligations as a borrower under a credit facility and as a guarantor of the obligations of another borrower under a credit facility.

However, as established in question 2.1 above, in order to comply with corporate mandate rules established in articles 1262 and 1263 of the Costa Rican Civil Code, if the company grants a security interest as a guarantor of obligations of other borrowers, it is the guaranteeing company who shall hold an Extraordinary Shareholders' Meeting in which it analyses the terms and conditions of the transaction and authorises its legal representative (or any other person) to guarantee the borrowings of a third party (a member of its corporate group or an independent third party company) on its behalf.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

In Costa Rica, the notarisation, registration, stamp duty and other fees are established pursuant to the following legislation: (i) Public Registry Tariff Law No. 4564; (ii) Notarial Code No. 7764; and (iii) General Tariff for Fees for Law and Notary Public Professionals No. 36562-JP. In this regard, depending on the act or contract that is being executed, there is a standardised cost for the notarisation and registration of security. In all instances, if the act or contract has an estimated amount, such fees and stamps are proportional to the estimated amount. If for some reason the amount cannot be estimated, then the fees and stamps are going to be subject to the type of act or contract and type of security taken.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The time required to execute a specific security shall ultimately depend on the type of security. For example, registration of a mortgage, mortgage certificate or pledge over registered or registerable assets before the Public Registry shall take approximately ten (10) working days, taking into consideration that no formal or draft errors are identified by the Public Registry.

With regards to expenses, it also varies on the type of security. In general, security that is subject to registration (see question 3.11 below) will usually have filing and registration expenses that range between 0.60% and 2% of the estimated amount. Security that is not subject to registration will usually have filing and notification expenses that range between 0.15% and 1% of the estimated amount.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No specific regulatory consents are required with respect to the creation of security. However, some securities such as a mortgage or a pledge over registered/registerable assets require registration before the Public Registry and, as a result, certain legal and

regulatory requirements need to be met in order to register such collateral security. If these securities are not registered, then they are not going to be applicable to third parties. Nevertheless, consent is not required.

In addition, certain specific concessions (i.e. maritime zone concessions located under certain legal framework such as the *Polo Turísitico de Papagayo*) may require administrative consent with respect to the creation of security.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

When dealing with revolving credit facilities, it is customary to guaranty the total amount of the facility with a type of secured collateral such as mortgage, mortgage certificate, pledge or trust agreement. As established in question 8.1, creditors with these types of collateral shall have a privilege over non-secured creditors.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Pursuant to Costa Rican laws and general practice, most securities are executed through a public deed before a Notary Public. Notarised documents such as public deeds ("*escritura pública*") are subject to very detailed formalisms established in Notarial Code No. 7764, and the Notary Public in charge of such execution shall comply with documentary formalities and strictly follow corporate mandate rules (see questions 2.1 and 2.3 above).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

The Costa Rican Code of Commerce establishes that a company cannot purchase shares of its own capital stock, unless the purchase is made with funds obtained from the company's gross profits of its legally approved balance. Thus, a company cannot finance or borrow money to purchase its own shares. As a result, a company is restricted from guaranteeing or supporting borrowings for the purchase of shares of the same company. In any case, a company is legally limited to own more than 50% of its own capital stock.

(b) Shares of any company which directly or indirectly owns shares in the company

There is no specific prohibition or restriction for a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of shares of any company which directly or indirectly owns shares in the company.

(c) Shares in a sister subsidiary

There is no specific prohibition or restriction for a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition shares in a sister subsidiary.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

When dealing with syndicated loans, Costa Rica will recognise the role of an agent who will hold the security in its name and on behalf of the remaining lenders. In this regard, it is important to clearly establish in the financing documents the role of the agent within the syndication and the rules that it shall follow for the repayment of the loan, execution of the collateral, communication with the borrower, etc.

5.2 If an agent or trustee is not recognised in Costa Rica, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

A trust agreement is an alternative mechanism to that of the syndicated loan. In this type of agreement, the Beneficiaries shall be all the lenders, the Trustor shall be the borrower and the Trustee shall be a third party which receives the assets in trust and holds them (see question 3.2). Under Costa Rican laws, there can be several Beneficiaries or lenders, as well as several Trustors or borrowers. Upon enforcement, the trust agreement shall clearly stipulate who shall be responsible to execute the instructions under the trust agreement.

5.3 Assume a loan is made to a company organised under the laws of Costa Rica and guaranteed by a guarantor organised under the laws of Costa Rica. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Assuming there is no limit to assign or transfer the loan from Lender A to Lender B, in order for the assignment or transfer to be valid to the borrower, it must be duly notified of the assignment of the loan. In addition, it is important to certify the date of the assignment through a public deed granted before a Notary Public ("*fecha cierta de la cesión*"). The assignment will be valid to third parties from the moment it is certified pursuant to the above.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

According to the Costa Rican Income Tax Law, interest payments made by Costa Rican corporations or entities to foreign lenders or financial institutions, as a result of the repayment of any loan, are subject to a 15% withholding tax in Costa Rica. This article also provides two possible scenarios where the foreign lender can be exempted from paying such 15% withholding tax – when the foreign lender has been recognised by the Costa Rican Central Bank ("BCCR") as an "Institution That Normally Executes International Transactions" or as a "First Order Bank". In order for this benefit

to apply, the foreign lender shall comply with certain requirements established by the BCCR and submit the request to be registered as either type of entity.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Please see question 6.1.

6.3 Will any income of a foreign lender become taxable in Costa Rica solely because of a loan to or guarantee and/or grant of security from a company in Costa Rica?

Costa Rica has a territorial tax system, thus, if a foreign lender grants a loan from abroad to a company established in Costa Rica, income generated through that loan or guarantee or grant of security shall not be taxable in Costa Rica. Nevertheless, as established in question 6.1 above, the remittances of interest shall be subject to a 15% withholding tax.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Generally, other than the established withholding tax indicated above, lenders do not assume any other cost in order to grant a loan and secure such loan in Costa Rica. As established in this document, most secured collateral is executed through a Notary Public in a public deed that is usually registered before the corresponding Section of the Public Registry. These costs, which are more specifically referred to in question 3.10 above, are always assumed by the borrower.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No. There are no adverse consequences.

7 Judicial Enforcement

7.1 Will the courts in Costa Rica recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in enforce a contract that has a foreign governing law?

The courts in Costa Rica shall always recognise a governing law in a contract and enforce that contract, unless the specific subject matter goes against a public policy law ("*ley de orden público*") that strictly prohibits such subjection to foreign law.

7.2 Will the courts in Costa Rica recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes. However, the following requirements have to be met: (a) the foreign judgment has been legalised by means of the Apostille Treaty or through the Costa Rican Consulate and translated into Spanish; (b) the foreign courts followed the established due process; (c) the subject matter of the foreign judgment was not tried in a Costa Rican court; (d) there is no former adjudication or *res judicata* on the same case by a Costa Rican court; (e) the rights declared in the foreign judgment are subject to execution in the forum where the judgment was rendered; and (f) the rights declared in the foreign judgment do not go against Costa Rican public policy laws.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Costa Rica, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Costa Rica against the assets of the company?

In general terms, if the default under a loan agreement has been well established, the time to prepare and file a lawsuit is immediate. In order to obtain a judgment, assuming that the debtor raises procedural issues, an approximate time would be 8 to 12 months, minimum. In addition, enforcement of the judgment against assets of the company can take an additional 8 to 12 months.

If we assume that all the legal requirements of the foreign judgment are in place, enforcement of such judgment in Costa Rica can take approximately between 8 to 12 months.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Under Costa Rican laws, some of the most important restrictions which impact timing and value of enforcements is when it is required to serve notice of the commencement of the legal proceeding. This first step in an enforcement case can be cumbersome and delay the proceeding. Once this is executed in accordance with due process and the established notification laws, there are no consents that might delay the process. Notwithstanding the above, the most recent notification laws have significantly reduced the notification process, making the entire enforcement process less problematic.

It is important to acknowledge that, in any of the above-indicated securities, the lender is not allowed to take automatic possession of the secured assets. In such cases, the lender has to execute any guarantee through the established judicial or private execution process.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Costa Rica or (b) foreclosure on collateral security?

No, there are no restrictions that apply to foreign lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in Costa Rica provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Upon declaration of bankruptcy, a moratorium to interest payments

is declared to all borrowings not secured by means of a mortgage, mortgage certificate, pledge or similar. Although this moratorium does not apply to secured lenders, they cannot demand payment of the interest until the assets have been auctioned and proceedings paid.

7.7 Will the courts in Costa Rica recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. Please see question 7.2.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Under Costa Rican law, lenders who have collateral security such a perfected mortgage, pledge, mortgage certificates or trust agreement shall have a privileged right to enforce their security over unsecured creditors. The above-indicated statement applies as long as the perfection of the security is not declared judicially fraudulent.

Our law establishes a specific remedy ("*Acción Pauliana*") in order to request the nullity and void of any act or contract which were executed up to two years prior to the declaration of bankruptcy which might affect unsecure creditors. In such case, the administrator of the bankruptcy shall have the power to begin such remedy action and the unsecured creditors may assist in such action.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

There are certain debts and obligations that have preference with respect to security. These have to be declared by a judge and the resulting liens are also known as legal mortgages which are established such as unpaid taxes, duly executed homeowners association fees and some administrative charges. In this regard, these types of obligations have a priority with respect to the security.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

There are only certain legal entities not subject to bankruptcy. These include the government of Costa Rica, all public and autonomous institutions, local municipalities and state-owned banks and financial institutions.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes, there are several processes other than court proceedings available to seize the assets of a company during enforcement.

Under most trust agreements in which assets are transferred to the Trustee to hold them in trust to secure an obligation, upon the occurrence of an event of default by the debtor or Trustor (according to the terms and conditions of the Trust Agreement or the other loan documents) and failure to cure or at least take specific actions to cure the default, the creditor – also referred to as the Beneficiary – shall give written notice of the default to the Trustee and to the Trustor. If the Trustor fails to timely cure the event of default within the term granted in the Trust Agreement for this purpose, the Trustee shall proceed to execute the auction of the Trust Estate. The trust agreement shall establish the rules to hold a private auction of the entrusted assets and, if there are no offers to the auction, the Trustee shall have the power to transfer the entrusted assets to the creditor or Beneficiary.

For a pledge agreement in which certain moveable assets are taken as collateral security (see question 3.6 above), upon an event of default, the lender can enforce the security through a private executor ("*corredor jurado*") and recover regular and delayed payment interest.

In addition, if a security contains an arbitration or conciliation clause, this process may be followed in order to seize – with the consent of the borrower – assets of a company.

In any case, under Costa Rican laws it is strictly prohibited for creditors to immediately seize assets of a company upon non-fulfilment of the terms and conditions or an event of default such as lack of payment. This immediate seizure is also known as "*pacto comisorio*". All documents and processes shall refer to an execution process (whether private or public, judicial or non-judicial) where due process is followed. Any agreement that violates the above shall be considered null and void.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Costa Rica?

A party's submission to a foreign jurisdiction is legally binding and enforceable under the laws of Costa Rica, unless there is a public policy law ("*ley de orden público*") that strictly prohibits such avoidance of domestic laws.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Costa Rica?

Generally, yes.

10 Other Matters

10.1 Are there any eligibility requirements in Costa Rica for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Costa Rica need to be licensed or authorised in Costa Rica or in their jurisdiction of incorporation?

Foreign lenders do not need to be licensed or authorised in Costa Rica or in their jurisdiction of incorporation in order to be able to grant loans in Costa Rica. In addition, there are no eligibility requirements for lenders to a company.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Costa Rica?

Although foreign lenders do not require authorisation to grant loans in Costa Rica, they shall have a corporate identification number ("*cédula jurídica*") in order to be identified as the lender in the financing documents to be registered at the corresponding Section of the Public Registry. This corporate identification number is granted by the Mercantile Section of the Public Registry and it does not generate any legal and tax consequences.

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Cyprus

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Cyprus?

The domestic lending market in Cyprus (lending to locally-owned business and resident individuals by local banks) is modest, reflecting the small size of the Cyprus economy, and is dwarfed by cross-border lending to Cyprus legal entities holding overseas assets.

Domestic lending volumes have been significantly affected by the Eurogroup's March 2013 "bail-in" of deposits at Cyprus banks. The use of depositor funds to bail out problematic banks inevitably hurt depositor confidence, and local banks have not been in a position to extend new lending. The result has been a 5% reduction in outstanding loans to local non-financial corporations during 2013, following flat loan volumes in 2012.

The current context of highly-leveraged local corporates operating in a weak economy presents a significant need for loan restructuring and refinancing, which local banks may not currently be able to accommodate. This provides an opportunity for international funds or lenders to become involved, given their greater financial flexibility.

Financing of Cyprus legal entities that hold overseas assets has been less affected by domestic developments. Such companies typically receive funding from foreign banks and apply this to their operations in foreign markets. Accordingly developments in this area of lending reflect the industry and financial trends of other major economies.

1.2 What are some significant lending transactions that have taken place in Cyprus in recent years?

In the past decade or so the main focus of domestic lending has been to companies that are active in the area of real estate development, particularly those catering to foreign buyers. However, few major domestic projects have been financed since the 2008 financial crisis.

By contrast, the financing of Cyprus companies holding overseas assets has been much more robust. For example, SUEK plc, which owns major coal production facilities in Russia, has secured US$1.5 billion in pre-export finance from a consortium of international banks in 2014.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

In principle under Cyprus law a company can provide guarantees for the borrowings of members of its group, provided that it demonstrates a direct or indirect benefit accruing to the company from granting the guarantee.

In the case of a parent granting security in respect of its subsidiary, the benefit to the grantor is usually apparent; however, this may not be the case with a subsidiary granting security for the benefit of its parent or a fellow subsidiary. Corporate benefit can be difficult to prove if the potential liability exceeds or accounts for most of the asset value of the company granting security.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

The directors must be in a position to discharge their fiduciary duties to the company, namely to act in the company's interest – the company must obtain a commercial benefit from entering into the guarantee in order for the directors to be in a position to discharge their duties. Guarantees are contracts and must, therefore, conform to the basic requirements of a contract: offer; acceptance; intention to create legal relations; and consideration. Guarantees are often executed as deeds to overcome any argument as to whether good consideration has been given.

2.3 Is lack of corporate power an issue?

In principle a Cyprus company is bound by its memorandum of association ("memorandum"), in relation to its scope of permitted operations and activities and by its articles of association ("articles") regarding internal management. Any act that is beyond the company's powers as set out in its memorandum is *ultra vires* under common law and *void ab initio*. For this reason, it is customary for the objects clause of companies' memorandums to be drafted extremely broadly so as to permit the widest possible range of activities. Moreover, even when it is not explicitly stated in the memorandum, relevant case law suggests that the memorandum should be construed and interpreted in the widest possible manner

and be considered to permit any activity unless it is expressly prohibited. Furthermore, section 33A of the Companies Law, Cap 113 ("Companies Law") provides *inter alia*, that a company will be bound *vis-à-vis* third parties by acts or transactions of its officers, even if they do not fall within the objects of the company provided that the third party acted in 'good faith', unless the performance exceeds the powers prescribed by law or which the law permits to be prescribed to the officers. The burden of proof is on the company to prove not only that the acts or transactions do not fall within the objects of the company and, further, that the third party did not act in 'good faith'. The test of 'good faith' is a subjective test and a person will be presumed to act in good faith unless the contrary is proven. Mere publication of the memorandum and articles will not constitute sufficient evidence of knowledge on the part of the third party.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Other than the possibility that the guarantee will be considered as being stampable in accordance with the Stamp Duty Law (Law 19 of 1963) (which is considered below in question 3.9) there are no governmental consents, filings or registration requirements to be obtained or made in connection with the issue of a guarantee.

The articles of a company will determine the corporate authorities required for it to enter into transactions and contracts, including guarantees. It is a well-established principle in Cyprus that third parties contracting with a company and dealing in 'good faith' may assume that acts within the company's constitution and powers have been properly and duly performed and as such are not bound to inquire whether acts of internal management have been regular. See also question 2.3 above regarding section 33 A of the Companies Law.

Shareholder approval may be required if there is a potential financial assistance issue (see section 4 below) and shareholders' approval is often obtained for added comfort.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Even though Cyprus law does not prohibit companies entering into an unlimited guarantee for all amounts owed by the debtor, such a guarantee could well raise issues regarding the directors' compliance with their duties. It is therefore advisable to link any guarantee to a specific agreement and to ensure that it does not put the company's solvency into question.

The guarantor's obligation is contingent on the borrower's primary obligation and will therefore never be greater than the borrower's obligation under the primary agreement. If, for example, the guarantee is granted in a different currency from the primary obligation it must be ensured that the amount guaranteed will not exceed the amount stated in the agreement which is guaranteed, by reason of currency fluctuations.

Regard should also be had to the provisions of sections 301 and 303 of the Companies Law, which are described in question 8.2 below.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Please see question 3.9 below regarding stamp duty in relation to enforcement. There are no exchange control issues which could be an obstacle to the enforcement of a guarantee.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Any type of asset that is an effective store of value, such as real estate, intellectual property, plant and machinery, rights under agreements and financial instruments are available to secure lending obligations.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Whereas it is possible to give asset security by means of a general security agreement covering several classes of assets, it is important in order to ensure effectiveness and enforceability that the relevant statutory provisions governing the creation and perfection of security over specified assets have been complied with.

For practical reasons, and to avoid the complexity implied in the preceding paragraph, it is standard practice that security over Cyprus real estate and shares in privately-owned Cyprus companies is created by separate agreements (please see questions 3.3 and 3.6 below).

Other assets, such as plant and machinery, receivables, bank accounts, inventory and the like can be collectively secured via a fixed and floating charge debenture, which, according to the nature of each asset, creates a fixed or a floating charge over it. A fixed and floating charge debenture may also incorporate the assignment of rights under contracts.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Collateral security over real property can be typically created by mortgaging the property in favour of the creditor. The Immovable Property (Transfer & Mortgage) Law (Law 9 of 1965) requires a Deed of Mortgage in the prescribed form to be signed by the mortgagor, being the registered owner of the mortgaged property, and filed with the District Lands Office in the district in which the immovable property is situated. Once the mortgage has been filed with the District Lands Office no transfer or other disposal of the property can be registered, except with the consent of the mortgagee.

A charge over plant, machinery and equipment would typically be created as a fixed charge under a fixed and floating charge debenture.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security over receivables is typically created within the context of a fixed and floating charge debenture or a separate security document.

It is at the discretion of the parties whether the security over the receivables will take the form of a fixed charge, an assignment or a floating charge, depending on the commercial arrangement on the control of the receivables during the life of the security. A fixed charge or an assignment by way of security will involve the control

of specified receivables by the chargee, which will involve, *inter alia*, the serving of notice on the debtor. A floating charge will typically cover a pool of receivables and leave the chargor free to manage the receivables in the ordinary course of business.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

It is possible to create security over a Cyprus bank account within the context of a fixed and floating charge debenture or a separate agreement.

Whether the charge constitutes a fixed charge or a floating charge depends on the extent to which the bank account is under the control of the chargor or the chargee. A fixed charge will require effective control of the inflows and outflows of the account by the chargee and this implies that the relevant terms relating to the management of the charged account require the consent of the bank.

Depending on its terms, a charge over the bank account may also constitute a financial collateral arrangement under the Financial Collateral Arrangements Law (Law 43(I) of 2004).

3.6 Can collateral security be taken over shares in companies incorporated in Cyprus? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

The giving of security over shares in a Cyprus company generally takes the form of a pledge of share certificates and charge of shares, and is regulated by the Companies Law, the Contract Law, Cap 149 ("Contract Law") and principles of equity.

The common form of such security involves the pledging and physical delivery of the share certificates to the pledgee together with creation of an equitable charge over the shares of the company, under which the pledgor remains the legal owner of the shares and (typically) retains the benefits deriving from the shares pending an enforcement event. The security instrument includes a mechanism for an event of default to trigger the out-of-court transfer of control over the shares to the pledgee.

The Contract Law sets out the requirements for the creation of a valid and perfected pledge over the share certificates of a company (it must be in writing, signed at the end by the pledgor and witnessed by two competent witnesses, who must also sign. In addition, for a pledge over shares in a Cyprus company to be valid and enforceable, the pledgee must give notice of the pledge to the company, the company must make a memorandum of pledge in its register of shareholders against the shares concerned, and it must provide the pledgee with a certificate of the memorandum of pledge). The Companies Law prescribes the procedure for transfer of legal ownership of the shares in the company. It therefore follows that while the security could in principle be governed by New York or English law, it must also comply with mandatory provisions of Cyprus law.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over inventory usually takes the form of a fixed and floating charge debenture. Because of the need for a business to acquire and dispose of inventory in the ordinary course of business (making it impractical and undesirable for the chargor to control), inventory is typically covered by a floating charge.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Unless the granting of security as primary or third party security provider is expressly prohibited under a company's memorandum and articles, then the company can grant a security interest subject to compliance with the law regarding directors' duties, corporate benefit and fraudulent preference (see questions 2.5 and 8.2) and unlawful financial assistance (see question 4.1).

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Section 90 of the Companies Law provides that any charge (as well as every amendment, assignment or other change to it created by a Cyprus company must be filed with the registrar of companies together with the duly stamped instrument, if any, by which it is created or evidenced, within 21 days after the date of its creation, failing which it will be void against the liquidator and any creditor of the company. A further 21 days is allowed for filing charges created overseas. There is an exemption for pledges of shares and agreements for the provision of financial collateral within the meaning of the Financial Collateral Arrangements Law (Law 43(I) of 2004) that has not yet been judicially tested.

The following additional registration requirements apply in relation to charges over specific classes of assets:

- Real Estate: A legal mortgage must be registered with the Land Registry Department under the Immovable Property (Transfer & Mortgage) Law (Law 9 of 1965). A registration fee of one thousandth of the amount secured is payable.
- Vessels or any share in a vessel: A mortgage must be registered with the Department of Merchant Shipping, under the Merchant Shipping (Registration, Sales and Mortgages) Law (Law 45 of 1963). The fee for registration will depend on the gross tonnage of the vessel.

Payment of Stamp Duty:

The Stamp Duty Law (Law 19 of 1963) as amended ("the Stamp Duty Law") provides, *inter alia*, that the documents specified in the Stamp Duty Law are chargeable with duty if they relate to any asset located in Cyprus or to matters or things to be done or performed in Cyprus irrespective of the place where the document is created. Non-payment of stamp duty does not invalidate the document or the transaction contemplated by it, but the document may not be adduced as evidence before a Cyprus court without payment of stamp duty and any applicable penalty for late payment.

The rates of stamp duty are as follows:

- For transactions with a consideration up to €5,000 no stamp duty is payable.
- For transactions with a consideration in excess of €5,000 but not exceeding €170,000, stamp duty of €1.50 for every €1,000 or part thereof is payable.
- For transactions with a consideration in excess of €170,000 stamp duty of €2.00 for every €1,000 or part thereof is payable.
- The maximum stamp duty payable on a contract is capped at €20,000.
- Where no amount of consideration is specified in the contract the stamp duty is €34.
- For a transaction which is evidenced by several documents

stamp duty is payable on the main contract and ancillary documents are charged at a flat rate of €2.

Stamp duty must be paid within 30 days from the date of execution of the relevant documents or, if they are executed abroad, within 30 days after they are received in Cyprus.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The registration fee for filing a charge with the Registrar of Companies under section 90 of the Companies Law is €680. The Registrar of Companies will typically issue a certificate of registration of the charge within one to four weeks of filing.

The fee for registering a mortgage with the Department of Merchant Shipping under the Merchant Shipping (Registration, Sales and Mortgages) Law is €0.034172 per gross tonne for the first 10,000 tonnes and half that rate above 10,000 tonnes. The registration of the charge can be finalised within five days.

The fee for registering a mortgage with the Land Registry Department under the Immovable Property (Transfer & Mortgage) Law is one thousandth of the amount secured. The registration of the charge can be finalised on the same day.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Unless the company operates in a regulated industry, such as financial services, or has a special status, such as semi-government bodies, there are no restrictions to the granting of security.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

So long as the terms under which the facility is being provided do not conflict with mandatory provisions of Cyprus law, there are no concerns relating to the granting of security.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

There are specific statutory requirements in relation to the creation of a valid pledge over shares in a Cyprus company. These are described in question 3.6 above.

The board resolution approving entry by the company into a security document that is a deed should expressly authorise the execution of such document as a deed. Any Cyprus law power of attorney authorising a person to execute the document as a deed should also be executed as a deed.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Section 53(1) of the Companies Law prohibits a company from providing direct or indirect financial assistance for the acquisition or subscription of shares in itself or its holding company subject to certain limited exceptions. Section 53 prohibits any financial assistance which may lead to the purchase of such shares unless otherwise permitted by section 53(1), notably if the lending of money is part of the ordinary business of the company. Contravention of this provision renders the company and every officer in default liable to a fine. There may, in addition, be proceedings on behalf of the company against the directors for breach of trust or, when the company is wound up, for misfeasance.

However, section 53(3) relaxes this prohibition by the introduction of a "whitewash" mechanism. A private company may now provide direct or indirect financial assistance for the acquisition of its own shares or shares of its holding company as long as it is not a subsidiary of a public company registered in Cyprus, and the arrangement is approved by a resolution passed at a general meeting at which the holders of 90 per cent of all the issued shares of the company vote in favour.

Public companies continue to be prohibited from providing financial assistance for the acquisition of their own shares. However, a public company may redeem or otherwise purchase its own shares out of realised and undistributable profits, subject to strict adherence to sections 57A–F of the Companies Law.

(b) Shares of any company which directly or indirectly owns shares in the company

As (a) above.

(c) Shares in a sister subsidiary

No prohibition unless the transaction results in indirect acquisition of the company's shares, in which case (a) above applies.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Cyprus recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Cyprus law recognises the role of a security agent or trustee who will hold the underlying security on trust for the benefit of all or some of the lenders in a syndicated loan, as well as for those lenders who may from time to time join the syndicate by way of a loan transfer. The rights and obligations of the security agent or trustee will normally be specified in the related loan agreement, and each security agreement will clarify which provisions of the loan agreement are equally applicable. Finally, it is common practice that the relevant security agreement will be filed with the Registrar of Companies as creating a charge over the assets of the borrower company in favour only of the security agent or trustee.

5.2 If an agent or trustee is not recognised in Cyprus, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable – see question 5.1.

5.3 Assume a loan is made to a company organised under the laws of Cyprus and guaranteed by a guarantor organised under the laws of Cyprus. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Under Cyprus law there are no special requirements to make the loan and guarantee enforceable by Lender B, provided that the transfer, assignment or novation requirements of the relevant Cyprus law facility agreement are clear as to their purpose and have been complied with.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

a) No withholding tax of any kind is due on interest payments to non-Cyprus tax residents. Interest paid to tax residents of Cyprus is subject to Special Contribution for Defence, which is deductible at source ("SDC tax").

Interest closely connected to the ordinary carrying on of a business (after deduction of the costs of earning the interest) of a Cyprus tax resident is subject to income tax in the hands of the recipient. Interest not closely connected with the ordinary carrying on of a business is subject to SDC tax on the gross amount.

b) There is no requirement to withhold tax from the proceeds of enforcement of any guarantee or security.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Foreign lenders are not subject to any withholding tax in Cyprus in relation to interest payments from resident companies and there are no specific anti avoidance rules governing the issue of companies which are highly leveraged.

6.3 Will any income of a foreign lender become taxable in Cyprus solely because of a loan to or guarantee and/or grant of security from a company in Cyprus?

Provided that the income derived by the foreign lender is not attributed to a Cyprus permanent establishment then there will be no liability to Cyprus tax in relation to income arising from a loan to or guarantee or grant of security by a Cyprus company.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are no other significant costs apart from those described.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Cyprus does not have thin capitalisation rules or any other specific anti-avoidance rules in relation to non-resident lenders.

However, a matter that must be taken into consideration in related party transactions (both for domestic and international transactions) is the need to comply with the arm's length principle. Section 33 of the Income Tax Law contains a general anti-avoidance clause permitting the tax authorities to disregard any transaction, through which the object of the tax of any person is reduced, which is deemed to be artificial or fictitious. While there is no jurisprudence or published policy regarding the application of this section, it is possible to obtain advance clearance on proposed transactions.

7 Judicial Enforcement

7.1 Will the courts in Cyprus recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Cyprus enforce a contract that has a foreign governing law?

The Cyprus courts will determine the governing law of a contract in accordance with the Rome I Regulation (Reg. (EC) No 593/2008), which respects the autonomy of the parties to choose the governing law of their contracts. It will be recognised and given effect to in any action brought before a court of competent jurisdiction in Cyprus subject to such governing law being pleaded and proved, except for such provisions of foreign law which the court considers procedural in nature, which are revenue or penal laws, or which are inconsistent with Cyprus public policy. Although this term has not been legislatively defined, it has been interpreted by courts as the totality of values, perceptions and ideas on which the ethical, financial and political order regulating Cypriot society is based from time to time.

7.2 Will the courts in Cyprus recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Recognition and enforcement of judgments given by English courts:

The courts in Cyprus will recognise and enforce judgments issued by English courts in accordance with the Brussels I Regulation (Reg. (EC) No 44/2001). Under the Regulation, there are no particular procedural requirements for the recognition of a foreign judgment, which may under no circumstances be reviewed as to its substance. A Cyprus court may refuse to recognise a judgment issued in another member state only in the circumstances specified in Article 34 of the Regulation.

As soon as the judgment is recognised, the competent Cyprus court will order its enforcement and the judgment will be executed as if it had been issued by a Cyprus court.

Recognition and enforcement of judgments given by New York courts:

There is no bilateral treaty between Cyprus and the United States of America concerning the enforcement of court judgments, and therefore any New York judgment will be enforced by Cyprus

courts pursuant to the common law. Cyprus courts generally assist the enforcement of a foreign judgment if:

- the judgment is issued by a jurisdictionally competent court in accordance with Cyprus rules on conflict-of-laws;
- the judgment is made on merit and not according to procedure;
- the judgment is not obtained by fraud;
- the proceedings leading to the judgment's issuance do not contravene the laws of natural justice; and
- enforcement of the judgment is not contrary to Cyprus public policy.

Finally, when a claim is brought on the judgment, the Cyprus court will not re-examine the merits.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Cyprus, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Cyprus against the assets of the company?

The amount of time of any court proceeding will depend on a variety of factors, including any interlocutory applications submitted by any of the parties, defences raised, complexity of the proceedings and postponement of hearings. It will usually take a couple of years to obtain a judgment and enforce it against the assets of the company.

The amount of time necessary for the enforcement of a foreign judgment in a Cyprus court is also dependent on a variety of factors; it would generally be prudent to allow at least six months.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There is no explicit requirement for a public auction. Some requirements may apply in respect to the consent of certain types of borrowers (for example, if an entity is regulated by the Central Bank of Cyprus ("CBC") there is a requirement to obtain consent from the CBC prior to the appointment of receivers).

In general, whereas receivers will prioritise the satisfaction of secured claims, they owe a general duty to apply reasonable care to obtain a fair price when realising assets. Liquidators owe a duty to all creditors of the borrower.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Cyprus or (b) foreclosure on collateral security?

Assuming Cyprus courts have jurisdiction over the matter, foreign lenders can file a suit against a company in Cyprus and foreclose on collateral security.

7.6 Do the bankruptcy, reorganisation or similar laws in Cyprus provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Liquidation proceedings provide for a moratorium on creditor claims but not on the claims of holders of fixed charge security. Schemes of Arrangement may bind secured creditors but are relatively uncommon and are subject to the courts' approval and to the agreement of a 75% majority in number and in value of each class of creditors. The effect of Schemes of Arrangement on secured creditors has not been judicially tested in Cyprus.

7.7 Will the courts in Cyprus recognise and enforce an arbitral award given against the company without re-examination of the merits?

As a contracting state to the 10 June 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), Cyprus is bound, in principle, to enforce awards made in foreign states which are parties to the Convention.

Article V of the Convention provides that a contracting state to the Convention may refuse to recognise and enforce an arbitral award at the request of the party against whom such award is invoked, only if such party furnishes to the competent authority where the recognition and enforcement is sought, all the requested proof, as defined under the Convention.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The main provisions relating to corporate insolvency in Cyprus are contained in the Companies Law. The lender's ability to enforce its rights as a secured party over the collateral security depends on the type of the security which has been provided (e.g. fixed or floating charge).

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In addition to the registration requirements under section 90 of the Companies Law, section 301 provides that any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company within six months before the commencement of its winding-up is considered to be a fraudulent preference against its creditors and invalid. On the question of fraudulent preference, the court looks at the dominant or real intention and not at the result. The onus is on those who claim to avoid the transaction to establish what the debtor really intended and that the real intention was to prefer. The onus is only discharged when the court, after reviewing all the circumstances, is satisfied that the dominant intention to prefer was present.

Section 303 of the Companies Law provides that a floating charge on the undertaking or property of the company created within 12 months of the commencement of winding-up is valid only to the extent of any cash paid to the company at the time of or subsequent to the creation of and in consideration of the charge, unless it is proved that immediately after the creation of the charge the company was solvent. Solvency requires not only an excess of assets over liabilities, but also the ability to pay debts as they become due. The onus of proving the company's solvency is on the holder of the floating charge.

It should be noted that the date of commencement of winding up may be considerably earlier than the date of liquidation: for

example, section 218 of the Companies Law provides that the winding up of a company by the court commences at the time of the presentation of the petition for the winding up or the date of an earlier resolution to wind up the company voluntarily.

In a winding up there are a number of categories of claim that rank ahead of debts secured by a floating charge, namely the costs of the winding-up and preferential claims, which comprise:

- all government and local taxes and duties due at the date of liquidation, having become due and payable within 12 months before that date and, in the case of assessed taxes, not exceeding one whole year's assessment; and
- all sums due to employees including wages, accrued holiday pay, deductions from wages and compensation for injury.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

There are no excluded entities either in personal or corporate insolvency. Special arrangements apply to insolvent banks and credit institutions (the Resolution of Credit and Other Institutions Law of 2013 as amended) and insurance companies (the Insurance Services and other Related Issues Laws of 2002-2011).

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

A creditor secured by a charge may appoint a receiver to take possession of the assets subject to the charge and realise them for the benefit of the appointor. If the charge is a floating charge over the whole or substantially the whole of the property of the company and the charge document provides for it, the charge holder may appoint a receiver and manager, with extensive powers to manage the company and dispose of the assets as a going concern.

In addition, creditors may use the self-help remedies available under common law such as liens.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Cyprus?

In general a party's submission to a foreign jurisdiction is accepted as legally binding and enforceable under the laws of Cyprus.

There does not exist a single unified system in Cyprus for the enforcement of foreign judgments. Depending on its origin, a foreign judgment may be recognised and enforced in Cyprus under Council Regulation (EC) No. 44/2001, under bilateral and international treaties or under common law. Generally, for a foreign judgment to be recognised in Cyprus it:

- must have been issued by a court that has jurisdiction according to the conflict of laws rules applied in Cyprus;
- must not be contrary to public policy;
- must have been made on merit and not according to procedure;
- must not have been obtained by fraud; and
- must have been the outcome of proceedings that were conducted in accordance with natural justice.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Cyprus?

The basic rule at common law, also applicable in Cyprus, is that whereas a foreign sovereign is immune from the jurisdiction of the Cyprus court, such court would take jurisdiction if the foreign sovereign submitted to it.

10 Other Matters

10.1 Are there any eligibility requirements in Cyprus for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Cyprus need to be licensed or authorised in Cyprus or in their jurisdiction of incorporation?

There are no requirements of this type.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Cyprus?

Law 72(I) of 2011 established a maximum rate of interest, the "reference rate" that can be charged on loans and made it a criminal offence to charge interest above that rate. The interest rate ceiling (currently 12.51 per cent per annum) is calculated by the Central Bank of Cyprus using a formula based on half the average bank lending rate of the previous year plus a margin of between 5 and 10 percentage points, which varies according to various risk factors.

The restrictions on interest rates do not apply to credit institutions or to:

- loans where the lender and the borrower are legal persons which are deemed to be connected persons for the purposes of article 33 of the Income Tax Law;
- loans to legal persons where the capital out of which the loan is provided derives directly or indirectly from sources outside Cyprus provided that the amount of the loan exceeds €1,000,000 and the minimum drawdown amount is €500,000; or
- loans to legal persons which are disbursed overseas provided that the amount of the loan exceeds €1,000,000 and the minimum drawdown amount is €500,000.

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All of the major independent legal rating agencies place Andreas Neocleous & Co LLC at the top of their Cyprus rankings. Legal 500 and Chambers rank the firm as the leader in every practice area, a distinction achieved by only a handful of firms worldwide.

Czech Republic

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in the Czech Republic?

In the Czech Republic, loan documentation is increasingly covenant heavy and banks tend to use documents based on the loan market association standards even for smaller bilateral loan facilities. While interest rates have gone down, the margins have been growing for most sectors and borrowers. There have been a lot of refinancing transactions through which banks were restructuring terms of badly performing loans granted prior to 2008.

1.2 What are some significant lending transactions that have taken place in the Czech Republic in recent years?

The largest lending transaction by volume in 2012 was the loan facility in the amount of EUR 1,000,000,000 to a Czech Energy Holding Company by a syndicate of Czech banks. This is also probably the largest banking loan to a Czech company ever.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, but certain restrictions may apply.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Guarantees are regarded as unilateral acts under Czech law and so no consideration needs to be provided for a guarantee to be valid.

On the other hand, directors must be able to show that they act in the best interest of their company. If a company grants a guarantee (be it for the borrowings of a related or an unrelated party) and the relevant director is not able to demonstrate adequate benefits of the guarantee to the company she/he can become personally liable for the damage caused to the company by issuing the guarantee. In addition, if a controlling company uses its influence over a controlled company to make the controlled company issue a guarantee, the controlling company will be liable to the controlled company for any resulting damage.

Certain guarantees provided without adequate consideration can be set aside (be considered ineffective) in insolvency proceedings over the party issuing the guarantee.

Additionally, in case of guarantees issued on behalf of a related party without any consideration or benefit, tax authorities could consider the guarantee as a gift to the party on whose behalf it is issued and assess a gift tax on such transaction.

2.3 Is lack of corporate power an issue?

Generally, any business company can issue guarantees regardless of its object of activity. Bylaws of the company can restrict the power of its directors to issue guarantees but such restriction will not normally be opposable to third parties acting in good faith.

However, in certain cases the law requires shareholders' consent, or at least a notification of the shareholders, before a company can issue a guarantee. A lack of consent/notification can invalidate the guarantee.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Business companies do not need governmental or similar consent for issuing a guarantee. However, if a company intends to issue a guarantee securing the obligations of its related party (including members of the same group, its directors or proxies) it must first obtain consent of, or at least inform, the general meeting of its shareholders. The shareholders may prohibit the company from granting such a guarantee.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Not specifically. However, a guarantee provided by a company with no adequate consideration when the company was insolvent or in the stage that leads to the insolvency of the company (including the company's over-indebtedness) will be set aside in insolvency proceedings.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Currently no. However, the law authorises the government to adopt certain restrictive measures on the flow of capital during economic or financial emergencies in the Czech Republic.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

A broad range of assets can be used as a fixed collateral security including real estate (land and buildings), movable (personal) assets, shares, bonds, receivables and certain rights (including certain intellectual property rights).

The law also enables the creation of floating charges over a defined set of assets (such as inventory or a collection of books) or over the whole enterprise of a company.

Certain financial transactions can be secured by additional collateral such as cash on bank accounts.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is possible to create a floating charge (pledge) over the whole enterprise of a person or over a defined set of assets. However, this charge does not affix to the individual assets forming part of the charged enterprise or set of assets. Consequently, if an asset forming part of the original enterprise or set of assets is sold by the owner, the charge will not extend to the sold item. The floating charge must be taken under a written agreement in the form of a notarial deed entered into between the owner of the enterprise or set of assets as pledgor and the beneficiary of the secured obligation as pledgee and then perfected by registration in the notarial register of pledges.

For a fixed security over specific assets, please see our answer to question 3.3.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. The procedure differs according to the type of property.

A fixed pledge over a movable (personal) asset can be perfected either by possession (in which case it can be created under a simple agreement in writing between the pledgor and the pledgee) or by registration in the notarial register of pledges (in which case it is created under a written agreement between the pledgor and the pledgee made in form of a notarial deed).

Any real property registered in the cadastral (real estate) register (basically all the land and most buildings) can be mortgaged through a written agreement between the owner of the real estate as mortgagor and the beneficiary of the secured obligation as mortgagee, provided that the authenticity of signatures of both parties must be verified by a notary. The mortgage must be registered in the cadastral register in order to become effective.

A pledge over real property that is not subject to registration in the cadastral register (certain petty or underground constructions) is taken through a notarial deed and registration in the notarial register of pledges.

The perfection of security over certain specific types of assets requires registration in specific registers (for example, a mortgage over an aircraft registered in the Czech Republic must be registered with the Czech aviation register).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. The pledge agreement must be entered into in writing and must specify the pledged receivable as well as the secured obligation.

The pledge is not enforceable against the debtor of the pledged receivable until the pledge is notified to the debtor by the pledgor or evidenced by the pledgee.

Alternatively, the pledge agreement can be made in the form of a notarial deed and the pledge entered into the notarial register of pledges. Then the pledge becomes enforceable upon its registration.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. It is usually created as a pledge over the account holder's receivables for payments from the account. Certain financial transactions can be secured by the pledge over the cash directly.

3.6 Can collateral security be taken over shares in companies incorporated in the Czech Republic? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, a pledge can be taken over the shares issued by a Czech joint stock company as well as over the ownership interests in a Czech limited liability company. Each must be created under a pledge agreement entered into in writing between the owner of the share (ownership interest) as pledgor and the beneficiary of the secured obligation as pledgee and specifying the pledged shares (ownership interest) and the secured obligation.

Shares of a Czech joint stock company can be issued in a certificated form (only in case of registered shares) or book-entered. The perfection of a pledge over certificated registered (*au nom*) shares requires a pledge endorsement in addition to the hand-over of the shares to the pledgee or a custodian.

A pledge over book-entered shares is perfected by its registration with the central depositary. A pledge over immobilised shares is perfected by the notification of the relevant depositary of the pledge. A pledge over an ownership interest in a limited liability company requires registration with the commercial register.

The relevant pledge agreement could be in theory governed by a foreign law but would still have to satisfy the requirements of Czech law in respect of the creation of the pledge if it was to be enforced in the Czech Republic.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, a floating pledge can be taken over the inventory defined as a certain set of assets. A fixed pledge can be created over the individual assets forming part of the inventory (but not over an asset which is pledged as a part of a set of assets). For procedure, see the answers to questions 3.2 and 3.3.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company can use its assets as security for its obligations as well as for obligations of other parties (certain restrictions as to consideration and internal approval requirements may apply to the same extent as to guarantees – see the answers to the questions in section 2).

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Where a pledge agreement must be made in the form of a notarial deed, the fee is set accordingly to the value of the secured obligation. The rate ranges from 1 % to 0.05 % of the obligation (the higher the price, the lower the rate) the minimum fee is *ca.* EUR 32 and is charged only for a secured amount up to *ca.* EUR 1,600,000. An additional fee is charged for each pledged item registered in the notarial register of pledges.

A fee for the registration of a mortgage over real estate in the cadastral register amounts to *ca.* EUR 40. Additional fees are payable for the registration of security over certain other assets in amounts varying according to the type of the asset.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The time required for registration of a security can extend up to several weeks in the case of real estate and certain specific assets such as aircraft or a trademark. Pledges over movable assets, enterprises or sets of assets are usually registered in the notarial register of pledges on the same day on which the pledge agreement is executed.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Generally, no regulatory consents are required for the creation of the security. However, the perfection of certain types of collateral security requires registration in public registers (cadastral register, aviation register, commercial register) and the registration is subject to consent of the authority maintaining the register.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No. In case of revolving facilities, the collateral secures all future obligations of the borrower under the relevant facility which will arise until a certain time and up to certain amount. The priority of the security is governed by the time it was perfected.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Yes, pledges over movable assets that are not perfected by possession, pledges over sets of assets or enterprises, pledges of receivables in certain cases and pledges over real estate that are not subject to registration in the cadastral register are established under agreement made in the form of a deed before a Czech notary public.

Signatures of parties on mortgage/pledge agreements in respect of real estate registered in the cadastral register or in respect of ownership interests in limited liability companies must be officially authenticated (by a notary public, an attorney or a municipal office).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

Yes, Czech companies are generally prohibited from providing financial assistance (in the form of loans, credits, guarantees or other security) with the acquisition of their shares or the shares of their holding companies. There are, however, certain white wash procedures available to the companies that may enable them to provide a financial assistance in certain cases.

Financial assistance restrictions have not been found to apply to acquisitions of shares in sister companies.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will the Czech Republic recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

New provisions that should allow the use of security trustees have been recently introduced into Czech law. However, these provisions are not tested yet and banks tend to avoid them for now.

5.2 If an agent or trustee is not recognised in the Czech Republic, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Yes, a parallel debt or a similar provision needs to make the security agent a joint and several beneficiary (creditor) of each secured obligation with each primary creditor (lender) of the obligation. The Czech law security is then created to the benefit of the security agent to secure all the obligations owed to the agent as the joint and several creditor with the lenders. The security agent can then enforce the security in its own name to the full extent of the secured obligations and distribute the proceeds to the lenders under the facility agreement.

5.3 Assume a loan is made to a company organised under the laws of the Czech Republic and guaranteed by a guarantor organised under the laws of the Czech Republic. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

No (subject to different provisions in the facility agreement or the guarantee), but the transfer will be enforceable against the borrower and the guarantor only after Lender A notifies them of the transfer or Lender B evidences the transfer to them.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest payable by a Czech tax resident to a foreign entity which has no permanent establishment in the Czech Republic is subject to a 15 per cent withholding tax. The withholding tax does not apply to interest payable to beneficiaries resident for tax purposes in EU or European Economic Area countries or in jurisdictions which have entered into a treaty with the Czech Republic reducing the withholding tax to zero. No specific withholding tax is applicable in respect of the proceeds of a claim under a guarantee or enforcement of security. However, to the extent the proceeds are used to satisfy the secured interest, the tax withholding from interest payments may apply.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no incentives aimed at foreign lenders in the Czech Republic. For the applicability of withholding tax and various notarial or registration fees see other parts of this chapter.

6.3 Will any income of a foreign lender become taxable in the Czech Republic solely because of a loan to or guarantee and/or grant of security from a company in the Czech Republic?

Generally not, as long as the lender is not considered to have a permanent establishment in the Czech Republic under the relevant treaty on double taxation or, in its absence, under Czech law.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

See our answer to question 3.9 for discussion of the fees related to the creation and perfection of security.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in the Czech Republic recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in the Czech Republic enforce a contract that has a foreign governing law?

Yes, the courts not only recognise it but also enforce foreign governing law, providing the contract includes a "foreign element". Usually a contract to which at least one of the parties has a seat outside the Czech Republic will have a sufficient foreign element for the choice of foreign law provision to be upheld by Czech courts. The recognition and enforcement of foreign law will always be subject to Czech public order and imperative norms.

7.2 Will the courts in the Czech Republic recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Enforcement of English court decisions, as well as decisions from other EU countries, is subject to Brussels I and Brussels IIA regulations under which judgments in civil and commercial matters and matrimonial and parental matters respectively decided by courts of EU Member States shall be recognised and enforceable in another Member State without any re-examination.

Recognition of judgments of other jurisdictions in the commercial matters is subject, among other conditions, to a reciprocity having been demonstrated. Several judgments of New York courts have already been recognised in the Czech Republic and the reciprocity is believed to have been established between the Czech and New York courts.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in the Czech Republic, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in the Czech Republic against the assets of the company?

A suit can be filed within days (depending on the complexity of the matter and time it requires to prepare it). In cases of a receivable lower than *ca.* EUR 40,000 an electronic action is available. The period for obtaining a judgment varies from one to several months, depending on the cooperation of the defendant and complexity of the case. The process can even take up to 3 years in case of an appeal. Once a final judgment is obtained, the enforcement is enforced by an executor (i.e. authority appointed to execute judgments). Enforcement proceedings are usually faster and last a few months.

The enforcement of a foreign law judgment should not take longer than in case of a judgment of a Czech court.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Generally a secured creditor can satisfy its claim from the collateral

only through a public auction or in a court ordered auction. New provisions that should allow a direct enforcement of collateral security by the creditor have been recently introduced into Czech law but have not been tested in practice yet.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in the Czech Republic or (b) foreclosure on collateral security?

No, the position of foreign lenders does not differ from that of their Czech counterparts. However, in practice they must expect that any documents presented to Czech courts or other authorities need to be translated into Czech.

7.6 Do the bankruptcy, reorganisation or similar laws in the Czech Republic provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes. The enforcement of lenders' claims and security is generally restricted after insolvency proceedings are initiated against the borrower or the owner of the collateral. For more details, see our answer to question 8.1.

7.7 Will the courts in the Czech Republic recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. The Czech Republic is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958. Pursuant to this Convention, arbitration awards are recognised in the Czech Republic and enforced under Czech law – arbitration awards are recognised automatically and for enforcement an order (court decision) is necessary. The courts will re-examine the case only from a procedural and public order perspective.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

After the insolvency proceedings have been commenced against a company, no party may enforce its claim against the company or seek satisfaction from the assets owned by the company otherwise than within the insolvency proceedings. However, creditors secured on an asset of the insolvent company have a right to be satisfied from the proceeds of the sale of the asset up to the amount of their claim.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes, generally any acts of the insolvent entity which prefer one creditor to the detriment of other creditors may be set aside and disregarded in insolvency proceedings if they occurred within 3 years preceding the commencement of the insolvency proceedings in favour of a related party creditor or within 1 year prior to the commencement in favour of an unrelated party creditor.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Yes, certain public entities such as the municipalities or the central bank are excluded from insolvency proceedings. Specific rules apply to financial institutions such as banks or insurance companies.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

There are only limited cases when a creditor can enforce its collateral directly without the involvement of a court. The law for example allows a creditor secured by a pledge over an ownership interest in a limited liability company or by a pledge over shares of a company to sell the interest or shares publicly in its own name and use the proceeds of the sale to satisfy its claim.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of the Czech Republic?

Generally yes with the exception of where the Czech courts have exclusive jurisdictions such as in case of disputes over real estate located in the Czech Republic.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of the Czech Republic?

Yes. Under Czech law, the state can validly waive its sovereign immunity. In addition, according to the decisions of Czech courts, in private legal matters (*acta iure gestionis*) between a state and a private entity no waiver is necessary as such matters are outside the scope of the state's immunity.

10 Other Matters

10.1 Are there any eligibility requirements in the Czech Republic for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in the Czech Republic need to be licensed or authorised in the Czech Republic or in their jurisdiction of incorporation?

Lending is not a regulated activity requiring a special licence under Czech law. However, any entity that carries out a business activity systematically in the Czech Republic needs to obtain a business licence (unless it carries out the activity based on the so-called European passport).

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in the Czech Republic?

There are a number of specific requirements and issues that may need to be addressed depending on the type of financing and collateral to be used. These should be always addressed on a case by case basis when a foreign lender intends to extend a loan to a Czech company or have a loan secured by assets located in the Czech Republic.

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From 1995 to 2005 Roman worked for an international law firm in Prague and in 2006 became a partner of JŠK. Roman regularly represents various Czech and international banks, including UniCredit Bank and CSOB in real estate, project and other financing transactions. Roman has also advised in relation to the sale and lease-back of a hangar of Czech Airlines, and drafted or advised on several aircraft mortgage agreements, aircraft leasing and financing agreements and aircraft purchase agreements.

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Patrik has been working with JŠK since his graduation. He advised several lenders on financing of a number of renewable energy source projects, including solar, wind and biomass power plants, as well as real estate projects. Patrik represented Moravan Aviation (now Zlin Aircraft), Czech manufacturer of sport aircraft, before the Czech Civil Aviation Authority and EASA and advised to the client on certain insolvency and restructuring related matters.
In his practice, Patrik also deals with energy and public procurement law.

JŠK, advokátní kancelář, s.r.o. (JSK) has serviced Czech and international clients since 2004. All of JSK partners have spent many years in major global law firms before they joined JSK to accomplish their desire to provide top-class international services in close touch with the clients and the market.

JSK works a lot for banks and insurance companies, as well as for local and multinational businesses ranging from energy generation to motorway construction and nanotechnology.

At the time of this paper, JSK has 3 partners and 15 other lawyers. In financing, JSK normally works for the banks or for the borrowers.

Denmark

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Denmark?

In the aftermath of the financial crisis, bank lending has decreased and has – to some extent – been replaced by other sources of financing. Most significantly, a DKK denominated corporate bond market for non-benchmark issues is developing. Also, a number of Danish pension funds have begun to make direct loans. Finally, and so far not on a significant scale, a number of investment funds are being set up with direct lending strategies.

1.2 What are some significant lending transactions that have taken place in Denmark in recent years?

As mentioned above, one of the most significant new trends in Denmark is the emergence of a DKK denominated corporate bond market for non-benchmark issues. Two issues in particular stand out here. One is the Danish oil well technology company Welltec's 2012 high yield issue of USD 325m senior secured bonds. The other is private equity fund Axcel's 2013 DKK 900m (USD 168m) issue of bonds to finance its acquisition of the Danish IT services company EG. The Welltec issue represents the first significant high yield issue by a Danish company in the SME segment, whereas the Axcel issue is the first time a bond issue was used to finance an acquisition in Denmark.

The largest single lending transaction on the Danish market in 2013 was the brewery Carlsberg's refinancing of its DKK 18bn (USD 3.35bn) five-year credit facilities. Of significance is also the mortgage financing by Nykredit Realkredit of Danish pension fund PFA's and public utility Syd Energi A/S' DKK 760m (USD 140m) purchase of 272 onshore wind turbine generators (192 MW) from DONG Energy A/S. This transaction marks one of the first ventures of Danish mortgage banks into the financing of large scale infrastructure projects backed by pension funds or other institutional investors.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Under Danish law, the general rule is that a limited liability company may freely guarantee the obligations of its subsidiaries. A company may also guarantee the obligations of its parent company, provided that the parent company is a limited liability company and that the parent company is incorporated in the EU/EEA or other countries classified by the OECD as risk classes 0 and 1 (including USA, Japan and Australia).

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Danish law generally requires that the directors of a limited liability company only act for the benefit of the company when exercising their duties, including when deciding to guarantee or put up security for the obligations of a group member. Wilful or negligent failure to comply with this requirement may lead to personal liability for the individual director. A beneficiary of a guarantee or security provided under such circumstances may not be able to enforce the guarantee or security if it can be established that he acted in bad faith. Such guarantees may also be set aside under the Danish Bankruptcy Act.

2.3 Is lack of corporate power an issue?

Lack of corporate power is generally not an issue under Danish law. In principle, Danish law requires that the granting of guarantees be contained within the objects of the company as set forth in its articles of association. In practice, such restrictions are seldom and would only be effective if clearly worded.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental or other consents or filings are required. The board of directors constitutes the central and supreme governing body of Danish limited liability companies, and it is usual practice and advisable that the board of directors approves the terms and execution of the guarantee (if granting the guarantee is deemed to be a substantial action for the guarantor). In contrast, shareholders' resolutions are seldom required.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Although there are no set limits under Danish law, it is a general requirement that the board of directors acts prudently taking the

company's financial resources into account. Therefore, guarantees sometimes include equity limitations or similar language to limit the risk of director liability.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Danish law does not contain any exchange control or similar obstacles to enforcement.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

In Denmark, all classes of property are in principle available as collateral, including but not limited to real estate, chattels, contract rights, receivables, securities and intellectual property.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Danish law does in general not allow a person to give security over all his present and future belongings (assets). Neither does Danish law generally allow for charges (i.e. non-possessory security interests) over an indefinite plurality of assets (e.g. a collection or inventory). However, since 2006, Danish statutory law has allowed borrowers to offer a floating charge over certain types of assets, including *inter alia* receivables from the sale of goods or services, inventory, machinery, production equipment, fuel and goodwill. The floating charge allows the borrower to dispose of such assets in the ordinary course of his business.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Denmark has a highly developed mortgage banking sector and a correspondingly sophisticated system for taking security over real property (land). Mortgages over real property (land) are perfected by electronic registration (based on a statutory mortgage form) in the Danish Land Register (in Danish "*Tingbogen*") and is subject to payment of a registration fee (see question 3.9 below). Plant and machinery fixed to a mortgaged real property may be deemed to be part of that property and, thus, caught by the mortgage.

An owner of real property can issue a mortgage to himself (a so-called owner's mortgage). The issuance and registration (the registration fee described in question 3.9 below applies) of the owner's mortgage do not establish a security interest for the owner, but it will obtain a fixed position in the priority hierarchy from this point. The owner's mortgage can subsequently be pledged to a secured lender, e.g. as security for payment for any and all present and future obligations and liabilities of the borrower. A security interest in an owner's mortgage is perfected by registration in the Danish Land Register against payment of DKK 1,660 (USD 310). Once the debt has been repaid, and the secured lender has released its security interest in the owner's mortgage, the owner's mortgage is still available for the mortgagor, who can pledge it to another secured lender against payment of DKK 1,660 (USD 310) (in contrast to an ordinary mortgage which is subject to the full registration fee described in question 3.9 below).

Security over plant and machinery not deemed to be part of the mortgaged real property, as well as equipment, can be given as either a fixed or a floating charge.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security over receivables is most commonly created by way of assignment of individual receivables, which is perfected by giving notice to the debtor stating that the debt has been assigned, and that payment of the debt must be made to the assignee.

Security may also be given over receivables as a floating charge over the borrower's receivables from the sale of goods or services. In this case, the charge is perfected by electronic registration in the Danish Personal Register (in Danish "*Personbogen*") and is subject to payment of a registration fee (see question 3.9 below).

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Security over cash deposited in bank accounts is typically created as a pledge over the account. The pledge is perfected by giving notice to the bank, barring the pledgor from accessing the deposited funds. If under the terms of the pledge agreement the pledgor is allowed access to the deposited funds, the pledge is considered to be non-perfected, which will (*inter alia*) result in a hardening period (typically three months) being applicable from such time when the pledge is perfected.

3.6 Can collateral security be taken over shares in companies incorporated in Denmark? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares can be and are often used as collateral security, usually created as a pledge over the shares. Under Danish law, there is, for the purposes of taking collateral security, a sharp distinction between shares that are issued electronically/dematerialised (typically listed shares) and shares that are not.

A pledge over electronically issued (dematerialised) shares is perfected by a book-entry registration with the Danish central securities depository (VP Securities A/S). In practice, the book-entry registration is effected by the pledgor's securities custodian (usually a bank) after receiving notice of the pledge.

Pledges over shares not issued electronically (i.e. unlisted shares) are perfected by giving notice to the issuing company, which will record the pledge in the shareholders' register (although this is not required for perfection).

Danish law does allow shares to be issued in certificated form; however, this is rare. Unless the certificated shares are also issued as bearer instruments, which is even rarer, the procedure for perfection is not different for shares in certificated form (if the shares are in bearer form, the pledgee must take the certificates into possession to perfect the pledge).

Although security over shares is traditionally created as a pledge (i.e. a possessory security interest), the economic and governance rights associated with the pledged shares will be retained by the pledgor unless the pledge agreement specifically states otherwise, and pledgees need to carefully consider the terms of the pledge agreement.

Security over Danish shares can be validly granted under documents governed by foreign law, provided that the security is perfected in accordance with Danish law; however, while it is theoretically possible, it may complicate enforcement, and therefore share pledge agreements are most often governed by Danish law.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over inventory can be created as either a pledge (i.e. a possessory security interest) or as a floating charge as described under question 3.2 above in which case perfection is subject to payment of a registration fee (see question 3.9 below). Pledges over inventory can only be validly sustained if the pledgee effectively prevents the pledgor from having physical control over the inventory.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Under Danish law, a limited liability company may secure both its own obligations as a borrower or guarantor and the obligations of a third party (third party security). Third party security gives rise to issues of corporate benefit as described under question 2.2 above.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

There are no notarisation, registration, stamp duty or other fees related to entering into an agreement regarding security. Fees are, however, payable when mortgages (real estate, floating charges, vehicles, intellectual property rights and certain other assets) are registered in the relevant public register. A mortgage (including floating charges) is subject to a registration fee of DKK 1,660 (USD 310) plus 1.5% of the secured amount, which will normally be the commitment or facility amount under the credit agreement. Fees are also payable when security is registered over vessels and aircraft.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Electronic registration of mortgages with the relevant public register can be a cumbersome procedure subject to rigid documentation requirements and may necessitate a number of successive registrations, which may take several weeks to complete.

Security over other types of assets, including shares, receivables and deposits, is not subject to such formalities and may generally be established at short notice.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No regulatory or similar consents are, as a general rule, required under Danish law.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There are no special priority concerns regarding a revolving credit facility if the security documents are drafted so that the security is not released upon repayment in full (or in part).

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Generally, Danish law documentation will be shorter than similar common law documentation. Danish parties traditionally rely on statutory and general principles of law, and the Danish courts will look to the parties' intentions and not only the wording of the agreement. Both of these factors contribute to a lesser need for highly detailed documentation.

Furthermore, Danish law does not operate with a requirement for "consideration" in agreements, and, thus, there is no equivalent to the English deed, and all security documents are in the form of agreements.

Although Danish law in general does not distinguish between original documents and copies, the Danish bailiff's court may not give effect to certain documents, such as promissory notes, mortgages and judgments unless they are presented in original.

See question 3.10 above in relation to mortgages to be registered with the relevant public register.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Under Danish law, limited liability companies are prohibited from, directly or indirectly, advancing funds, making loans or providing security for the acquisition of shares issued by the same company or its parent company. The prohibition also extends to certain subsequent transactions between the company and the shareholders, which would result in *de facto* financial assistance, including mergers between the issuing company and any corporate vehicle used for the acquisition of the company's shares.

Following a 2009 reform of the Danish Companies Act, a company may offer financial assistance provided that an approval procedure is followed (whitewash procedure). The procedure requires the financial assistance to be approved by a preceding resolution of a general meeting of the shareholders passed with 2/3 majority. Prior to the general meeting, the board of directors must produce and make publicly available a statement laying out the terms and corporate benefits of the financial assistance. The board of directors must also make a credit evaluation of the receivers of the financial assistance, although there are no formal requirements as to the content of this evaluation. Finally, the financial assistance must always be prudent taking the company's capital resources into account, and the company may only provide financial assistance if the total amount is less than or equal to the company's statutory distributable reserves. Such whitewashed financial assistance is

seldom used in Denmark, and particularly the requirement for a public statement as to the reasons for and benefits of the financial assistance seems to be a stumbling block.

(b) Shares of any company which directly or indirectly owns shares in the company

The restriction described above also applies to subsidiaries which cannot provide financial assistance for a third party's acquisition of the shares in their parent companies, unless the exceptions described above apply.

(c) Shares in a sister subsidiary

The Danish Companies Act does not prohibit a company from providing financial assistance for a third party's acquisition of the shares in a sister company.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Denmark recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

There is a statutory regime which allows lenders (from time to time) to appoint a security agent (the terms trust and trustee are still not used in Danish law) to hold security on their behalf. The security agent will be able to enforce the credit agreement and to receive the proceeds from any security on behalf of the lenders.

5.2 If an agent or trustee is not recognised in Denmark, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

See question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of Denmark and guaranteed by a guarantor organised under the laws of Denmark. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

As long as the transfer is in accordance with the terms of the credit agreement, no special requirements have to be observed.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest payable on loans made to domestic or foreign lenders, and the proceeds of a claim under a guarantee or the proceeds of enforcing security, are generally not subject to withholding tax in Denmark. However, interest arising out of controlled debt (i.e. debt to a controlling entity) paid to a foreign company is subject to 25% withholding tax, provided that the lender is not covered by the EU Interest and Royalties Directive or protected by a Double Taxation Treaty (certain other exceptions apply). The main scope of this provision is interest paid to holding companies located in tax havens. The same withholding taxation rules apply on any prearranged capital gains on loans. If the loans contain a profit-participating element, this part of the return is regulated by a different set of withholding tax rules.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no such incentives provided preferentially – and no special taxes apply – to foreign lenders (except as described in question 6.1).

6.3 Will any income of a foreign lender become taxable in Denmark solely because of a loan to or guarantee and/or grant of security from a company in Denmark?

A foreign lender will not become taxable in Denmark merely as a beneficiary of a guarantee or security from a Danish company. Interest arising out of controlled debt may, however, be subject to taxation in Denmark (see question 6.1). Denmark has adopted the concept of "beneficial owner" of the interest in question, which implies that conduit countries will be disregarded as the beneficial owner of the interest.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Normally no other significant costs arise in Denmark purely as the result of a loan/guarantee/security document being executed by foreign lenders. However, see question 3.9 above in relation to registration fees for mortgages.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

The lenders' domicile will normally not affect Danish borrowers' tax position. Rules on thin capitalisation apply to controlled debt in Danish legal entities regardless of the lenders' domicile. As lenders must be assumed not to be affiliated with the Danish entities, thin capitalisation rules will normally not apply.

7 Judicial Enforcement

7.1 Will the courts in Denmark recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Denmark enforce a contract that has a foreign governing law?

The Rome I Regulation (Regulation (EC) No 593/2008) does not apply in Denmark, and the 1980 Rome Convention on the law applicable to contractual obligations is still applied by the Danish courts. In accordance with the Rome Convention, a Danish court will, as a general rule, respect the parties' autonomy and recognise a foreign governing law in a contract. Such a contract will be enforceable in accordance with its terms and the foreign governing

law subject to applicable mandatory rules applied in accordance with the Rome Convention.

7.2 Will the courts in Denmark recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Generally, Denmark does not enforce any foreign judgments in the absence of a treaty obligation to do so. As there is no reciprocal agreement or convention applying between Denmark and the United States/New York, a Danish court will not recognise and/or enforce a judgment given against a Danish company in a New York court.

Denmark has entered into a (parallel) agreement with the European Community which extends the application of the provisions of the Brussel I Regulation (Regulation (EC) No 44/2001) to the relations between the Community and Denmark. Danish courts will, therefore, apply the Brussel I Regulation and therefore recognise and enforce a judgment given by an English court, subject to the exceptions provided in the Brussel I Regulation, including "*ordre public*".

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Denmark, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Denmark against the assets of the company?

Lead time in the Danish judiciary is dependent on several factors, including the case load at the relevant court and the parties' ability to expedite and resolve the matter. Generally, lenders should not expect court proceedings to be completed in less than six months, and they are likely to last substantially longer. Lead time on the enforcement of an English judgment is also subject to several factors, but it may be possible to complete the process in a couple of months after having declared the English judgment enforceable in Denmark.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

It depends on the asset type and the security interest how a security interest can be enforced. Danish law generally requires collateral security to be enforced at a public auction, and collateral security in the secured lender's possession can be sold at a public auction after one week's notice. The security agreement may provide for alternative methods of enforcement including private sale.

Enforcement of security does usually not require regulatory consents, although it may be necessary for certain special asset types, such as assets of public utility companies and other infrastructure related assets.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Denmark or (b) foreclosure on collateral security?

A foreign lender can, as a general rule, file a suit in Denmark against a company, provided that the Danish court has jurisdiction. Certain foreign lenders, but not lenders incorporated within the EU, may, however, be required to provide security for the costs of the legal court proceedings.

7.6 Do the bankruptcy, reorganisation or similar laws in Denmark provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Once bankruptcy is declared, a general suspension of individual enforcement actions against the company will apply. Collateral security can only be enforced at the request of the trustee in bankruptcy during the first six months of a bankruptcy unless the collateral security is pledged (a possessory security interest), in which case the moratorium does not apply to the enforcement. After this moratorium, the trustee in bankruptcy will be obliged to sell the pledged asset by auction at the secured lender's request.

Restructuring under the Danish Bankruptcy Act may involve a combination of various schemes, which may include moratorium on enforcement, composition of assets or a private sale of the debtor's business.

7.7 Will the courts in Denmark recognise and enforce an arbitral award given against the company without re-examination of the merits?

The courts in Denmark will recognise and enforce an arbitral award given against the company without re-examination of the merits in accordance with the New York Convention and the Danish Arbitration Act (in Danish "*Voldgiftsloven*"), which is based on the UNCITRAL Model Law on International Commercial Arbitration. The defendant can only defend itself against enforcement by proving the arbitration agreement's invalidity, insufficient notice of the arbitral proceedings, that the award is beyond the agreement's scope, unauthorised or illegal arbitral procedures, or that the award is non-binding. In addition, Danish courts can *ex-officio* refuse to recognise and enforce an arbitral award if the subject matter is non-arbitrable or the award is contrary to public policy.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Bankruptcy proceedings will recognise collateral security (subject to certain hardening periods depending on the circumstances). A secured lender's security interest in certain types of assets, excluding real estate, may, however, be limited by a probate court's valuation in connection with a compulsory composition or a reconstruction.

As described above (see question 7.6 above), bankruptcy etc. may provide for a moratorium on the enforcement of lender claims.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

As a general rule, the security will only benefit the secured lender. There are a few exceptions, e.g. certain tax claims will rank prior to a real estate mortgage.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

In general, there are no entities that are excluded from bankruptcy proceedings in Denmark.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No, there are not.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Denmark?

In general, the Danish courts will respect if the parties have submitted a case to a foreign jurisdiction and dismiss the case. This general rule is subject to certain limitations, e.g. two parties residing in Denmark (without having residence elsewhere) will probably be unable to submit a case to a foreign jurisdiction, provided that the case has nothing to do with the foreign jurisdiction.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Denmark?

Under Danish law, only the sovereign (at present the Queen) is immune from civil liability, and it is therefore unnecessary for a Danish entity to waive sovereign immunity. A Danish court will respect a foreign state's waiver of immunity.

10 Other Matters

10.1 Are there any eligibility requirements in Denmark for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Danmark need to be licensed or authorised in Denmark or in their jurisdiction of incorporation?

Danish law does not regulate the making of a loan, but a lender may, however, be subject to regulation due to other activities. A security agent in syndicated lending is as such not subject to regulation (in contrast to a security agent for bondholders).

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Denmark?

The above covers most of the key legal issues for secured financings in Denmark.

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Chapter 34

England

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in England?

Whilst there seems to be increasing optimism in the market, it is likely that the relative lack of liquidity in the European debt markets will continue for a while yet. This lack of liquidity – i.e. a relative lack of loan capital available from banks and other lenders in the European debt markets – has had a number of impacts, some of which may continue for a little while.

In contrast to Europe, investors in the US have had a lot of capital available to lend and a significant amount of that capital has found its way across the Atlantic – in the form of (i) acquisition financings of European assets, with loan facilities documented under New York law and syndicated in New York to US investors (which in itself has driven another trend – the increase of more flexible terms typically found in the US loan market, as compared to the more typically conservative terms offered in Europe), (ii) the refinancing (and even acquisition) of assets with high yield debt (and no bank debt, other than a working capital facility), and (iii) an increasing number of financings structured as loans, but which have bond-like features, known as 'Term B Loans'. Moreover, it seems that bond and loan terms may be converging generally.

Pricing remains high (and with more variance relative to the particular asset, sector, geography and sponsor), but various sponsor/borrower-friendly terms are re-emerging, including covenant-lite loans.

As well as increased competition from the US, traditional European lenders are also under pressure (at least in the middle-market) from alternative or non-traditional lenders. Unitranche facilities (combining a first lien facility and second lien facility in a single instrument) have become more commonplace, again, particularly in the middle-market.

As regards loan terms, trends include fall-away covenants (where certain covenants cease to apply on a certain leverage being achieved or some other trigger fulfilled – a "market standard" trigger is yet to be developed). Provisions that may fall away include the excess cash sweep and the cashflow cover covenant; baskets in the negative covenants may be increased.

Also, increasingly seen are portability provisions which allow loan facilities to continue following a change of control (which previously would have triggered a full prepayment).

1.2 What are some significant lending transactions that have taken place in England in recent years?

Whilst there may have been fewer of the really large leveraged acquisitions in Europe in the last year or so, there have been some very significant and ground-breaking transactions and there have also been some noteworthy refinancings and restructurings of major financings. Joh. A. Benckiser GmbH's $9.8bn acquisition of D.E Master Blenders 1753 N.V., the Dutch-based global coffee company, has been recognised by a number of publications as a leading deal of 2013 and, potentially, signalled a return of the large European leverage finance deals.

More recently, Liberty Global's €3.7bn financing of its acquisition of Dutch Cable company, Ziggo, has given the European leveraged loan market a further lift, with one commentator saying "the loan market is back". The financing was cheaper and more flexible than a bond financing.

On the bond side, there have been many high yield refinancings, often combined with a super-senior revolving credit facility to provide working capital – the €580 million high yield issue (combined with a €70 million super senior credit facility) by TMF Group is just one example.

Another type of transaction that has been happening, often below the radar, is the acquisition of loan assets by various funds and other investors – as banks de-leverage their balance sheets in light of the new regulatory regime and as certain borrowers face the reality that the non-distressed refinancing route is not open to them. Those loan acquisitions are likely to lead to other interesting transactions as the purchasers look to exploit their leverage over the borrowers (pun intended!).

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Provided there is appropriate corporate benefit for the company (see question 2.2 below) and the company has the requisite corporate capacity (see question 2.3 below), a company can guarantee the borrowings of one or more of its corporate group. The guarantee can be downstream, upstream and/or cross-stream.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

A director has a statutory duty to act in the way he considers, in

good faith, would be most likely to promote the success of the company for the benefit of its members as a whole (Section 172, Companies Act 2006). Demonstrating this is easier with downstream guarantees (where a benefit to the subsidiary is also likely to benefit the parent company giving the guarantee), but is harder with cross-stream guarantees and upstream guarantees. A director must have regard to a number of factors when considering this duty, including the likely consequence of any decision in the long term, the interests of the company's employees and the need to act fairly as between members of the company.

The key point is each director must consider what is in the best interests of the company (and not just in the interests of the group as a whole) and, depending on the solvency of the company, the creditors (see question 2.5 below). The board minutes approving the entry into the guarantee should record the fact that the directors considered these questions (with the particular benefits for the company mentioned, where possible) and concluded that entry into the guarantee was in the best interests of the company.

Another customary approach adopted to mitigate against the risk of a subsequent claim by a shareholder that there was insufficient corporate benefit, is to have the entry into the guarantee approved by the shareholders of the company.

If there are particular concerns, a guarantee fee can be paid to the guarantor and/or the amount of the guarantee capped, although this is rare in practice for English companies.

The Insolvency Act 1986 (the "Insolvency Act") is also relevant in this context – in certain circumstances, a transaction (including the entry into a guarantee) may be set aside as a transaction at an undervalue, but not if the company entered into it in good faith and had reasonable grounds for believing it would be to its benefit (see question 8.2 below).

2.3 Is lack of corporate power an issue?

As with any proposed transaction, it must be considered whether the giving of the guarantee is within the company's powers or "objects", under the company's memorandum and articles of association. If the company was incorporated after 1 October 2009 and has adopted the standard form articles of association under the Companies Act 2006 for a private company limited by shares, there should be no restriction on it granting a guarantee or security. However, if the company was incorporated before 1 October 2009 or has adopted "bespoke" articles of association, its memorandum and articles of association may prohibit or restrict the giving of guarantees. The memorandum and articles of association should, therefore, always be reviewed carefully.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Generally, no governmental consents or filings are required for the granting of a guarantee by an English company. However, in order to be binding a guarantee must fulfil the requirements for being a valid contract, including that there is the intention to create a legal obligation and there is consideration or the guarantee is executed as a deed. In fact, unlike most contracts, a guarantee must be in writing and signed by the guarantor or a person authorised by the guarantor (Statute of Frauds 1677).

A guarantee should be properly authorised by the company's directors and, in certain circumstances (see question 2.2 above), the shareholders of the company.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

English law does not require that a guarantee is limited or capped by reference to any measure of the company's net worth, solvency or otherwise, although it may be that a guarantee is capped for commercial reasons and a cap may assist in the corporate benefit analysis, referred to above.

The directors of the company must assess whether the company is insolvent at the time it is asked to grant the guarantee or will thereby become insolvent (in which case they should not agree to grant the guarantee).

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange controls under English law that would impede the enforcement of a guarantee. Any relevant sanctions (for example relating to transactions with a particular country) and similar arrangements need to be considered in the light of the relevant facts.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

The majority if not all of an English company's assets can be provided as security. This would include real estate, shares and other securities, bank accounts, receivables, contracts, plant and machinery, inventory and other chattels and intellectual property. The method of taking security, and the perfection requirements, differs depending on the asset over which security is being taken (see questions 3.2 to 3.7 below).

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is common for a debtor to grant security over all (or substantially all) of its assets by means of a single security agreement, containing fixed and floating charges and assignments over the various types of assets, generally known as a "debenture".

A debenture will typically provide for (i) mortgages over real property, (ii) fixed charges over shares and other securities, plant and machinery, intellectual property and various other assets, (iii) an assignment of receivables and other choses in action, and (iv) a floating charge over all assets of the company not otherwise mortgaged, charged or assigned (i.e. anything else not specifically dealt with and any asset where the purported mortgage, charge or assignment is not effective for any reason). No particular procedure or form of document is required, although most debentures are in a relatively customary form. Particular procedures are required for creating a legal mortgage and legal assignments (see questions 3.3 and 3.4 below).

Certain categories of asset (e.g. ships, planes, certain chattels) are generally secured with specific security documents, tailored for that particular type of asset.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. Security is, where possible, generally taken over real property by way of a legal mortgage. A legal mortgage created by deed and duly registered is the most robust form of security over real property. It transfers legal title to the mortgagee (creditor) and prevents the mortgagor (debtor) from dealing with the real property whilst it is subject to the mortgage. It is not possible to create a legal mortgage over future-acquired property. An equitable mortgage may be granted over such future-acquired property and involves the transfer of only the beneficial title in the real property to the mortgagee and may rank behind a subsequent legal mortgage.

Plant, machinery and equipment that are sufficiently attached to the land will be deemed to form part of the land and will therefore be secured by any mortgage on that land. Otherwise, they are generally separately secured by a fixed charge.

As noted above, such mortgages and charges will generally be included in a debenture, but can also be granted pursuant to individual security documents. As with debentures, there is not a prescribed form, but such security documents are generally in fairly customary form (and please note the comments in question 3.13 below regarding execution and other particular requirements).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. Security is usually taken over receivables by means of an assignment. Alternatives include a fixed charge (which necessitates the chargee controls the receivables and the bank account to which they are to be paid) or a floating charge (see question 3.5 below for some commentary on the issues with taking fixed charges and the weaknesses of floating charges).

Whilst assignments used as a means of granting security are drafted as absolute assignments (essentially no different from an assignment where the party sells an asset to another, by means of assigning it), the relevant security document will contain a contractual right of the assignor (debtor) to have the relevant assets re-assigned to it on the discharge of the secured obligations (i.e. just as a chargor is entitled to have its charge released on repaying its secured debt).

In order to obtain a legal (as opposed to an equitable) assignment, the assignment (i) must be absolute in form and not purport to be by way of security only, and (ii) must be in writing, and (iii) express notice of the assignment must be given to the third party debtor. If the assignment is a legal assignment then the assignee (creditor) will obtain the right to sue, in its own name, the third party debtor. If the assignment is an equitable assignment, the assignee is required to join the assignor in any action it brings against the third party debtor and the third party debtor may discharge its debt by making payment to the assignor (rather than to the assignee or into any specified bank account, charged to the assignee).

When the notice must be served on the third party debtor is a matter for negotiation – it may be required to be given at the time the security is taken (in which case the assignment should always be a legal assignment) or it may be agreed that such notice only needs to be given following the occurrence of a default or some other specified trigger (in which case the assignment is an equitable assignment until the notice is given).

The priority of an assignment is governed by the date of notice to the third party debtor (unless the subsequent security-taker has actual or constructive notice of the prior security).

It is normal to require acknowledgment of the notice from the third party debtor (or at least that an acknowledgment is sought by the assignor), but an acknowledgment is not required in order for the assignment to be a legal assignment.

It may not be possible to effectively assign receivables if such contractual rights are expressed to be non-assignable. Therefore, due diligence on the underlying contract(s) is required. Solutions include assigning only the proceeds or relying on a charge, depending on the scope of the restriction.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. Security over cash deposited in bank accounts is customarily granted by way of a fixed or floating charge or, sometimes, by means of an assignment.

Typically a chargee (creditor) will take a floating charge over a bank account due to the practical difficulties with the chargee controlling the cash in the account (which would be required in order for it to constitute a fixed charge). If the bank account is a current or operational account and the chargor (debtor) has the ability to freely withdraw cash without the consent of the chargee each time, then the charge will be a floating charge regardless of what it is called in the security document. Certain "blocked accounts" may be the subject of a fixed charge, in which case the chargee will control all withdrawals from such account.

A fixed charge requires that the chargee has sufficient control over the relevant asset. As a practical and commercial matter it may not be possible for the chargee to have a fixed charge and it may only be able to obtain a floating charge. With a fixed charge each disposal of charged assets will require the chargee's considered consent, with the possible effect of strangling the day to day operations of the chargor's business. By contrast, a floating charge is ambulatory and shifting in nature over a pool of assets. The hallmark of a floating charge is the chargor retains control of the charged assets and remains entitled to deal with those assets in the ordinary course of its business without the consent of the chargee until a default or other specified trigger occurs. At such point the floating charge is said to crystallise into a fixed charge. Floating charges rank behind fixed charges in terms of priority and the proceeds of floating charge enforcement are subject to certain other priority claims (see question 8.2 below).

3.6 Can collateral security be taken over shares in companies incorporated in England? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares in an English company may be secured by a legal mortgage or an equitable mortgage (a charge). Shares in English private companies and some public companies in England are in certificated form. Many English public companies' shares are in non-certificated form.

The mortgage or charge should be governed by English law.

Typically, shares in an English company are secured by way of an equitable mortgage. The mortgagee (creditor) generally does not want a legal mortgage, which would result in title to the shares being transferred to it, so it becomes the registered member. An equitable mortgage provides that the mortgagor remains the registered member until such time as the mortgagee enforces or perfects the mortgage.

Generally, a mortgage will permit the mortgagor to vote at shareholder meetings and to receive dividends until the security becomes enforceable (or the occurrence of some other agreed trigger).

A mortgagor will supply the mortgagee with the original share certificate(s) and executed, but otherwise uncompleted, stock transfer form(s), which will allow the mortgagee to effect a transfer of the shares to itself or its nominee if a default (or other agreed trigger) occurs, or to a purchaser if the mortgagee is enforcing the mortgage.

A different form of mortgage will be required where the shares in question are not in certificated form, but are instead held in a clearance system. The mortgagee will take security over the rights the registered owner has against the clearance system operator.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, by means of a fixed charge or a floating charge. Very typically, a floating charge will be used for inventory because it is impracticable for the chargee to have control over the inventory – the chargor needs to be able to deal with the inventory in the ordinary course of its business without the consent of the chargee (see commentary in question 3.5 above).

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company may grant security to secure its own borrowings and it may, subject to the considerations outlined in questions 2.2 and 2.3 above, grant security to secure the obligations of others (including those of another group member which is a borrower and/or other guarantors of that borrower).

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Most charges created by an English company must be registered with the Registrar of Companies (Section 860, Companies Act 2006) – within a 21 day period, commencing on the day after the day the charge was created. A fee (currently £13) is payable for each charge registered. If the charge is not registered within that period, the charge will be void against a liquidator, administrator and any creditor of the company and the money secured by that charge immediately becomes payable.

Security over real property should be registered at the Land Registry, whose prescribed fees must be paid.

Security over other types of assets, such as intellectual property, planes and ships, should (or may) also be registered.

There is no requirement to notarise security documents under English law and, accordingly, there are no notarisation costs in creating or registering security under English law. With regards to stamp duty, please see question 6.2 below.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Registering a charge with the Registrar of Companies is a straightforward process, requiring a form to be completed and lodged with the prescribed fee and a copy of the charge instrument. The process of registering at the Land Registry is similar, although the Land Registry may raise requisitions (questions) depending on the complexity of the title to the real property.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Certain consents may be required depending on the assets to be secured, the nature of the chargor and the transaction. For example, assets overseen by a government-appointed regulator may necessitate its consent is obtained before such assets can be used as security.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

A revolving credit facility does not give rise to any special priority concerns, although, clearly, the security documents must be drafted to cover future borrowings.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

A legal mortgage over real property must be in writing and must be a deed, incorporating all the expressly agreed terms, and signed by all the parties (Law of Property (Miscellaneous Provisions) Act 1989).

Typically, a debenture and other security agreements will grant a power of attorney in favour of the creditor and to be valid a power of attorney must be granted by deed (Powers of Attorney Act 1971).

The Companies Act 2006 and, in some cases, an English company's articles of association prescribe how English companies should execute deeds.

If documents are to be executed by way of a "virtual" completion (i.e. by email) the requirements set down by the Mercury case must be complied with (as explained by The Law Society in its practice note on the subject ("Execution of Documents by Virtual Means")). In summary: merely exchanging signature pages is not sufficient/effective.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Since 1 October 2009 a private English company is not restricted from providing a guarantee or security (or other financial assistance) for the acquisition of its own shares or those of any other private company.

A public company is prohibited from providing a guarantee or security (or other financial assistance) for the acquisition of its own shares, unless certain exceptions apply (Section 678, Companies Act 2006) or for the acquisition of shares in any of its holding

companies (Section 679, Companies Act 2006). A public company's subsidiaries may not give financial assistance to support the acquisition of the public company's shares.

The prohibitions apply to financial assistance given at or before the acquisition and also after the acquisition.

The restrictions do not apply to the giving of financial assistance for the purposes of the acquisition of shares in a sister company.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will England recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

English law will recognise the appointment of a security agent or trustee. A security trust is generally used where there are multiple creditors (e.g. a syndicated loan) and will be recognised by English law, provided the trust is properly constituted. The creation of the trust and appointment of the security trustee must comply with English law and will be typically documented in the financing agreement, intercreditor deed (if applicable) or a separate security trust deed.

5.2 If an agent or trustee is not recognised in England, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

An agent/trustee should be recognised in England (see question 5.1 above).

5.3 Assume a loan is made to a company organised under the laws of England and guaranteed by a guarantor organised under the laws of England. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

No special requirements are required under English law to make the loan and guarantee enforceable by Lender B. Generally, syndicated loan agreements contain mechanics to novate or otherwise transfer the relevant part of the loan, and all related rights (e.g. to any guarantees and the security which is held on trust for the lenders from time to time) from Lender A to Lender B (normally by execution of a simple transfer certificate, scheduled to the loan agreement).

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

(a) There is an obligation on UK corporates and certain other persons to deduct 20% from annual interest, which is interest paid on a loan with a stated term of a year or more or which is capable of being outstanding for more than one year as determined by the facts and intentions of the parties at the date when the loan is made. There is no obligation to withhold from loans of less than a year, unless there is an intention at the outset to extend it beyond a year.

This obligation is subject to a number of exemptions notably on interest paid:

- to a beneficial owner that is a UK corporation or to a UK branch of a non-UK corporation that brings that interest into the charge to UK corporation tax;
- by a bank in the ordinary course of its business;
- between parties who are able to rely on an applicable double tax treaty; and
- on a loan listed on a recognised stock exchange (the 'quoted Eurobond exemption').

(b) The position of payments under a guarantee is based on a number of reported cases and is not entirely clear. The better view is probably that the nature of the guarantee payment depends on the nature of the obligation being guaranteed and the source of that payment, so, for example, if a UK borrower can pay interest gross under, say, the quoted eurobond exemption, a guarantee payment in respect of that interest by a UK guarantor could also benefit from that exemption.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives for foreign lenders, nor any specific loan taxes or taxes levied on taking security or registering a loan in the UK.

Entry into a loan agreement should not give rise to UK stamp duty.

As a general rule there is no stamp duty on the assignment of ordinary commercial loans. However, it should be noted that transfers of loans which have certain equity-characteristics (e.g. convertible loans) or loans with an abnormally high interest rate or an interest rate linked to the financial performance of the relevant business or assets will be stampable.

Taking security over assets does not trigger a liability to UK stamp duty. However, upon enforcement, if the lender transfers the legal and beneficial ownership of UK real property or certain UK shares and securities on enforcement this may trigger a liability to such duty.

6.3 Will any income of a foreign lender become taxable in England solely because of a loan to or guarantee and/or grant of security from a company in England?

No, not in isolation. Payments under the loan, guarantee or security could be subject to UK withholding tax as mentioned above or could be within the UK tax net if such loan, guarantee or security is part of a wider trading activity conducted by the lender in the UK that takes place through a UK permanent establishment, branch or agency.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

See question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Assuming the lender and borrower are unconnected, then generally not.

7 Judicial Enforcement

7.1 Will the courts in England recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in England enforce a contract that has a foreign governing law?

Yes, the English courts will generally recognise and enforce a contract that has a foreign governing law. The parties' choice may, however, be significantly modified or displaced in certain circumstances. For example, where all other elements relevant to the situation at the time of the choice is made are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of the provisions of the law of that other country which cannot be derogated from by contract. Similarly, where all of the elements at the time the choice is made are located within one or more Member States of the EU, the choice of law of a place other than the EU shall not prejudice the application of provisions of EU law as implemented in England which cannot be derogated from by agreement. In addition, effect may be given to the overriding mandatory provisions of law of the country where the obligations arising out of the contract have to be or have been performed so far as those mandatory provisions render the performance of the contract unlawful.

7.2 Will the courts in England recognise and enforce a judgment given against a company in New York courts (a "foreign judgment") without re-examination of the merits of the case?

Yes, in accordance with the usual common law rules on the recognition and enforcement of foreign judgments. Under the common law, a foreign judgment will generally be enforced, without a re-examination of the merits, so long as: the judgment is final and conclusive on the merits (although it may be the subject of an appeal); the court making the judgment had jurisdiction in accordance with English law principles; the judgment does not seek to enforce the penal or tax laws of another country; the judgment is not for multiple damages (as provided for under the Protection of Trading Interests Act 1980); the judgment is for a definite amount of money; the judgment has not been procured by fraud; the proceedings in which the judgment was rendered accorded with principles of natural justice; and enforcement would not otherwise be contrary to English public policy.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in England, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in England against the assets of the company?

The length of time it would take to obtain and enforce a judgment against the assets of the company is dependent on a large number of variable factors. If the defendant is within the jurisdiction, and does not contest the proceedings then it should be possible to obtain a default judgment in approximately 1 to 2 months. If the defendant is within the jurisdiction, files a defence but has no real prospects of successfully defending the claim, a claimant lender ought to be able to obtain summary judgment in relatively short order (approximately 2 to 3 months). If the defendant is outside the jurisdiction, succeeds in persuading the court that summary judgment is inappropriate, because, for example, there is a relevant and material factual dispute, and/or there are other procedural complexities, then the process for obtaining judgment could be significantly longer.

There are various avenues available for a judgment creditor to enforce against assets of the company which are in England. The speed of enforcement will depend on the nature and location of those assets. For example, a writ of *fieri facias* or warrant of execution which enables an enforcement officer to seize and sell a judgment debtor's goods can be achieved relatively speedily, whereas obtaining a charging order imposing a charge over a judgment debtor's beneficial interest in land, securities or certain other assets can take more time. Similarly, issuing a formal statutory demand for the judgment debt and then seeking the winding up of a company following non-payment is likely to result in a relatively lengthy process before any assets are realised and paid to creditors.

Obtaining the recognition of a foreign judgment where the judgment debtor has no defence to enforcement ought also to be a relatively straightforward and speedy process, whether at common law by way of summary judgment or under any applicable legislation or treaty. Enforcement of the foreign judgment ought to proceed as for a domestic English judgment.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Under English law, there are a number of different options for enforcing security, many of which do not involve a judicial process (please refer to questions 8.1 and 8.4 below for further detail).

The restrictions facing a creditor who intends to enforce collateral security are dependent upon both the nature of the collateral security and the context of the enforcement. For example, liquidators, administrators and receivers are all subject to special rules concerning the exercise of their duties, and specific rules govern a mortgagee taking in possession under a mortgage. Entities which are regulated by the Financial Conduct Authority or the Prudential Regulation Authority may be required to obtain consent from such authorities prior to the appointment of administrators in accordance with such institutions' general supervisory role.

When a creditor makes an application to the court to foreclose, the court will normally give the debtor a period of time (usually 6 months) to repay the debt before making a foreclosure order. There is no requirement for a public auction when exercising a power of sale. The creditor's power of sale is broad with the principal restriction being that he must act fairly and in good faith, and must take reasonable steps to obtain a proper price.

Further restrictions may arise from the context of the enforcement. Generally, before exercising a power of sale over security, a demand should always be made to the borrower and notice given. A creditor, receiver or administrator may incur liabilities on enforcement. Such parties owe duties to the debtor and subsequent

mortgagees, as their conduct can materially affect the financial position of the debtor.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in England or (b) foreclosure on collateral security?

No specific restrictions apply to foreign lenders in either circumstance. As with any domestic lender, a foreign lender will first need to establish that the English court has jurisdiction over the relevant defendant company before being able to bring a claim against it. The most straightforward way of establish this is by including an English jurisdiction clause in the relevant security document.

7.6 Do the bankruptcy, reorganisation or similar laws in England provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Various insolvency processes are available under English law and each has different features under the relevant governing legislation or procedure established by the courts. These insolvency procedures are largely governed by the Insolvency Act. The availability of a moratorium on the enforcement of lender claims and the enforcement of collateral security will depend upon which process is being utilised. Under English law, liquidation is the main bankruptcy procedure for companies and administration is designed to be the main reorganisation procedure for companies.

In a liquidation there is a moratorium on legal proceedings against the company. However, this moratorium does not apply to the enforcement of collateral security. In an administration there is a moratorium, which lasts for the duration of the administration, on the enforcement of both lender claims and collateral security. Any enforcement action cannot be commenced or continued without the permission of the administrator or the court. The Financial Collateral Arrangements (No.2) Regulations 2003 (the "FCA Regulations"), however, confer a number of benefits on a collateral holder in an insolvency situation including the removal of a number of restrictions on the enforcement of security in an administration.

Further reorganisation procedures include company voluntary arrangements and schemes of arrangement.

In a company voluntary arrangement certain eligible companies may take the benefit of a 28-day moratorium. This moratorium only applies to small companies and has a similar effect to the statutory moratorium available under an administration.

The relevant legislation governing schemes of arrangement is the Companies Act 2006. This does not provide for a statutory moratorium. However, the courts have established that the case management powers set out in the CPR enables a court to grant a stay of enforcement proceedings in relation to secured creditor claims which are going to be the subject of a scheme of arrangement.

7.7 Will the courts in England recognise and enforce an arbitral award given against the company without re-examination of the merits?

Where the award is a domestic award, it may be enforced, with the permission of the court, in the same manner as a judgment or order of the English court to the same effect pursuant to the Arbitration Act 1996, and without any re-examination of the merits. Permission to enforce may be refused if a timely objection is raised regarding the jurisdiction of the tribunal rendering the award sought to be enforced. An award may also be challenged on the grounds of a serious procedural irregularity within the timeframe provided for under the Arbitration Act 1996. There is, in addition, a limited right to appeal on a point of English law, which right may be and very often is excluded by the parties in their agreement to arbitrate.

With regards to foreign awards, there are a variety of different regimes which may apply regarding enforcement. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention") is given force of law by the Arbitration Act 1996, and provides a very common route to enforcement for qualifying awards. The relevant provisions of the Arbitration Act 1996 provide a regime for the enforcement of awards made in New York Convention states in England as if they were English judgments, without any review of the merits, subject to certain limited grounds on which recognition and/or enforcement may be refused. These grounds include: lack of capacity; invalidity of the agreement to arbitrate; lack of notice of the arbitral proceedings; lack of jurisdiction of the tribunal rendering the award sought to be enforced; that the dispute was not one capable of being resolved by arbitration; and/or that recognition or enforcement would be contrary to English public policy.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Please refer to question 7.6 above for details on the availability of a moratorium on the enforcement of collateral security during insolvency and reorganisation procedures.

A secured creditor with a qualifying floating charge over a company's assets is able to enforce its security through the 'out of court appointment' of an administrator upon the floating charge becoming enforceable. There is no requirement that the company is insolvent in order to enforce in this manner.

Alternatively, in certain limited circumstances, a secured creditor may be able to enforce its floating charge security through the appointment of an administrative receiver. Unlike administration, which is primarily designed to rescue a company, administrative receivership is purely a means of enforcing security. This difference is reflected in the differing duties of an administrator to an administrative receiver and can ultimately have an impact on a secured party's recovery from an enforcement process. The main duty of an administrative receiver is to the secured creditor who appointed it, whereas, an administrator owes duties to all the company's creditors. An administrator has a duty to obtain the best price reasonably obtainable on the sale of an asset. However, in contrast to an administrative receiver, an administrator must take care in choosing the time of the sale. An administrative receiver can give priority to his or her appointor's interest in determining when to sell. However, upon deciding to sell an administrative receiver will have a duty to seek the best price reasonably obtainable at the time of sale.

A scheme of arrangement is a court-sanctioned compromise between a company and its creditors or members (Part 26 of the Companies Act 2006). This procedure affects the ability of a creditor to enforce its rights as a secured party as it binds all of the creditors to the terms of the compromise, once requisite approval is attained.

Please also see question 8.4 below in relation to the appointment of receivers.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Clawback is available in relation to certain types of transaction entered into by a company prior to its insolvency, such as (i) transactions at an undervalue, (ii) preferences, (iii) extortionate creditor transactions, (iv) the creation of certain floating charges for inadequate consideration, and (v) transactions defrauding creditors.

Generally, in order for clawback to be available, the following conditions have to be met:

- the company must be in formal insolvency proceedings (either liquidation or administration);
- the transaction resulted in an unfair advantage to the party contracting with the company;
- the company was either unable to pay its debts at the time of the transaction or as a consequence of it; and
- the company entered into formal insolvency proceedings within a specified time of the transaction otherwise known as the "hardening period". The length of the hardening period will depend on the nature of the transaction, including the relationship between the parties.

In a liquidation or administration, the officeholder distributes the company's assets to creditors according to the following statutory order of priority: (i) fixed charges; (ii) officeholder expenses; (iii) preferential debts (largely certain employee claims); (iv) floating charges (noting a portion of these recoveries is carved out for the unsecured creditors – up to a maximum of £600,000); (v) unsecured creditors (*pro rata*); (vi) interest (incurred subsequent to the company entering either liquidation or administration); and (vii) shareholders.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Generally, all companies incorporated in England may be subject to liquidation proceedings under the Insolvency Act, subject to certain restrictions. The Insolvency Act also contains provisions which are applicable to the winding up of unregistered companies which in certain circumstances enable overseas companies to be wound up in England.

A key restriction on the jurisdiction of the courts to wind up a company flows from the EC Insolvency Regulation which provides that a company may only open main insolvency proceedings in a Member State where it has its centre of main interests (known as its 'COMI'). It may, however, open secondary proceedings in relation to a liquidation in a Member State where it has an establishment.

Further legislation deals with the winding up of certain types of companies. For example, the Banking Act 2009 establishes both a liquidation and administration procedure for banks as well as providing for a special administration regime for investment firms. The Building Societies Act 1986 governs the liquidation of building societies. The dissolution of charities is governed by the provisions of the Charities Act 2006. The insolvency of partnerships, with the exception of limited liability partnerships (which is governed by the Limited Liability Partnerships Regulation (SI 2001/1090)), is governed by the Insolvent Partnerships Order 1994 (as subsequently amended).

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Creditors are generally able to enforce their security according to the pre-agreed enforcement mechanics set out in the relevant security documents without needing to resort to court proceedings. A typical security package will provide the secured creditor with the following enforcement options:

- the power to take possession of the secured property;
- the power of sale;
- the right of foreclosure; or
- the power to appoint a receiver to manage and/or sell the secured property.

The availability of processes other than court proceedings to allow the secured creditor to seize the assets of a company in an enforcement will depend on the nature of the security that is being enforced. In practice, a secured creditor will generally enforce its security interests through the appointment of a receiver (or an administrator or administrative receiver – see question 8.1 above for further details) as a receiver is largely independent of the secured creditor and as such the receiver rather than the secured creditor will incur any liability resulting from the enforcement action.

The FCA Regulations generally facilitate enforcement by, where applicable, disapplying certain provisions of the Insolvency Act in relation to the enforcement of security. The position of creditors is also significantly improved by the disapplication of a number of avoidance provisions and certain requirements for the creation and perfection of security.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of England?

Yes, an English court will generally recognise a valid contractual submission to a foreign jurisdiction, whether under the common law, the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (44/2001) (the "**Brussels regulation**"), which applies generally within the EU, and/or the Lugano Convention (L339/3) which applies generally within the EEA. At common law, an English court may not enforce a jurisdiction clause if the contract of which it forms part is void such that no agreement came into force in the first place. This may occur where: there is a failure to reach agreement on a material term; where there is an absence of consideration; where there is a mistake (the document is a forgery or a plea of *non est factum* is made); or for some varieties of illegality. Otherwise, an English court has discretion at common law as to whether or not to recognise a jurisdiction clause in favour of a foreign court, although strong reason is likely to be required before an English court would decide not to hold parties to their agreement on jurisdiction. Such reasons may include: if the choice of jurisdiction is contrary to a statutory rule against ousting the jurisdiction of the English court; or if the orderly and efficient resolution of complex disputes favours resolution of the dispute between the parties in a forum other than that which they have agreed to. Where the jurisdiction clause falls within the scope of the Brussels Regulation or the Lugano Convention, the English courts do not have any such discretion. A jurisdiction agreement in favour of the courts of a Member State will therefore be given effect subject to: any questions regarding the validity of that agreement; certain restrictions on jurisdiction clauses in insurance, consumer and employment contracts; and certain circumstances where other courts are specified to have exclusive jurisdiction (for example, in respect of immovable property, insolvency proceedings, entries on public registers and certain intellectual property matters).

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of England?

A waiver of sovereign immunity in writing is likely to be given effect in England, in accordance with its terms, pursuant to and subject to the requirements of the State Immunity Act 1978 (the "SIA"). Separate written waivers are required to address the adjudicative jurisdiction of the English courts to resolve any dispute with the sovereign, and also in respect of the jurisdiction of the English courts to deal with enforcement matters. Excluded from the SIA are matters governed by the Diplomatic Privileges Act 1964 and the Consular Relations Act 1968, which enact certain provisions of the Vienna Convention on Diplomatic Relations 1964 and the Vienna Convention on Consular Relations 1963 respectively. Those conventions provide, amongst other things, that the actual premises of a diplomatic (or consular) mission are inviolable. A waiver of diplomatic or consular immunity in respect of the adjudicative and enforcement jurisdictions of the English court is possible, although this may apply only where immunity is waived at the moment when the English court is asked to exercise jurisdiction.

10 Other Matters

10.1 Are there any eligibility requirements in England for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in England need to be licensed or authorised in England or in their jurisdiction of incorporation?

Generally there are no eligibility requirements in England for lenders to a company, although consumer credit legislation may apply to loans to individuals.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in England?

The considerations raised above deal with the main legal issues to be considered in relation to secured financings under English law.

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Skadden
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Skadden is one of the world's leading law firms, serving clients in every major financial centre from 23 offices. Skadden's European Banking & Finance practice advises on a wide range of finance matters, including acquisition and leveraged finance, structured finance, high yield issues and other capital markets issues, investment grade financings, asset-backed financings, property and project financings, derivatives and restructuring transactions for private equity houses, funds, corporates, banks and other lenders. Our attorneys have extensive experience advising on complex financing and restructuring transactions, often involving multiple jurisdictions. We are particularly well-placed if the deal requires advice on both English and New York law. The London office acts as a hub for European financing deals, working in conjunction with our continental offices. We can also draw on the expertise of our extensive group in the U.S., as well as U.S.-qualified attorneys in the London office.

France

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in France?

There has been quite a large number of financing transactions in 2013 in France. This is largely due to the high level of liquidity in the market resulting from the availability of new sources of financing originating in particular from capital markets, but also from debt funds providing capital solutions to borrowers directly rather than as primary or secondary participants in syndicated financings. Traditionally, French corporates have relied heavily on banks for external funding, but this no longer seems to be the case as French corporates have turned to capital markets and to debt funds on a large scale throughout 2013.

1.2 What are some significant lending transactions that have taken place in France in recent years?

The French financing market saw general corporate lendings of several billion euros. Most recently, Alcatel-Lucent raised a €2 billion financing, Pernod Ricard a €2.5 billion financing, Lafarge a €1.850 billion financing and Infopro Digital a unitrache refinancing in excess of €200 million (being the largest unitranche financing in France).

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, subject to certain conditions, restrictions and limitations relating in particular to the French law requirement of corporate benefit and the prohibition of financial assistance – see questions 2.2, 2.3, 2.4, 2.5 and section 4 below for details.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

All guarantees and security interests granted by a French company must be in that company's corporate benefit. If only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown, the guarantee/security may be deemed as not being in the corporate benefit of the guaranteeing/securing company and may trigger the criminal liability of the managers/directors of the company (for misuse of corporate assets). Some French courts have also declared void guarantees/security interests which were not in the corporate benefit of the guaranteeing/securing company on the ground that such guarantees/security interests have been granted for an illicit cause (the misuse of corporate assets).

In case of a group of companies, French courts assess such corporate interest at the group level, but some strict criteria must be met, among which: (i) the guarantee/security interest must be granted in the common interest of the group within the framework of a common policy defined for the group as a whole; (ii) there must be some consideration for the guarantee/security interest; and (iii) the guarantee/security interest must not exceed the financial capabilities of the grantor.

A guarantee/security interest granted in order to guarantee the obligations of a subsidiary is usually unlimited as it is generally admitted that a holding company has a corporate interest in guaranteeing its subsidiary's obligations. As for upstream and cross-stream guarantees/security interests, the most commonly accepted corporate benefit justification is the granting of an intercompany loan by the guaranteed company to the guarantor out of loan proceeds made available to the guaranteed company (the guaranteed amount under the guarantee/security interest being in such case limited to the amount of such intercompany loan).

2.3 Is lack of corporate power an issue?

Guarantees granted by the legal representatives of a company are deemed to be validly granted and enforceable (as long as the granting of such guarantees does not fall outside the corporate object of the company, save for the case where (i) it has been authorised by a unanimous shareholders' resolution, or (ii) it was granted by a joint stock company (i.e., a *société anonyme*, a *société par actions simplifiée* or a *société européenne*) or by a limited liability company (i.e., a *société à responsabilité limitée*)). This rule does not, however, cover (i) guarantees which are prohibited by law, or (ii) guarantees which are subject to prior authorisation by the board of directors or by the shareholders (see question 2.4 below).

If a guarantee agreement is signed by a person who is not the legal representative of the company (and if such person does not act under a power of attorney granted by a legal representative of the company) such guarantee may be voided, save for the case where the company has confirmed the guarantee either explicitly or implicitly by performing its obligations thereunder.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental consents or filings are required. Shareholder approval is not required by law (save for the case of a *société civile* offering securities to the public), but the by-laws of a company may contain clauses pursuant to which shareholder approval is required with respect to the granting of guarantees. Also, guarantees granted by a *société anonyme* are subject to authorisation by the board of directors.

If the guarantee is granted by an individual, the signature of such person must be preceded by a specific handwritten statement specifying the maximum guaranteed amount and the duration of the guarantee. A similar requirement is provided by French law with respect to guarantees granted by non-commercial companies.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

See the answer to question 2.2 above with respect to upstream and cross-stream guarantees granted in the context of a group of companies.

Guarantees granted by a French company which is insolvent (*en état de cessation des paiements*) may be declared null and void by a French court – see question 8.2 below for more details.

A guarantee granted by an individual must be proportionate to its income and assets (otherwise, a court may declare that such guarantee is not enforceable).

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange control or similar obstacles to enforcement of a guarantee.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Collateral security can be taken over tangible or intangible assets among which are: real property; shares; financial securities; bank accounts; receivables; intellectual property rights; business as a going concern; equipment and machinery; inventory; cash; etc. Security interests may be granted in the form of a pledge, a mortgage (real property), a lien (real property), a transfer by way of security (receivables, cash), a delegation (receivables) or a security trust (*fiducie*).

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

A separate agreement must be entered into in relation to each type of asset. There are, however, some types of security interest agreements which encompass several types of assets: (i) a pledge over business as a going concern, which includes security over assets such as the company's logo and commercial name, goodwill (customer relationship) and lease rights and may also include intellectual property rights, equipment and machinery; and (ii) a securities account pledge which includes a pledge over shares or other financial securities and a pledge over the bank account on which cash proceeds relating to such shares/financial securities are credited (such as dividends).

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Collateral security can be taken over real property (land or buildings) by way of a mortgage (*hypothèque*), a lender's lien (*privilege du prêteur de deniers*) or a *gage immobilier*. These security interests must be entered into by way of a notarised deed and must be registered with the relevant land registry.

Collateral can also be taken over machinery and equipment by way of a pledge, but (if not included in a pledge over business as a going concern) only in favour of certain beneficiaries among which the vendor of the machinery and equipment, and the lender having made available the facilities used to finance the acquisition of the machinery and equipment. The pledge agreement relating to machinery and equipment must be entered into within a maximum period of two months following the delivery of the machinery and equipment to the pledgor and must be registered with the relevant commercial registry within 15 days from its execution for validity purposes.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, collateral can be taken over receivables by way of: (i) a pledge over receivables; (ii) an assignment of receivables by way of security (*Dailly assignment*); or (iii) a delegation (*délégation*).

A pledge over receivables may be granted by an obligor in favour of any type of beneficiaries (as opposed to a *Dailly* assignment of receivables – see paragraph below). The notification of the pledge to the debtor(s) is not required for validity purposes but in order to render the pledge enforceable against the debtor(s). As from such notification, the debtor(s) must make payments directly to the secured creditor, unless otherwise agreed in the pledge agreement.

A *Dailly* assignment of receivables by way of security may only be granted by a borrower (and not by a guarantor or a third party security grantor) and only in favour of a French licensed credit institution (*établissement de credit*) (or a foreign credit institution which is licensed to carry out bank activities in France under the 2000/12 directive under a so-called "European passport"). The notification of the assignment to the debtor(s) is not required for validity purposes but in order to render such assignment enforceable against the debtor(s).

A delegation of receivables is generally used to take security over receivables under insurance policies or vendor warranties. The parties to the delegation agreement are not only the delegating obligor (*délégant*) and the secured creditor (*délégataire*), but also the debtor (*délégué*) and therefore no notification of the latter is required. Under a delegation agreement, the debtor agrees to make direct payments to the secured creditor.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A pledge over the balance of a bank account is possible under French law. No particular formalities are required in connection therewith, although the bank account holder is usually notified of

the pledge so as to render such pledge enforceable against such person. A pledge may also be granted over cash (*gage-espèces*) by transferring the ownership of such cash to the secured creditor who may then freely dispose of it, subject to returning the same amount of cash to the pledgor upon discharge of all the secured liabilities.

3.6 Can collateral security be taken over shares in companies incorporated in France? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Collateral security can be taken over shares in companies incorporated in France either by way of a securities account pledge with respect to shares of a joint stock company (a *société anonyme*, a *société par actions simplifiée* or a *société européenne*) or by way of a share pledge with respect to other type of companies (such as a *société à responsabilité limitée*, a *société en nom collectif* or a *société civile*, etc.).

A securities account pledge is a pledge over a securities account in which shares (and/or other securities) are credited and over a cash proceeds account in which dividends or other cash proceeds relating to such shares (and/or other securities) are credited. The securities account is either held by the company whose shares are pledged or by a financial institution. Such security interest automatically extends to any additional shares and any additional cash proceeds which are credited to the pledged accounts during the life of the pledge. In order for such pledge agreement to be valid under French law, a mandatory form of statement of pledge (*déclaration de nantissement*) must be signed by the pledgor. It is also customary for the securities account holder and the cash proceeds account holder to sign confirmations of the pledge.

A share pledge actually pledges the shares (as opposed to the pledge of a securities account in which such shares are credited, as explained above with respect to securities account pledges) and therefore new additional shares are not included automatically in the scope of the pledge. It may also cover cash proceeds related to the pledged shares, but only if this is expressly specified in the pledge agreement. In addition to the registration of such pledge with the clerk of the relevant commercial court as mentioned below, other perfection formalities may be required depending on the type of company whose shares are pledged. For instance, a pledge over the shares of a *société civile* must be notified by bailiff (*signifiée par huissier*) to the company whose shares are pledged.

Shares of French companies are not in certificated form, but in dematerialised form. The pledge must be registered (i) with respect to shares of joint stock companies, in the share transfer registry (*registre de mouvements de titres*) and the shareholders' accounts (*comptes d'actionnaires*) of the company whose shares are pledged, and (ii) with respect to shares of other type of companies, in a special register held by the clerk of the relevant commercial court where the company whose shares are pledged is registered.

It is not recommended to have a securities account pledge or a share pledge governed by New York or English law because of difficulties, both practical and legal, which would arise with respect to the perfection and the enforcement of such security interests.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, security can be taken over inventory. The pledged assets must be identified in the pledge agreement (type, quality, quantity and value). The pledge agreement must contain some mandatory provisions and must be registered (for validity purposes) with the clerk of the relevant commercial court where the pledgor is registered.

This type of pledge may only be granted by a borrower (and not by a guarantor or a third party security grantor), in favour of a French licensed credit institution (*établissement de credit*) (or a foreign credit institution which is licensed to carry out bank activities in France under the 2000/12 directive under a so-called "European passport") and may not be enforced through private foreclosure (*pacte commissoire*).

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, save for a lenders' lien (*privilège du prêteur de deniers*), a pledge over machinery and equipment, a pledge over inventory or a *Dailly* assignment of receivables by way of security (which may only be granted in order to secure the grantor's obligations as borrower) and subject to corporate benefit and financial assistance rules.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The most expensive fees are those relating to security interests over real estate properties. Registration costs and notary fees with respect to a mortgage are calculated as a percentage of the secured amounts and are therefore expensive (as at 31 December 2013, these costs include mandatory fees of 0.715% of the amount of the secured obligations corresponding to the land tax (*taxe de publicité foncière*), plus mandatory fees of 0.05% of the amount of the secured obligations corresponding to the land registrar's fees (*contribution de sécurité immobilière*), plus notary fees, which can be negotiated when they exceed 80,000 euros). The costs relating to a lenders' lien (*privilège du prêteur de deniers*) are also based on the secured amount but are not as high as registration costs of a mortgage, as they do not include the 0.715% mandatory fees corresponding to the land tax (*taxe de publicité foncière*).

Registration fees with respect to a pledge over intellectual property rights are not expensive unless the pledge covers an important number of intellectual property rights and the accelerated registration procedure is chosen, as opposed to the ordinary registration procedure (the ordinary registration procedure may take up to two months while the accelerated registration procedure takes up to 5 days). The cost for the registration under the ordinary procedure is €26 per intellectual property right with a maximum amount of €260 and the cost for the registration under the accelerated procedure is an additional €50 per intellectual property right with no maximum amount.

The registration fees with respect to other types of security interests are not significant: e.g., registration costs with the commercial court of Paris of a pledge over business as a going concern, a pledge over inventory, a pledge over machinery and equipment or a pledge over shares (other than shares of a joint-stock company which do not require registration with a public register) amount to €150 for each pledge (for an amount of the secured obligations exceeding €41,600). The commercial courts may require, prior to the registration of the above-mentioned security interests with the relevant commercial registry, a registration of such security interest

agreements with the tax authorities – the cost of such registration is not significant (€125 for each security interest agreement).

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Generally no, save for (i) security over real estate properties with respect to which registration requirements involve a significant amount of expense (see above), and (ii) pledge over intellectual property rights which may take up to two months if the ordinary procedure is chosen or may be expensive if the accelerated procedure is chosen (please see question 3.9 above).

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No, but it should be noted that the granting of a share pledge or a securities account pledge may require the prior consultation of the works council of the company whose shares are pledged (if such works council exists and if the pledge is over more than 50% of the shares of such company). The opinion of the works council is not binding, but its consultation is mandatory and may take from 15 days to several months depending on the complexity of the contemplated transaction.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

A security interest agreement over real estate property requires notarisation. If such agreement is signed under a power of attorney, such power of attorney agreement must also be notarised.

French law agreements may not be signed in counterparts.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

(a) **Shares of the company**

Yes, a French joint stock company (a *société anonyme*, a *société par actions simplifiée* or a *société euopéenne*) may not provide any financial assistance in the form of a loan, guarantee or security interest for the acquisition of its own shares. The violation of this prohibition may lead to the criminal liability of the managers/directors of such company and to the voidability of such loan, guarantee or security interest agreement.

(b) **Shares of any company which directly or indirectly owns shares in the company**

The prohibition of financial assistance would also apply in case of the acquisition of shares in a company which directly or indirectly holds shares in the company.

(c) **Shares in a sister subsidiary**

There is no financial assistance prohibition as such, but this type of transaction remains subject to the corporate benefit rules described above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will France recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

France has not ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition. However, in a recent case law, the French Supreme Court has recognised the filing of claims in a bankruptcy proceeding by a New York law security trustee, but there is no case law yet with respect to the enforcement of the loan documentation and related collateral security by a trustee.

The role of an agent in a parallel debt mechanism, as well as the parallel debt mechanism itself, has also been recognised by the above-mentioned recent case law of the French Supreme Court and may therefore be an alternative to the trust mechanism in credit agreements.

The agent concept is very largely used in French syndicated loans and is based on a power of attorney granted by lenders. The security interests are generally granted in favour of each lender and not only in favour of the security agent, and each lender may act individually in enforcing its rights under the collateral security, save for the case where it is contractually prohibited from doing so by the finance documents. If enforcement of security interests is implemented through judicial proceedings, an agent may only act before a French court if it is granted a special power of attorney (*mandat ad litem*) by each lender.

5.2 If an agent or trustee is not recognised in France, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

See the answer to question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of France and guaranteed by a guarantor organised under the laws of France. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

A transfer is usually made in France by way of assignment rather than by way of novation.

A transfer made by way of assignment must be notified to all French borrowers by bailiff (*signification par huissier*) or each French borrower must sign the transfer agreement in a notarised form.

If the transfer is made by way of novation, the consent of the guarantor (as well as the consent of the security provider) is required in order for Lender B to be able to enforce its rights under the guarantee (or under the security interest). Such consent may be granted concomitantly with the transfer or prior to such transfer

(such prior consent may also be provided in the guarantee/security interest agreement itself).

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

(a) **Interest payable on loans made to domestic or foreign lenders**

Interest paid to French tax resident individuals: As of 1 January 2013, such payments are subject to personal income tax in the hands of the individuals under the progressive tax schedule. However, when the paying establishment is located in France, it has an obligation to declare the gross amount of interest paid and withhold a compulsory tax advance at a rate of 24%, which is later offset against the definitive income tax charge due by the lender.

Interest paid to French tax resident companies: As a matter of principle, such payments are not subject to any withholding tax (***WHT***).

Interest paid to foreign lenders (individuals or companies): Such payments do not give rise to any French WHT.

Interest paid to a Non Cooperative State or Territory (***NCST***): As a general rule, a 75% WHT applies in cases where interest is paid to an account located in a NCST (notwithstanding the tax residency of the corporate/individual lender), unless the French debtor can demonstrate that the operations in respect of which the interest is paid have a main purpose and effect other than allowing their localisation in a NCST. However, please note that if the lender is tax resident of a country that has entered into a double tax treaty with France, the provisions of that treaty (if available) may permit the reduction of the rate (down to nil) of such WHT.

(b) **Proceeds of a claim under a guarantee or the proceeds of enforcing security**

As a matter of principle, proceeds deriving from a claim under a guarantee or as a result of enforcing security are not subject to WHT in France (irrespective of the tax residence of the beneficiary).

However, it should be noted that:

- Proceeds resulting from the enforcement of a security, in cases where the security grantor is not a French tax resident, may be subject to capital gains WHT (provided that a capital gain is realised upon the sale of the asset on which the security is taken) at rates that vary depending on the nature of the asset. However, if the security grantor is a tax resident of a country that has entered into a double tax treaty with France, the provisions of that treaty (if available) may permit the avoidance of (or at least, reduce the cost of) the WHT.
- When the proceeds deriving from enforcing a security are used to pay interest accrued under a loan agreement, the rules indicated in question 6.1 (a) above are applicable.
- Proceeds resulting from a claim under a guarantee are of a *sui generis* nature, but in the case where the purpose of the guarantee is to ensure (in part or in total) the payment of interest accrued under a loan agreement entered into between a French debtor and a foreign beneficiary, it cannot be totally excluded that such guarantee payments would be viewed (at least in part) as interest payments and accordingly be subject to French interest WHT (under the rules summarised in question 6.1 (a) above). There is, however, no firm position of the French tax authorities in this respect, nor relevant case law on the matter.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

(a) **Incentives attributed to foreign lenders**

The absence of WHT on interest (subject to the NCST exception) is very attractive for foreign lenders.

In addition, it is worth mentioning that interest payments made to an account located in a NCST or to a beneficiary residing or located in a NCST as remuneration of a loan agreement entered into outside of France either (i) before 1 March 2010 provided that the expiry date has not since been extended, or (ii) as of 1 March 2010 if said agreement is assimilated to an agreement entered into before that date, are also exempt from WHT in France.

(b) **Taxes applicable to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration**

The same taxes apply to all lenders irrespective of whether they are French or foreign with respect to their loans, mortgages or other security documents for the purposes of effectiveness or registration – see the answer to question 3.9 above for details with respect to taxes in relation to registration with the tax authorities (if required).

6.3 Will any income of a foreign lender become taxable in France solely because of a loan to or guarantee and/or grant of security from a company in France?

No, it will not.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No other significant costs would be incurred by foreign lenders in the grant of such loan/guarantee/security (other than those mentioned above which apply to all lenders, irrespective of whether they are French or foreign). However, translation costs may be incurred with respect to security interests which require registration in a public register, if the security agreements are not already drafted in the French language.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No: thin capitalisation rules apply irrespective of the lender's place of residence.

7 Judicial Enforcement

7.1 Will the courts in France recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in France enforce a contract that has a foreign governing law?

Convention on the law applicable to contractual obligations of 19 June 1980 (the "**Rome Convention**") in relation to contracts entered into before 17 December 2009 and Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (the

"**Rome I Regulation**") in relation to contracts entered into after 17 December 2009, are applicable in France.

(i) **Contracts entered into before 17 December 2009**

French courts will enforce the foreign law chosen by the parties to contracts entered into before 17 December 2009 in accordance with the Rome Convention, subject to:

- the overriding mandatory rules (*lois de police*) of the law of another country with which the situation has a close connection, if, and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract; and
- overriding mandatory provisions applicable in France irrespective of the law otherwise applicable to the contract.

In addition, notwithstanding any choice of law clause, in purely domestic contracts, i.e., where all the elements relevant to the situation (apart from the chosen law) are connected with one country only, the mandatory rules of said country shall be applicable.

(ii) **Contracts entered into after 17 December 2009**

French courts will enforce the foreign law chosen by the parties to contracts entered into after 17 December 2009 in accordance with the Rome I Regulation, subject to:

- French overriding mandatory provisions (*lois de police*); and
- the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.

In addition, notwithstanding any choice of law clause, in purely domestic contracts, i.e., where all the elements relevant to the situation (apart from the chosen law) are connected to one country only, the mandatory rules of said country shall be applicable.

7.2 Will the courts in France recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The criteria relating to the recognition and enforcement in France of judgments rendered by foreign courts vary depending on the country where such judgments were rendered:

- judgments rendered within one of the Member States of the European Union are enforced in France in accordance with the Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("**EC Regulation 44/2001**");
- judgments rendered in countries with which France has signed a bilateral treaty are recognised and enforced in France in accordance with the provisions of the relevant treaty; and
- judgments rendered in countries with which France has not signed bilateral treaties, which is the case for the United States, require a specific procedure for their recognition and enforcement, namely the exequatur decision.

(i) **Recognition and enforcement of a judgment given against a company in English courts**

Under EC Regulation 44/2001, a simplified procedure, known as 'declaration of enforceability', is used to enforce judgments rendered by the EU Member States' courts. As a matter of principle, judgments rendered by the courts of a given Member State should circulate freely in other Member States. Accordingly, judgments made by the courts of a Member State shall be declared enforceable in another Member State, immediately upon production of certain documents.

The declaration of enforceability is granted in summary *ex parte* proceedings (*sur requête*) before the clerk (*greffier en chef*) of the relevant *Tribunal de grande* instance (article 509 – 2 paragraph 1 of the French Civil Procedure Code). The clerk does not check the validity of the judgment and must declare the judgment enforceable when provided with a request to that end as well as with (i) a copy of the judgment which satisfies the conditions necessary to establish its authenticity, and (ii) a certificate made by the competent authority certifying that the judgment is enforceable in its country of origin. Also, certain clerks (for instance the clerk of the *Tribunal de grande instance de Paris*) must be provided with a certified translation of these documents.

An appeal may be lodged before the relevant *Cour d'appel* within one month as from the notification of the declaration of enforceability. At this stage, the appellant will be able to argue that the judgment should not be granted leave to enforce based on one or more of the limited grounds set out under Articles 34 and 35 of EC Regulation 44/2001. These grounds are more restrictive than those applicable to the standard exequatur procedure.

Council Regulation 44/2001 was amended on 12 December 2012 by Council Regulation 1215/2012, which will enter into force on 10 January 2015. The amendment cancels the "declaration of enforceability procedure" and provides that any judgment enforceable in a Member State will be automatically enforceable in the other Member States (Article 39 of Regulation 1215/2012).

(ii) **Recognition and enforcement of a judgment given against a company in New York courts**

In the absence of a treaty signed between France and the United States, the procedure for the enforcement of judgments rendered by New York courts requires a formal writ of summons. Foreign judgments may be enforced in France only once exequatur (also known as the *formule exécutoire*) is granted by the *Tribunal de grande instance* of the defendant's residence (or, if the debtor is not resident in France, the place where his assets are located).

The following tests must be met in order for a French court to grant an exequatur order with respect to a foreign judgment:

- the court rendering the judgment had jurisdiction over the defendant;
- the foreign court had not been used fraudulently to escape the jurisdiction of a court more closely related to the dispute (i.e., for forum shopping); and
- the foreign judgment was consistent with French international public policy, including due process.

If the French court is satisfied as to the above, the judgment given against a company in New York courts will be granted exequatur without any review of the facts or legal merits.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in France, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in France against the assets of the company?

If a company is in payment default, a lender may use the fast-track procedure known as *référé-provision* available for the recovery of debts which are not challengeable on serious grounds.

If the amounts are found to be indisputably due, the president of the *Tribunal de Commerce* orders the payment of the debt by an order

(*ordonnance de référé*) which has the advantage of being immediately enforceable, notwithstanding an appeal that may be lodged. *Ordonnances de référé* may indeed be appealed within fifteen days. Such appeals are heard relatively rapidly by the *Cour d'appel*. There may be a further challenge by a *pourvoi* before the *Cour de cassation* and in such case the decision of the *Cour de cassation* may take up to one year.

Notwithstanding the above, lenders can always go through normal proceedings to obtain payments due under a loan agreement or a guarantee agreement, which may last between 12 to 18 months. The enforcement of non-European judgments may also be of the same duration.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

French law security interests may only be enforced upon the occurrence of a payment default (either resulting from a non-payment of interest, fees or principal or following an acceleration of the secured facilities) and not upon the occurrence of any event of default.

Enforcement of a pledge may be carried out under French law either through judicial foreclosure or public auction or by way of private foreclosure. Enforcement through judicial proceedings (i.e., judicial foreclosure or public auction) may take a significant amount of time (12-18 months with respect to a mortgage or up to 12 months for other type of security interests) whereas enforcement through private foreclosure may take up to two weeks.

The enforcement of a securities account pledge granted over the shares of a listed company may require a regulatory consent from the French stock exchange regulator (*Autorité des Marchés Financiers*) if the pledge is enforced through private foreclosure over more than 30% of the shares of the listed company. Under French takeover rules, where a person, acting alone or in concert, comes to hold directly or indirectly more than 30% of a company's equity securities or voting rights, such person is required, on its own initiative, to inform the French stock exchange regulator immediately and to file an offer for all the company's equity securities. In order to avoid the obligation to file a mandatory bid, an authorisation may be requested from the French stock exchange regulator to temporarily cross the 30% threshold upwards. Such an authorisation may be granted provided that the lenders undertake to sell the shares held in excess of the 30% threshold within a 6-month period.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in France or (b) foreclosure on collateral security?

There are no restrictions applying to foreign lenders in the event of filing suit against a company in France or foreclosure on collateral security.

7.6 Do the bankruptcy, reorganisation or similar laws in France provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, the opening of certain bankruptcy proceedings – safeguard proceedings (*sauvegarde*), accelerated financial safeguard proceedings (*sauvegarde financière accelérée*), judicial administration proceedings (*redressement judiciaire*) or liquidation proceedings (*liquidation judiciaire*) – provide for a moratorium of enforcement with respect to lender claims and collateral security (save for collateral security created under a *Dailly* assignment of receivables, a cash collateral agreement (*gage-espèces*), a receivables delegation agreement (*delegation de créances*) or a *fiducie* agreement (but only in the case of a so-called possessory *fiducie* (*fiducie avec dépossession*) whereby the assets are effectively transferred to the *fiduciaire*).

7.7 Will the courts in France recognise and enforce an arbitral award given against the company without re-examination of the merits?

French courts do not carry out a judicial review of the merits of arbitral awards. They only play a supervision function regarding the validity of arbitral awards for which recognition and enforcement are sought in France. According to the French Civil Procedure Code, a French court can set aside an arbitral award only if:

- the arbitral tribunal wrongly upheld or declined jurisdiction;
- the arbitral tribunal was not properly constituted (i.e. it was irregularly composed or the sole arbitrator was irregularly appointed);
- the arbitral tribunal ruled without complying with the mandate conferred upon it;
- due process (*principe du contradictoire*) was not respected; or
- recognition or enforcement of the award would be contrary to international public policy (*ordre public international*).

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

See the answer to question 7.6 above.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

If a guarantee or a security interest is granted during a so-called hardening period (*période suspecte*), such guarantee/security interest is voidable. The hardening period is a period set by the bankruptcy court during which the guarantor/pledgor is deemed to be insolvent. According to the French law insolvency test (*cessation des paiements*), a company is insolvent if it is unable to pay its liabilities as they fall due with its immediately available assets (cash or other liquidity assets). A French bankruptcy court may set the insolvency date of a company as far as 18 months prior to the date on which the company has filed for insolvency.

French law provides for preferential creditor rights with respect to: employees' claims; legal expenses; new loans made available during a court-approved conciliation proceeding; security interests over real estate property; and security interests benefiting from a retention right (such as a share pledge, a securities account pledge or a bank account pledge).

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Entities regulated by public law (*personnes morales de droit public*) (such as *collectivités territoriales* or *établissements publics*) are excluded from bankruptcy proceedings.

Entities which are not registered with the commercial register and do not have a legal personality (such as *sociétés en participation*, *sociétés de fait*, *sociétés en formation*) are also excluded from bankruptcy proceedings.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes, private foreclosure (*pacte commissoire*) is permitted under French law with respect to almost all types of security interests, save for certain exceptions such as a pledge over business as a going concern and a pledge over inventory.

However, enforcement by private foreclosure is prohibited during bankruptcy proceedings such as safeguard proceedings, accelerated financial safeguard proceedings, judicial administration proceedings and judicial liquidation proceedings.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of France?

French law allows considerable freedom to the parties to a contract in selecting a jurisdiction for their disputes, with the notable exception of disputes relating to real property, which must be resolved by the appropriate court at the place where the property is located.

The choice of a foreign jurisdiction is valid provided that:

- the dispute is international, it being specified that French courts do not require that the dispute has a material link to the foreign jurisdiction chosen by the parties;
- the jurisdiction choice clause does not preclude the mandatory exclusive jurisdiction of a French court in relation to certain aspects (e.g. in relation to employment contracts); and
- the clause is not a unilateral dispute resolution clause giving only one party the choice between several jurisdictions while the other party is bound to bring actions before one jurisdiction only (this principle has recently been confirmed by a decision rendered by the French Supreme Court on 26 September 2012).

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of France?

Waivers of sovereign immunity from jurisdiction are legally binding and enforceable under the laws of France.

But a waiver of sovereign immunity from jurisdiction does not entail a waiver of immunity from execution, which:

- must be separately expressed in order for it to be equally binding and enforceable; and
- must specifically identify the assets or the category of assets over which the waiver is granted.

10 Other Matters

10.1 Are there any eligibility requirements in France for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in France need to be licensed or authorised in France or in their jurisdiction of incorporation?

Pursuant to French banking monopoly rules, an entity which carries out banking activities on a regular basis in France must either be (i) duly licensed as a credit institution (*établissement de crédit*) in France, or (ii) duly "passported" under the European Directive 2000/12 to provide such services in France. Non-compliance with such banking monopoly rules may lead to criminal liability, but according to French Supreme Court case law, a banking transaction carried out in violation of the banking monopoly rules remains valid (however, it should be noted that French courts are not bound by precedent).

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in France?

Among the other specificities with respect to French law financing transactions, the following should be taken into account: (1) interest under a French law loan agreement may only be compounded if it has accrued for a period of at least one year; and (2) a special effective global rate (TEG) notice must be sent to French borrowers on no later than the day of entering into of the credit agreement.

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Germany?

While at the beginning of 2013, due to the sovereign debt crisis, the uncertainty in the market was palpable, the general view today is that the current prospects for Germany's economic development are positive. This has a corresponding impact on the German lending markets. Germany has one of the strongest leveraged buy-out markets in Europe. In particular, there has been a solid flow of high-volume deals since 2013. However, this positive development is somewhat clouded by the fact that primary buy-out volumes continue to remain significantly behind secondary ones.

As opposed to other European jurisdictions, there are currently no signs of a credit crunch in Germany. However, banks are under pressure to de-leverage and reduce their balance sheets due to regulatory requirements. Apart from restructuring scenarios, German companies currently operate in a market environment in which ample financing sources are available. In spite of the health of the German bank lending market, companies increasingly make use of alternative financing means, such as bonds. In the lending markets, new participants such as insurance companies and direct lending funds are becoming increasingly active.

1.2 What are some significant lending transactions that have taken place in Germany in recent years?

Reflecting the strong leveraged buy-out market, BC Partners' acquisition of Springer Science & Business Media from EQT serves as a good illustration, being the largest debt-financed private equity transaction in years, with a deal volume of an estimated EUR 3.3bn. Another debt-financed high-volume secondary buy-out transaction was the acquisition of Ista by CVC Capital Partners from Charterhouse Capital Partners, which valued the company at roughly EUR 3.1bn in an auction process. A further major deal concerned Douglas Holding. Advent International launched a successful leveraged buy-out bid worth almost EUR 1.5bn for the listed company's shares in an effort to take Douglas private.

These three examples of recent German transactions were also the three largest European buy-out deals in 2013.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

While the main German corporate forms are both subject to the principle of the maintenance of share capital, a differentiation has to be made between a limited liability company (*Gesellschaft mit beschränkter Haftung* – "**GmbH**") and a stock corporation (*Aktiengesellschaft* – "**AG**"). A further corporate form that is frequently used in Germany is a limited partnership (*Kommanditgesellschaft*) with a GmbH as the sole general partner (a "**GmbH & Co. KG**").

Pursuant to the capital maintenance rules under the German Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung* – "**GmbHG**"), assets of the GmbH that are required for the maintenance of its registered share capital must not be disbursed to its shareholders (or to a third party in favour of the GmbH's shareholders). In other words, a distribution to shareholders is prohibited to the extent that such distribution results in a situation in which the net assets at book value fall below the registered share capital. This rule is applied broadly and commercially by the courts. The granting of downstream guarantees for borrowings of subsidiaries is not in conflict with capital maintenance principles. In contrast, upstream guarantees granted by a subsidiary of the borrower can, depending on the actual balance sheet ratios of the subsidiary from time to time, result in a violation of the capital maintenance rules, except to the extent that the funds that a borrower receives under a credit facility are passed on to the subsidiary. Furthermore, it is generally accepted that the granting of cross-stream guarantees in favour of affiliated companies (other than direct or indirect subsidiaries of the grantor subsidiary) can be qualified as a distribution (and possibly a prohibited distribution) to the grantor's shareholder. The specific requirements depend on the factual circumstances. It should also be noted that, as an exception to the general rule, distributions that are covered by a full-value counter-claim or re-transfer claim are permissible. A second exception concerns cases where a statutory domination and control or profit transfer agreement is in place (although according to some commentators, this exception only applies if the company has a full-value loss compensation claim under statutory law). Regarding GmbH & Co. KGs, the same rules apply on the level of the general partner GmbH.

In a more far-reaching manner, the German Stock Corporation Act (*Aktiengesetz* – "**AktG**") prohibits any payment (or grant of any other benefit) by an AG to (or in favour of) its shareholders, except for the distribution of dividends on the basis of a shareholders' resolution, and subject to the aforementioned exceptions (receipt of arm's length consideration including a full-value counter-claim or re-transfer claim, existence of a statutory domination and control or profit and loss transfer agreement with a full-value statutory compensation claim of the AG, or, in the case of an upstream or cross-stream guarantee granted by the AG, an on-transfer of loan funds by the shareholder to the AG).

As a general matter, the principles outlined above in respect of downstream, upstream and cross-stream guarantees equally apply to the grant of downstream, upstream and cross-stream security.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Where German capital maintenance rules are violated on the basis of the principles outlined in question 2.1 above, there can be personal liability on the part of both the shareholders and the managing directors *vis-à-vis* the company. In addition, a managing director may be held personally liable by the company for any payments made to shareholders that were bound to cause the company's cash-flow insolvency (*Zahlungsunfähigkeit*), unless the payment was reconcilable with the care of a prudent businessman (*Sorgfalt eines ordentlichen Geschäftsmanns*).

In order to protect a GmbH's managing directors from these liability risks, it has become common market practice in Germany to stipulate contractual enforcement limitation language where upstream or cross-stream guarantees or security is granted for the (direct or indirect) benefit of a shareholder. The prevalent form of such language effectively limits the secured party's right to enforce the guarantee or security to the amount of the GmbH's free reserves from time to time, and to an amount the distribution of which would not cause the GmbH's cash-flow insolvency. Any such limitation language can reduce the value of a guarantee or security significantly. See further question 2.4 below regarding the role of shareholders' approvals for the managing director's exposure. No enforcement limitation is applied to the extent that the guarantor/security grantor GmbH received loan funds itself, be it as a direct borrower or on the basis of an on-transfer of funds to it by the borrower.

More rigorously and as described in question 2.1 above, under the rules applicable to AGs, any payments (or the grant of any other benefits) to (or in favour of) shareholders that do not fall under one of the aforementioned exceptions generally expose both the shareholders and the AG's management board members to liability *vis-à-vis* the AG. As a general rule, the members of the management board should withstand pressure exerted by the shareholders to make any such payment (or grant any such benefit), except where a statutory domination and control agreement is in place.

In addition to the above-mentioned statutory restrictions, some legal commentators have taken the view that the grant of upstream or cross-stream guarantees or security at a shareholder's request may expose such shareholder and management to liability under the doctrine developed by the German Federal Court of Justice (*Bundesgerichtshof*) on destructive interference (*existenzvernichtender Eingriff*) where any such actions jeopardise the company's continued existence. This doctrine complements the capital maintenance régime and applies to wilful unethical tortious impairments (*vorsätzliche sittenwidrige Schädigung*) of the company, causing or deepening its insolvency (*Insolvenz*). In some secured lending transactions, additional enforcement limitation language has been proposed or agreed, although that is generally not acceptable from a lender's perspective.

2.3 Is lack of corporate power an issue?

There is no *ultra vires* doctrine in German law (except in respect of certain types of insurance companies). Both the GmbHG and the AktG set forth that the power of the company's management to represent the company cannot be restricted *vis-à-vis* third parties. Any limitations to such power deriving from the company's by-laws generally do not affect the effectiveness of agreements concluded with third parties. There are few exceptions to this rule, most notably where it is obvious for the contractual counter-party that the company's representative is acting in excess of his or her powers, or where both parties collude.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

According to the German Banking Act (*Kreditwesengesetz*, or *KWG*), the granting of guarantees in a commercial manner, or to an extent that necessitates a commercially organised business, requires the authorisation of the German bank regulator (*Bundesanstalt für Finanzdienstleistungsaufsicht* – "**BaFin**"). However, entities that only engage in any such transactions with their subsidiaries, parent companies or other affiliates do not require such authorisation (see question 10.1 below as regards further exceptions to the authorisation requirement).

Apart from obeying the internal procedures of the company as set forth in the company's or its management board's by-laws, an additional shareholders' resolution approving of the grant of guarantees or security is common. In the case of GmbHs, such shareholders' resolutions typically contain an instruction to the managing directors to execute the relevant agreements. A managing director executing a binding shareholders' instruction may generally not be held liable by the company, even if the execution of the instruction is detrimental to the company.

However, any such shareholders' resolution is not binding where it violates mandatory law, e.g., in case of an instruction to do an act in violation of capital maintenance requirements. Therefore, in the case of an upstream or cross-stream guarantee or security, a prudent managing director should duly consider the probability of a possible violation of such requirements in case of a realisation of such guarantee or security. The obvious uncertainties of such prognosis and the lack of case law on point demonstrate the importance of the contractual enforcement limitation language, as described in question 2.2 above.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no limitations on the amount of a guarantee or security imposed by mandatory German law. However, see question 2.2 as regards limitations to the enforceability of amounts in the light of capital maintenance requirements.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange controls imposed by German law that would pose an obstacle to the enforcement of a guarantee or security.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

For lending obligations, the most common forms of available collateral are as follows.

Security over real estate:

- land charge (*Grundschuld*); and
- mortgage (*Hypothek*).

Security over movables and equipment:

- security transfer of title (*Sicherungsübereignung*); and
- pledge (*Verpfändung*).

Security over receivables and cash accounts:

- security assignment (*Sicherungsabtretung*);
- pledge; and
- account pledge (*Kontoverpfändung*).

Security over shares:

- share pledge (*Anteilsverpfändung*); and
- security assignment of title.

Security over intellectual property:

- security assignment; and
- pledge.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

If a party desires to grant security over all of its assets, it must individually charge such assets in accordance with applicable law. German law does not know the concept of a floating charge over all assets of the chargor.

While from a legal perspective it is possible to create security interests in multiple classes of assets in a single document (e.g., a security transfer of movables and an account pledge), the market practice is to have one security agreement for each asset class, owing to the different procedures applicable to the creation and enforcement of security for each class.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

A security interest in real property can either be created in the form of an (accessory) mortgage or as a (non-accessory) land charge. Land charges are a lot more common since they have several advantages over a mortgage. Owing to the accessoriness of the mortgage, the mortgage and the secured receivable are inseparably connected. Consequently, a mortgage secures only a specific receivable, it cannot be transferred without the receivable that it secures, and it is deemed automatically transferred where such receivable is transferred. This distinguishes the mortgage from the non-accessory land charge, which can be created and transferred independently of any receivable that it secures. Generally, both mortgages and land charges extend to fixtures, accessories, related products and other components of the real estate.

Mortgages and land charges are created by way of a security agreement. The relevant lien is usually entered into in the form of a notarial deed, to allow for the registration in the land register (*Grundbuch*) and to facilitate a possible enforcement. Both mortgages and land charges can be either certified (*Briefhypothek/Briefgrundschuld*) or uncertified (*Buchhypothek/Buchgrundschuld*). In addition to the aforementioned requirements, where a certificate has been issued, such certificate must be handed over to the secured party. Where no certificate is issued, the fact that the certification was excluded has to be registered in the land register.

In respect of equipment that does not constitute a fixture, see question 3.1 above in respect of the possible types of security. As a practical matter, as a formal pledge becomes effective only upon the surrender of possession, the only common form of security of equipment is a security transfer of title.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Generally, security over receivables is created by way of a security assignment, which results in the transfer of legal ownership of the receivables involved. Any such security assignment may relate to one or multiple (or all) existing or future receivables. A security assignment can in theory be agreed orally. However, for evidentiary purposes, receivables are usually assigned in written form. To provide for legal clarity, the assigned receivables are required to be sufficiently identifiable (*bestimmbar*). It is however not necessary to specifically identify each of the receivables to be assigned in order to provide for an effective assignment.

Where a receivables contract contains a prohibition on assignments, the assignor can still undertake to assign the receivable, but it can generally not effect a valid assignment *in rem*. However, an assignor can validly assign a receivable (with the exception of loan claims of a bank) in spite of a contractual prohibition on assignments where both the assignor and the obligor are corporate entities, partnerships or individual merchants and the receivables contract constitutes a commercial transaction, or where the obligor is a government agency.

The failure to give notice to the obligor does, generally, not affect the effectiveness of the security assignment, except where notice is required by the receivables contract. The assignee is entitled to enforce the receivable directly against the obligor (providing required evidence of the assignment), whether or not the obligor was previously notified of the assignment. However, notification is required to cut off certain set-off rights and other defences of the obligor. For example, unless the obligor has been notified or has otherwise obtained knowledge of the security assignment, it can validly discharge its obligation under the receivables contract by making payment to the assignor.

Alternatively, a security agreement in respect of receivables may also be in the form of a formal pledge. To become effective, a pledge of a receivable requires the notification of the obligor. Due to the fact that assignors generally seek to avoid such notification, security assignments are far more common than receivables pledges.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Although security over cash in bank accounts (which as a legal matter is considered a receivable against the account bank) could in theory be created by way of security assignment, the common form is an account pledge. The market practice is to enter into an account pledge agreement in written form, although as a matter of law

generally no formalities have to be obeyed. To become effective, it is necessary that the obligor, i.e. the account bank, be notified of the pledge. Under their standard business terms, German banks take a pledge over each account maintained with them, which is commonly waived or subordinated by the account bank where a new contractual account pledge is created.

3.6 Can collateral security be taken over shares in companies incorporated in Germany? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares in a GmbH are always uncertificated (and are not considered "securities"). Security over any such shares is very rarely created in the form of a security transfer of title, because it has been argued that such a security interest may increase certain lender liability risks for the secured party. By far the most common form of security over shares in a GmbH is a pledge. It is essential that a share pledge agreement be notarised, otherwise the pledge is not perfected. While a notification of the pledge to the GmbH is not a necessity under German law, sometimes the GmbH's by-laws provide that a pledge of the GmbH's shares requires the prior consent of the GmbH or of the remaining shareholders (if any). In addition, the notification of a pledge may be advisable with respect to the enforcement of certain rights of the secured party *vis-à-vis* the GmbH. As a matter of German corporate law, the validity of a pledge over the shares of a German GmbH is generally determined under German law, regardless of any choice of law clauses to the contrary. Furthermore, the predominant view is that a pledge of shares in a GmbH does not extend to claims to profits, unless the parties expressly agree on such extension. Unless provided otherwise in a GmbH's by-laws, specific rights deriving from the shareholding (such as claims to profits, but not voting rights) can be pledged separately, without obeying any form requirement other than the notification of the company.

Shares held in an AG are typically issued in bearer form. Security over any such shares that are in certificated form and in respect of which there is only one global certificate that has been deposited with a clearing system (which is by far the most common form of certification), most commonly takes the form of a pledge, which requires the transfer of direct or indirect possession (*Besitz*) of the securities. This is generally effected either by way of a transfer of the securities to a securities account maintained in the name of the secured party, or by the "blocking" of the securities account of the security provider in the books of the account bank. The validity of a pledge over shares in a German AG is generally determined by the laws of the jurisdiction in which the certificate is situated (*lex cartae sitae*). This means that German law will be applied mandatorily where the certificate is situated in Germany.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over movables (including inventory) can be granted by way of security transfer or pledge. As the perfection of a pledge over movable property would require a transfer of direct possession of the assets to the pledgee, a pledge of inventory is very uncommon in Germany.

Thus, security over inventory is generally created in the form of a security transfer, which results in the transfer of legal title to the secured party. A security transfer requires the entry into a security transfer agreement, which is not subject to any form requirements. For the sake of legal clarity, the assets transferred under the agreement have to be identified (*Bestimmtheitsgrundsatz*). The perfection of a security transfer also requires the transfer of possession, but in connection with this type of security it is sufficient that the collateral provider agrees to hold possession on behalf of the secured party, whereby the secured party obtains indirect possession (*mittelbarer Besitz*).

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company can secure both its own obligations as a borrower under a credit facility and as a guarantor of the obligations of other borrowers/guarantors under a credit facility, subject to the limitations described in questions 2.1 and 2.2 above.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Taxes levied on documents such as stamp duties do not apply in Germany in relation to the creation of security over assets. The involvement of a notary for the creation of share pledges, mortgages and land charges triggers notary fees, the amount of which depend upon the market value of the assets involved. A notary's fees are determined on the basis of a statutory fee schedule, and there is no fixed percentage in this regard. The same is true for the court fees for the registration of mortgages and land charges in the land register. Notary fees can be significant. In the past this often led to parties choosing to notarise share transfers in Switzerland, where the amount of notary fees can be freely agreed. However, corporate law reforms in Germany and Switzerland cast doubt on this cost-saving practice, and there is a risk that after these reforms, notarisations of share transfers in Switzerland might be void.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

See question 3.9 above regarding expenses. The registration of land charges and mortgages may take several weeks or even longer, depending on the court involved. This potential cause of delay is, however, of limited importance if according to the facility agreement the filing for registration of the lien shall be sufficient for the closing of a lending transaction.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Generally, no such regulatory consents are required for the creation of security under German law.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Generally, special priority is not a concern under a revolving credit facility. In particular, a security interest can be created regarding future receivables, provided that such receivables are identifiable (see question 3.4 above).

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

See questions 3.3 and 3.6 above regarding notarisations. Due representation of any party to a notarial deed (or certain submissions to official registers) has to be evidenced by a complete chain of notarially certified powers of attorney or entries in commercial registers (*Handelsregister*). As far as foreign companies are concerned, the respective foreign notaries can certify the identity of signatories and the content of the respective register and thus can certify due representation. Furthermore, for several jurisdictions, an apostille needs to obtained.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

AGs are subject to an explicit prohibition of the granting of loans to third parties, and the securing of loans of third parties, for purposes of the acquisition of shares in such AGs by such third parties. Any agreements that nevertheless grant financial assistance are null and void according to the AktG. There are three exceptions to this prohibition of financial assistance: First, pursuant to the AktG, financial assistance is not prohibited where a statutory domination and control or profit and loss transfer agreement is in place. The second exception concerns cases in which the assistance is granted in the course of the regular business of banks or financial service institutions. The third exception relates to transactions by which employees are to participate in share ownership of the company.

In contrast, there is no such specific prohibition of financial assistance applicable to GmbHs. However, a GmbH is subject to the régime of capital maintenance and the doctrine on destructive interference described in questions 2.1 and 2.2 above, which can in effect impose similar restrictions on a GmbH. In fact, financial assistance provided by a GmbH target at the request of the purchaser in a typical leveraged buy-out situation could be regarded as a prime example of destructive interference within the meaning of such case law. The capital maintenance regime not only applies to payments to (or the grant of other benefits in favour of) a current shareholder, but also where any such payment or grant is effected to (or in favour of) a third party prior to such third party becoming a shareholder, provided that such act is closely related to the acquisition process.

(b) Shares of any company which directly or indirectly owns shares in the company

In this respect, German case law and legal commentary are not fully clear. Regarding AGs, the above-mentioned rules on financial assistance should extend to the granting of collateral for the acquisition of shares of a company which directly or indirectly owns shares in the collateral-providing company, provided that the former has dominance over the collateral-providing company.

Under the GmbHG, the making of payments (or the grant of other benefits) to (or in favour of) a company which has a controlling influence over the shareholding company may, subject to the limitations described in questions 2.1 and 2.2, be prohibited under the rules of capital maintenance where the factual requirements under such rules are met. Furthermore, considering that German courts apply the capital maintenance regime broadly, it should generally not make a difference whether the beneficiary is, at the time of the relevant act, already a part of the group. Apart from limitations resulting from capital maintenance requirements, the doctrine on destructive interference (see question 2.2 above) imposes additional restrictions that could apply to the granting of collateral, depending on the circumstances of the individual case.

(c) Shares in a sister subsidiary

As in the case of (b) above, German case law and legal commentary are not fully clear in this respect. While the prohibition of financial assistance under the AktG would not apply in this case, the granting of collateral in such a scenario is subject to the restrictions under capital maintenance and the doctrine on destructive interference described in questions 2.1 and 2.2 above. This can in effect impose restrictions similar to a financial assistance régime. Depending on the circumstances of the case, such rules can also apply where benefits are granted to an affiliate other than the shareholder, provided that the transaction can be attributed to the shareholder because of additional factors such as the exertion of a controlling influence over both the collateral grantor and the relevant affiliate. It should not make a difference whether the beneficiary is, at the time of the act, already a part of the group.

Under the GmbHG the same rules generally apply, although the capital maintenance requirements are different than in respect of AGs, as described above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Germany recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

While the notion of a security trust which permits a security agent to receive the security for the benefit of all lenders is generally known in Germany, it is not recognised regarding accessory security rights such as pledges and mortgages (see question 5.2 below regarding the parallel debt concept).

5.2 If an agent or trustee is not recognised in Germany, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Regarding accessory security rights (see question 3.3 above regarding the concept of accessory security rights), a security agent is in principle only able to hold accessory security rights to the extent that it is itself a creditor of the secured claim, owing to the fact that accessory security rights and the secured claims are generally inseparable. Therefore, and in order to avoid having all lenders become parties to a security agreement, a parallel debt concept is commonly used in Germany. Pursuant to this concept, a separate additional obligation of the borrower to the security agent is created in the same amount from time to time as what is owed to the lenders. This additional obligation allows for the creation of (accessory or non-accessory) security rights for the entire amount of the loans in favour of the security agent, which can be administered and enforced by the security agent. It should be noted that the concept of parallel debt has not been tested in German courts.

5.3 Assume a loan is made to a company organised under the laws of Germany and guaranteed by a guarantor organised under the laws of Germany. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Under German law, claims under a guarantee agreement (*Garantievertrag*) require a transfer (assignment) separate from the principal claim, as the German guarantee gives the lender an isolated, non-accessory claim against the guarantor. Regarding guarantees payable upon first demand, it is disputed whether the right to demand payment upon first demand is assignable. However, the assignability is uncontested where expressly agreed in the guarantee agreement. The guarantor may invoke any defences it has deriving from the guarantee agreement against its contractual counterparty thereunder (Lender A/B), but generally not the defences deriving from the contractual relationship between the debtor and the creditor under the loan agreement (Lender A/B).

In practice, however, guarantees are granted for the benefit of all parties of the facility agreement that are lenders at a certain point of time. The security agent will hold such guarantee as a trustee for the benefit of all lenders. Thus, there is no need to transfer the guarantee to a new lender.

In case of a surety (*Bürgschaft*) (for which the written form is a statutory requirement) the security right is automatically transferred with the assignment of the secured receivable. Unlike a guarantor, the issuer of a surety can not only invoke any defences it has deriving from the surety itself but also the debtor's defences deriving from the contractual relationship between the debtor and the creditor under the loan agreement.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Generally, there is no requirement to deduct or withhold tax from interest payable on loans made to domestic or foreign lenders, the proceeds of a claim under a guarantee, or the proceeds of an enforcement of security rights.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no German tax incentives provided preferentially to foreign lenders. There are no taxes (such as stamp, issue, registration or similar taxes or duties) payable in Germany with respect to loans, mortgages or other security documents for the purpose of effectiveness or registration.

6.3 Will any income of a foreign lender become taxable in Germany solely because of a loan to or guarantee and/or grant of security from a company in Germany?

Income of a foreign lender will not become taxable in Germany solely because of a loan to or guarantee and/or, generally, the grant of security from a company in Germany.

However, income of a foreign lender may be subject to German taxation where a loan is secured by real estate or similar rights located in Germany or ships registered in Germany. However, the double tax treaties concluded by Germany typically prevent Germany from imposing any such tax on lenders that are resident in the respective treaty jurisdictions. In addition, income may become taxable in Germany (i) where such income is attributable to the business property of a permanent establishment, including a permanent representative, or a fixed base maintained in Germany by the foreign lender, or (ii) such income is otherwise viewed as German-source income (e.g., rental income from German real estate).

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

See question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Generally, there are no such consequences under German law.

7 Judicial Enforcement

7.1 Will the courts in Germany recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Germany enforce a contract that has a foreign governing law?

Generally, Regulation (EC) 593/2008 on the Law applicable to contractual Obligations (Rome I) permits the parties to a contract to choose the contract's governing law, provided that the situation involves a conflict of laws and the contract relates to contractual obligations in civil or commercial matters. Such a choice of law can be express or implied. A choice of law provision can also be added or modified after the original contract was entered into. However, where a contract is exclusively connected with one or more EU Member States and the parties have chosen the law of a non-EU Member State, German courts would apply such provisions of EU law (as implemented in Germany) as cannot be derogated from by agreement, irrespective of the choice of law. In addition, German courts may give effect to overriding mandatory provisions of the law of the country where the contractual obligations have to be performed. Finally, any contractual choice of law is subject to the German *ordre public*. As a consequence, a German court will generally apply a foreign governing law that is validly chosen and enforce contracts governed by such foreign law, provided that the court has jurisdiction.

7.2 Will the courts in Germany recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The enforcement of judgments rendered in another EU Member State is governed by Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the

"**Brussels I Regulation**"). Pursuant to Article 33 of the Brussels I Regulation, such judgments are to be recognised without any special procedure being required. Recognition may only be denied in certain instances, for example where the decision is manifestly contrary to public policy (Article 34 *et seq.* of the Brussels I Regulation). The judgment shall be declared enforceable upon application to a presiding judge of a chamber of a German regional court (*Landgericht*).

Judgments rendered in non-EU states will in principle be automatically recognised, unless the recognition is expressly excluded under the German Code of Civil Procedure (*Zivilprozessordnung*). Statutory reasons which exclude the recognition apply, e.g., where the recognition would lead to a result which is evidently incompatible with fundamental principles of German law or if the foreign court did not have jurisdiction according to German law. It is common for a party relying on a foreign judgment to initiate an action to obtain a declaratory judgment which expressly recognises the foreign judgment. For a non-EU judgment to become enforceable in Germany, the judgment has to be declared enforceable by a German court pursuant to the German Code of Civil Procedure. A review on the merits, however, does not take place.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Germany, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Germany against the assets of the company?

The amount of time necessary to obtain a decision of a German court or to enforce a judgment of a foreign court depends on various factors, such as the complexity of the case and the workload of the courts. In a best case scenario, a judgment in the first instance may be obtained within less than one year, and the recognition and enforcement of a foreign judgment may take place after a few months (for a non-EU judgment). However, both could take substantially longer. Most of the judgments may be appealed. However, a trial court judgment is typically preliminarily enforceable after furnishing collateral. An EU judgment should be recognised and enforceable within a few days.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Security over movables/inventory which has been created by way of pledge will typically be realised outside formal enforcement proceedings (*Zwangsvollstreckungsverfahren*) by way of public auction. (A discretionary sale may take place as an alternative, where exchange rates for the asset exist.) Public auctions have a significant impact on timing, as the intended sale has to be notified to the collateral grantor. The notification triggers in particular a mandatory waiting period of one month before the auction can take place.

Liens over real estate have to be enforced in formal enforcement proceedings. Such collateral will often be enforced by way of public auction by the enforcement court (*Vollstreckungsgericht*). The court's workload may impact the duration of the enforcement proceedings. In addition, the debtor may apply for a suspension of enforcement for a period of six months, provided that there is a prospect that the suspension will render the auction unnecessary and the suspension is justified by reasons of equity.

Under German law, there is no general requirement to obtain regulatory consents when enforcing collateral security. However, the Legal Services Act (*Rechtsdienstleistungsgesetz*) sets forth that providing legal services, which includes debt collection services (*Inkassodienstleistungen*), requires an express permission in statutory law (subject to certain exceptions, e.g., in respect of attorneys). Legal services provided in the context of debt collection services are permitted under this law, provided that the debt collection agency is registered in the legal services register and that it has particular expertise in various fields of law, in particular civil law, commercial law and insolvency law.

Furthermore, any factoring that is conducted in a commercial manner, and any factoring whose extent necessitates a commercially organised business, requires generally the authorisation of the BaFin under the German Banking Act. See question 2.4 above and question 10.1 below as regards exceptions to the authorisation requirement.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Germany or (b) foreclosure on collateral security?

Foreign plaintiffs may be required to furnish security for costs before court proceedings will commence. This does not apply where this requirement is waived by treaty between Germany and the country of plaintiff's domicile or residence. Generally speaking, there is no security requirement for plaintiffs in EU Member States or states which are party to the Hague Convention on Civil Procedure of 1 March 1954. Otherwise, there are no restrictions that apply to foreign lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in Germany provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

In this regard, so-called preliminary insolvency proceedings (*vorläufiges Insolvenzverfahren*) and (actual) insolvency proceedings (*Insolvenzverfahren*) need to be distinguished.

In the vast majority of cases, the insolvency court, upon having received an application for the opening of insolvency proceedings, will appoint a so-called preliminary insolvency administrator (*vorläufiger Insolvenzverwalter*) and open preliminary insolvency proceedings. Preliminary insolvency proceedings usually take up to three months and serve to determine whether a reason to open insolvency proceedings exists and whether the company's assets are sufficient to cover the expected costs of the insolvency proceedings. Even during preliminary insolvency proceedings, the insolvency court (*Insolvenzgericht*) may (and often will) impose a prohibition on enforcement measures against the debtor. While this prohibition does not apply to enforcement measures in respect of real estate, in this regard, the preliminary insolvency administrator can still apply for the suspension of enforcement by public auction, provided that he or she shows probable cause that the suspension is necessary to prevent adverse changes affecting the debtor's financial situation.

The opening of insolvency proceedings imposes a moratorium on all enforcement measures against the insolvent debtor. See question 8.1 below on creditors with a right to preferential treatment.

7.7 Will the courts in Germany recognise and enforce an arbitral award given against the company without re-examination of the merits?

German law provides for very limited review of arbitral awards. The recognition and enforcement of arbitral awards is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Generally, a court will not re-examine the merits. Exceptional grounds for review include the invalidity of the arbitration agreement, and thus, the lack of jurisdiction of the arbitral tribunal.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Upon the opening of insolvency proceedings, secured creditors generally have a right to preferential treatment (*Absonderung*), i.e., a right to obtain preferred satisfaction from the proceeds of enforcement, with all other creditors being entitled to share only in the surplus (if any). Security over inventory/movables in possession of the insolvency administrator (*Insolvenzverwalter*) may generally be enforced only by such the insolvency administrator. Likewise, the insolvency administrator is generally entitled to enforce security over receivables, even where the obligor has been notified of the assignment. The secured party itself may generally enforce security over receivables or movables only in the rare cases where the security interest takes the form of a pledge. Generally, both the secured party and the insolvency administrator are entitled to enforce liens on real estate by way of public auction or sequestration, and the insolvency administrator may also enforce such liens by way of a discretionary sale. However, a secured creditor's rights can be limited in various ways. *Inter alia*, the insolvency administrator may apply for the suspension of enforcement by way of public auction, in particular where the auction would significantly impair the realisation of the insolvency estate.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Upon the opening of insolvency proceedings in Germany, the insolvency administrator is entitled to challenge acts of the debtor that prejudice third party creditors, provided that certain additional requirements are met. These requirements are set out in statutory rules. German insolvency courts do not have the same discretion in this respect that insolvency courts have in other jurisdictions. Preference periods range from one month to ten years prior to the filing of the application for the opening of the insolvency proceedings.

In particular, the insolvency administrator has the right to challenge acts that granted a creditor security or satisfaction where the act was performed (i) during the last three months prior to the filing of the application for the opening of insolvency proceedings, provided that at such time the debtor was unable to pay its debts as they became due and the creditor knew of such inability, or (ii) after such filing, provided that at such time the creditor knew of the debtor's inability to pay its debts or the filing.

The insolvency administrator may also challenge acts that granted a creditor collateral or satisfaction to which such creditor was not entitled – or not in such a way or not at such time – if the act was performed (i) during the last month prior to the filing of the application for the opening of insolvency proceedings or after such filing, (ii) during the second or third month prior to the filing of the application and the debtor was illiquid at such time, or (iii) during the second or third month prior to the filing of the application and the creditor knew at the time such act was performed that such act was detrimental to the debtor's third party creditors.

Challengeable are further transactions (*Rechtsgeschäfte*) of the debtor directly prejudicing the debtor's other creditors if the transaction was conducted (i) during the three months prior to the filing of the application for the opening of insolvency proceedings, provided that at such time the debtor was illiquid and the creditor knew of such illiquidity, or (ii) after such filing, provided that at such time the creditor knew of the debtor's illiquidity or the filing.

Any acts performed without any consideration can also be challenged by the insolvency administrator, except if performed more than four years prior to the filing of the application for the opening of insolvency proceedings.

Furthermore, the insolvency administrator has the right to challenge acts performed with the intention – as known to the creditor – to prejudice the debtor's third-party creditors if the act was performed within ten years prior to the filing of the application for the opening of insolvency proceedings, or after such filing.

Regarding shareholder loans and similar transactions, the insolvency administrator can challenge:

(i) acts performed without any consideration except if performed more than four years prior to the filing of the application for the opening of insolvency proceedings;

(ii) acts providing collateral for a shareholder's claim for the repayment of a shareholder loan or similar claim if the act was performed within ten years prior to the filing of the application for the opening of insolvency proceedings or after such filing;

(iii) acts providing satisfaction for a shareholder's claim for the repayment of a shareholder loan or similar claim if the act was performed within one year prior to the filing of the application for the opening of insolvency proceedings or after such filing; or

(iv) acts providing satisfaction for a third party's claim for the payment of a loan or similar claim, provided such claim was secured by security granted by the debtor's shareholder, if the act was performed within one year prior to the filing of the application for the opening of insolvency proceedings or after such filing.

In the case of an act performed by the debtor for which there was immediate and equivalent consideration (e.g., in the case of the granting of collateral, where such collateral constitutes equivalent (*gleichwertig*) collateral and there is a direct nexus (*unmittelbarer Zusammenhang*) to the extension of a credit), such act or act constitutes a cash transaction (*Bargeschäft*). If that is the case, the administrator may challenge the act under the aforementioned rules only where the debtor performed the act with the intention to prejudice its creditors. In the case of the granting of security, depending on the type of collateral, equivalence may exist despite a certain degree of overcollateralisation. A direct nexus between the extension of a credit and the granting of the security securing the credit exists where there is no significant time lag between the extension of the credit and the granting of the security. By contrast, where a debtor grants collateral with respect to an existing debt without being specifically obliged to do so (i.e., there is no sufficiently precise contractual requirement to do so), such granting of security would not constitute a cash transaction. This rule applies even where, upon the extension of a new credit, the parties agree that the security granted to secure the new credit should also

secure existing debt that was previously incurred without granting security.

Finally, the German Insolvency Code (*Insolvenzordnung*) contains a number of presumptions that make it easier for an insolvency administrator to challenge transactions between the debtor and its related parties. For example, the insolvency administrator may challenge any transaction between the debtor and a related party if the transaction was (i) entered into for consideration during the two years preceding the filing of the application to open insolvency proceedings, (ii) directly detrimental to the debtor's third party creditors, and (iii) performed by the debtor with the intention to prejudice the debtor's third-party creditors, unless the related party can prove that it did not know of such intention.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Owing to public interest considerations, there are some entities that cannot be subject to insolvency proceedings, including certain legal entities governed by public law.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

It is a principle of German law that a creditor has to resort to legal assistance by courts if its rights are infringed or otherwise impaired. Private remedies such as "self-help" are only permissible as an *ultima ratio*, typically where there is a present danger to suffer irreparable harm.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Germany?

A party's submission to a foreign jurisdiction is governed by Article 23 of the Brussels I Regulation, at least in cross-border contracts. Pursuant to this provision, a choice of jurisdiction clause is generally permissible and legally binding. Some form requirements may apply. A clause giving only one party the choice between several jurisdictions while the other party is bound to bring actions is permissible when expressly agreed.

A jurisdiction may not be chosen if other courts have exclusive jurisdiction pursuant to Article 22 of the Brussels I Regulation. This exception applies, *inter alia*, to proceedings that have as their object rights *in rem* in immovable property or tenancies of immovable property.

At present, the scope of applicability of the Brussels I Regulation is unclear in certain cases. It is applicable in cross-border matters where both parties are domiciled in different EU Member States. If only one party is domiciled in an EU Member State and the other is domiciled either in the same Member State or in a non-EU country, a court may take the view that the choice of jurisdiction clause may be governed by national, i.e. German law. In practice, this will most likely not make a significant difference, as the German law rules are similar to the rules under EU law.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Germany?

A waiver of sovereign immunity is generally legally binding and permissible as long as it does not conflict with public international law. It should be noted that a general waiver of sovereign immunity will not extend to areas that are specifically protected by international law such as diplomatic immunity. Enforcing into assets protected by diplomatic immunity, such as embassy buildings, is only possible with an express waiver of diplomatic immunity.

10 Other Matters

10.1 Are there any eligibility requirements in Germany for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Germany need to be licensed or authorised in Germany or in their jurisdiction of incorporation?

According to the German Banking Act, the granting of cash loans in a commercial manner, or in an extent that necessitates a commercially organised business, requires the BaFin's permission. However, various exceptions to this general rule apply according to the German Banking Act. For example, insurance companies (public or private) are not regarded as banks and therefore do not require the BaFin's authorisation (see further question 2.4 above regarding a further exception applicable to banking business with certain group companies). In addition, according to the BaFin's own guidance, the authorisation requirement does not apply to a lending business protected by European fundamental freedoms that simply maintains existing client relationships, or the entry into loan agreements at a client's own initiative, which is, according to the BaFin, typically the case with large corporate clients or institutional investors.

Furthermore, the BaFin may grant individual exemptions from the permission requirement, provided that the entity does not require supervision given the nature of the business it conducts. Regarding foreign entities, such exemption can apply where the entity is effectively supervised in its home country by the competent authority/authorities in accordance with internationally recognised standards, and the competent home country authority/authorities cooperates/cooperate satisfactorily with BaFin.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Germany?

One additional consideration that should be taken into account is that a risk of lender liability under German law can result from a "tortuous grant" of a restructuring loan (*Sanierungskredit*). This concept has been developed by German courts in a series of decisions which are not very clear and, arguably, not fully consistent. The basic test is whether a lender has extended credit to a distressed company that is not viable (i.e., technically insolvent), thereby not restructuring the borrower but merely delaying its insolvency in order for the lender to obtain special benefits (such as the expiration of applicable preference periods). Where the lender acted with a certain degree of intent and/or recklessness, German courts consider the extension of such credit as unfairly prejudicial *vis-à-vis* third-party creditors of the company. As a consequence, such lender is obligated to pay damages to third-party creditors to the extent that the latter actually suffered financial damage due to the delay of insolvency. In practice, such liability is particularly relevant *vis-à-vis* future third-party creditors of the borrower that are not fully secured. Existing creditors can be entitled to damages equal to the amount by which their insolvency quota (i.e., the expected payment to them from the borrower's insolvency estate) is

reduced as a consequence of the delay of insolvency. In addition, security granted in connection with the new financing may be void under certain circumstances, or the insolvency administrator may be able to challenge such security (see question 8.2 above). On the other hand, German courts have acknowledged that every restructuring effort (which almost invariably involves the granting of new loans) involves a certain risk of failure and thus a risk of a subsequent insolvency of the borrower. The participation by a lender in a good faith restructuring effort will generally not lead to lender liability.

Another liability risk to which persons representing lenders (e.g., managing directors) are potentially exposed in the context of restructuring loans results from the fact that the lender could, under certain circumstances, be qualified as a *de facto* managing director (*faktischer Geschäftsführer*). A *de facto* managing director lacks a (legally effective) act of appointment as managing director, but manages the company in a way a *de jure* managing director would. While the requirements for the qualification as *de facto* managing director are not fully clear, it is recognised that all circumstances of the case have to be considered, in particular the duration and extent of any influence taken by the *de facto* managing director on the management. It is a requirement that the person to be qualified as *de facto* managing director acts in relation to third parties, shaping the activities of the *de jure* managing director in office. In particular, a *de facto* managing director is potentially exposed to liability *vis-à-vis* third parties for the delayed filing of an insolvency petition.

Furthermore, upon the opening of insolvency proceedings, all outstanding shareholder loans are subordinated to the claims of the borrower's other creditors, with the exception of loans granted (i) by a shareholder who has acquired its shares in an attempt to effect a restructuring (*Sanierungsprivileg*), or (ii) by a shareholder holding 10% or less of the registered share capital (*Kleinbeteiligungsprivileg*). This subordination is complemented by the insolvency administrator's right to challenge certain acts of the debtor, as described in question 8.2 above.

In the context of subordination of shareholder loans, another risk for lenders can derive from the qualification as *de facto* shareholder when the lender has been granted a pledge over a company's shares. This stems from a decision by the German Federal Court of Justice regarding what the court called "irregular pledgees" (*irreguläre Pfandgläubiger*). By this the court meant pledgees that have been granted extensive possibilities to exert influence over the company (in particular by way of covenants and consent requirements imposed by the pledgee). The court held that, where by such covenants and requirements the non-bank lender obtains *de facto* control over the pledged company, it should be treated as a *de facto* shareholder for purposes of shareholder loan subordination in the borrower's insolvency.

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Greece

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Greece?

While the Greek economy is still experiencing the longest and steepest recession anywhere in Europe in recent times, optimism is growing that Greece is reaching a turning point and will be in a position in the short/mid-term future to convince international markets that it is a creditworthy sovereign borrower. Within such a framework, consolidation and recapitalisation of the Greek banking sector has been successfully completed; however, numerous obstacles remain, which keeps liquidity away from the real economy.

1.2 What are some significant lending transactions that have taken place in Greece in recent years?

In 2013, Greek banks have continued refinancing existing loans on a syndicated basis. Within such a framework, the most significant lending transactions of 2013 were: €730m Viohalco relocation financing; a €500m ELPE Eurobond; a EUR 430m Titan multicurrency revolving credit facility; €400m Emma Delta bonds financing the acquisition of a majority stake in OPAP; €400m Ellaktor refinancing; €275m S&B senior secured notes; and €243m Mytilinaios refinancing.

In this chapter and unless otherwise indicated, any reference to:

- "lenders" means credit institutions and "borrowers" or "obligors" means companies; whereas
- "companies" means Greek corporations which are regulated by codifying Law 2190/1920 on *societé anonyms*, as amended by Law 3604/2007 and in force (the "**Greek Company Law**").

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Article 23a of Greek Company Law provides that a company is prohibited from guaranteeing the borrowings of associated legal entities, unless the following (quite strict) conditions are cumulatively met: (i) the guarantee serves the company's interests; (ii) the company has a right of recourse against the principal debtor (i.e. the associated enterprise in favour of which the guarantee is provided); (iii) the general meeting of shareholders (the "**GM**") approves the transaction by an increased special quorum and majority; and (iv) the claims of the lender, in favour of which the guarantee is provided, are subordinated to the claims of the company's existing creditors. Greek financial institutions are not subject to the above regime and may freely guarantee borrowings of members of their groups. In addition, a company may guarantee borrowings of one or more other legal entities, whose financial statements are subject to consolidation pursuant to articles 90-109 of Greek Company Law, again provided that the GM approves the transaction by an increased special majority.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

In principle, the provision of guarantee shall serve the guarantor company's interests, an issue which is a factual and multidimensional one and therefore has to be examined on a case-by-case basis. If such a condition is not met, then the guarantee is considered as null and void and directors' liability (including penal) may arise.

2.3 Is lack of corporate power an issue?

Lack of corporate power (i.e. total absence of the relevant scope in the company's Articles of Association) is an issue only to the extent that a guarantee is considered as not serving the attainment of the company's business scope, in which case it is null and void, as per our response under question 2.2. On such a basis, lenders usually require the provision of guarantee to be included in the business scope of borrower companies.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

In principle, no. As aforementioned under question 2.1, an approval by the GM, to which shareholders representing 1/10 of the paid-up share capital (1/20 in the case of listed companies) shall not oppose, is required. The Board of Directors (the "**BoD**") shall submit to the GM a report confirming satisfaction of the conditions for the lawful granting of the guarantee, whereas the GM resolution shall be registered with the Companies' Registrar and meet the statutory publication requirements. In case of companies, whose financial

statements are subject to consolidation, pursuant to articles 90-109 of Greek Company Law, the GM approval shall be resolved by a 2/3 majority (increased to 19/20, if provided on a post-transaction basis).

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

In general, no (except for guarantees raising financial assistance issues, in respect of which refer to section 4).

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, there are not.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

There are two (2) basic categories of security rights under Greek law: collateral *in personam*; and collateral *in rem*. The main personal security rights are guarantees, whereas the main real security rights are (prenotation of) mortgages (over immovable assets) and pledges (over movable assets and rights). Non-attachable assets and/or claims are not available to secure lending obligations.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Given that specific establishment, publication and registration requirements may apply depending on the type of either the security or the asset, on which such security is granted, an agreement in relation to each type of asset is commonly used. The procedure depends on whether a court decision, notarial deed or private agreement is statutorily required for the establishment of the security, as well as whether such decision, agreement or deed has to be registered with a specific authority and meet any publication requirement. See below for more details.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Collateral, in the form of either a mortgage or a prenotation of mortgage, may be taken over real property (land) and plant, as well as all component parts and accessories of the immovable (i.e. machinery and equipment), which are owned by the security provider and are fixed (or exist) thereto.

As per the provisions of the Greek Civil Code (the "**GCC**"), a mortgage is the right *in rem* established in favour of a creditor over a person's full ownership (or usufruct) rights on immovable property (land and buildings) to secure an obligation by means of the creditor's preferential satisfaction. A prenotation is a type of temporary mortgage, which may be rendered final provided that: (a) a final court decision orders payment of the due and payable claim, which is secured by the prenotation; and (b) the prenotation is converted to a mortgage within a period of 90 days from the issuance of such a court decision. Given their equal treatment as to enforceability and ranking, prenotation is usually preferred due to the lower costs involved.

As to the procedure, a mortgage may be established bilaterally, by virtue of a notarial deed, or unilaterally, by virtue of a court decision; a prenotation of mortgage is always established by virtue of a non-appealable court decision (either on a bilateral or a unilateral basis). For the perfection of both types of securities, the court decision or the notarial deed shall be registered with the competent Land Registry or Cadastre.

Under both types of security, possession of the real property is not conveyed to the creditor. Pursuant to special statutory provisions applicable to (prenotations of) mortgages securing claims of credit institutions: said securities are protected from clawback in case of bankruptcy of the collateral provider; such securities extend to any machinery and equipment that enters the mortgaged plant even after the establishment of the security; the collateral provider is prohibited from removing and/or transferring the machinery and equipment, without the prior consent of the creditor; and enforcement procedures are facilitated.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Receivables (present or future) may be pledged under the provisions of the GCC on the basis of a written agreement, which shall take the form of a notarial deed or a private agreement bearing a certain date (the latter is preferred due to its minimal costs). The agreement is executed between the creditor and the collateral provider and must be notified to the debtors of the pledged receivables in order to be perfected. Pledge of current or future business receivables may also be established under the provisions of articles 11-15 of law 2844/2000; in addition, collateral security over business receivables may take the form of a floating charge under the provisions of articles 16-18 of law 2844/2000, which is established on a group of claims/rights. Such claims/rights are freely collected/disposed by the security provider, who is, however, obliged to substitute them with similar claims/rights. Finally, claims may be pledged in favour of credit institutions licensed in Greece pursuant to the beneficial provisions of legislative decree ("**l.d.**") 17.7.1923.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A pledge over cash deposited in bank accounts is commonly realised in favour of credit institutions under the provisions of either l.d. 17.7.1923 and/or law 3301/2004, transposing into Greek law the EU Directive on financial collateral arrangements (the "**collateral law**"). The procedure involves in this case, too, a pledge agreement in the form of a notarial deed or a private agreement bearing a certain date, which is notified to the bank maintaining the accounts.

3.6 Can collateral security be taken over shares in companies incorporated in Greece? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares in companies incorporated in Greece may be pledged as security of claims arising from lending transactions. The pledge is extended to dividends and other monetary or personal rights deriving from the shares, unless otherwise agreed.

A pledge of either bearer or registered shares is realised in accordance with the aforementioned (under question 3.4) GCC procedure, with the additional requirement of delivery of the share certificates to the pledgee, whose details shall be noted on the share certificates, as well as into the shareholders' book, in the case of registered shares. In the case of dematerialised listed shares, the pledge needs to be registered with the Dematerialized Securities System. Finally, a pledge of listed shares may also be effectuated under the provisions of the collateral law.

In principle, security over shares in companies incorporated in Greece may validly be granted under a New York or English law governed document; rights *in rem* however over the shares will be governed by the *lex rei sitae*, i.e. the law of the place where either the respective account or registry is maintained, in the case of dematerialised shares, or the person – normally the security holder – holding the shares is located, in the case of securities in paper form. Finally, such choice of law will be subject to Greek public order and overriding mandatory provisions, to the extent applicable.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Given its purpose (i.e. to be sold), inventory (products) is commonly pledged, under the provisions of articles 16-18 of law 2844/2000, in the form of a floating charge over a group of assets (the inventory), which remain in the possession of the security provider, the latter being entitled to dispose, with the concurrent obligation, however, to substitute them with similar assets. A floating charge is perfected by virtue of its registration in the public book kept with the competent pledge registry.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company may grant a security interest in order to secure its obligations under a credit facility both as a borrower and as a guarantor of the obligations of other borrowers and/or guarantors of obligations.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Costs vary depending on the type of security:

In the case of mortgage, notarial fees amount to 1.2% of the security value, whereas legal fees are also payable if lawyers are involved. In the case of prenotation of mortgage, court costs do not exceed €500. Registration costs for both securities amount to 0.83% of the security value in case of land registries, or 0.93% in case of Cadastres.

Registration of the notional pledge or floating charge to the Pledge Registry is burdened with fees equal to 0.7% of the security value.

The above security costs and fees are significantly reduced in case of bond loans issued by Greek companies under the provisions of law 3156/2003 (the "**bond loans law**").

Registration of the pledge of dematerialised listed shares to the Dematerialized Securities System costs €120 (per issuer and type of share). The fees of court bailiffs for the notification of a security document amounts to €40-70 per service.

Finally, loans granted by Greek or foreign banks to Greek companies, as well as securities granted in their context, are exempted from Greek stamp duties.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

In principle, notification or registration of securities does not involve a significant amount of time. Certain Land Registries are slow in processing registrations of deeds or court decisions to their public books. In terms of expenses, please refer to our answer to question 3.9.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

In principle, no consents are required. The only related requirements are provided by the provisions of:

a. law 1892/1990, pursuant to which consents shall be obtained as to agreements involving the acquisition by non-EU individuals or legal entities of rights *in rem* on real property within Greek border areas (as well as shares in companies with such real rights); and

b. law 3310/2005, pursuant to which any agreement (including a security document) in respect of rights in shares representing at least 1% of the share capital of a media company or a company taking part to a public tender is null and void unless such agreement is executed before a notary public and notified to the Greek National Council for Radio and Television.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No. Any type of collateral secures the obligations arising from the balance of the respective accounts, after closing thereof.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

See our answers as above.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) **Shares of the company**

Pursuant to article 16a of the Greek Company Law, a company (other than a credit institution) is not allowed to provide guarantees and/or give security to support borrowings incurred to finance the direct or indirect acquisition of shares of the same by any third party (other than the company's employees) unless:

(i) the GM provides its prior consent to the guarantee and/or security by an increased quorum and majority on the basis of

a BoD report on the reasons and the company's interest for the transaction to be approved, as well as an auditor's report; and

(ii) the secured amount, which shall appear in a non-distributable reserve as long as the security is outstanding, does not cause the company's own funds to fall below the aggregate amount of share capital and non-distributable reserves.

(b) **Shares of any company which directly or indirectly owns shares in the company**

As long as the company whose shares are being acquired is considered to be the parent company of the company which is providing the guarantee or other security, then the restrictions referred to under question 4.1(a) apply.

(c) **Shares in a sister subsidiary**

This case is not covered by the provisions of the Greek Company Law.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Greece recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

In principle, no. Such a notion may only be found in the bond loans law, which provides for the role of a bondholders' representative, acting also as a security agent in the framework of bond loans issued by Greek companies, as well as securitisation transactions. Under such provisions, securities *in rem* are granted in favour of the security (bondholder) agent, which shall be either a credit institution or an investment firm, licensed to operate in Greece. Such security agent is appointed by the issuer of the bonds (i.e. borrower) and is acting in the name and on behalf of all the secured creditors (bondholders).

5.2 If an agent or trustee is not recognised in Greece, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Other than the security agent provided by the bond loans law as above, there is no alternative mechanism (including the parallel debt clause) to achieve the intended effect without any legal risk.

5.3 Assume a loan is made to a company organised under the laws of Greece and guaranteed by a guarantor organised under the laws of Greece. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The transfer of a lender's rights and obligations arising from a loan (and a guarantee) agreement is allowed, unless otherwise provided by the respective contractual provisions. In order to be perfected, the transfer shall be notified to the debtors (borrower and guarantor).

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest payable on credit facilities is not subject to withholding tax; it is not clear under the provisions of the new Greek Income Tax Code (the "**ITC**"), applicable as of 01.01.2014, whether such exemption also applies to foreign lenders (see our answer to question 6.2 for applicable DTT rates). A 15% withholding tax is levied on interest from bond loans issued by resident companies (see our answer to question 6.2 for foreign investors). The above tax treatment should not alter due to the fact that interest has been paid in the form of proceeds from a guarantee claim or from enforcement of security.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

In cases where, under ITC provisions, interest payable to foreign lenders is subject to withholding tax, the lower rate among the following shall apply:

(a) 15%, as provided by ITC;

(b) the rate provided by the tax treaty (if any), signed by Greece, with the State of which the foreign lender is a tax resident; and

(c) the zero rate provided by the EU Interest and Royalties Directive, if the relevant statutory conditions are met.

It seems that under the ITC the exemption of non-resident companies without a permanent establishment in Greece from any withholding tax on interest from bond loans issued by resident companies no longer applies.

6.3 Will any income of a foreign lender become taxable in Greece solely because of a loan to or guarantee and/or grant of security from a company in Greece?

Foreign banks do not acquire a permanent establishment in Greece solely because of the granting of a loan to a Greek company or a guarantee and/or grant of security therefrom.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

An annual contribution at the rate of 0.6% is imposed on the average outstanding monthly balance of each loan granted by a Greek or foreign bank to a Greek resident. Loans between banks, loans to the Greek State, loans funded by the EIB, as well as bond loans are exempt from such contribution. As to guarantees, no additional cost arises. For costs and fees in respect of securities, kindly refer to our answer to question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

There are, in principle, no adverse legal consequences to a borrower due to the fact that some or all of the lenders are organised under the laws of a jurisdiction other than Greece. Thin capitalisation rules exist in Greece, but their application is not affected by the residence of the lenders. Deductibility of interest may be disallowed under special tax anti-avoidance provisions.

7 Judicial Enforcement

7.1 Will the courts in Greece recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Greece enforce a contract that has a foreign governing law?

Greek courts do recognise and enforce contracts that have a foreign governing law on the basis of the provisions of the Rome Convention on the law applicable to contractual obligations and Regulation EC 593/2008, whichever is applicable, subject to: rights *in rem*, which are governed by the law applicable as per the conflict of law rules; Greek public order; and overriding mandatory provisions.

7.2 Will the courts in Greece recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes, Greek courts will recognise and enforce a foreign judgment without re-examination of the case, pursuant to the applicable provisions of: EU Regulations, in case of judgments from other EU Member States (e.g. Regulations EC 44/2001 and/or 805/2004 and/or 1215/2012, which shall take force after 10.01.2015); bilateral International Conventions; and the respective provisions of the Greek Code of Civil Procedure (the "**GCCP**").

However, Greek courts may deny recognition in case: the foreign judgment is not an enforceable title or a *res judicata* in the foreign country; it is issued by a foreign court not having jurisdiction as per Greek law; it violates the Greek public order; the defendant was deprived of its rights to a fair trial; or the foreign judgment is contrary to a Greek judgment, which is *res judicata* for the same issue and parties.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Greece, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Greece against the assets of the company?

The period required for a foreign lender to obtain a judgment over a Greek law governed contract starts from six months, in case of a payment order, and goes as far as two to four years, in case of a law suit. In the case of a foreign governing law, such periods are expected to be significantly extended. The period required for the recognition of a foreign judgment may also prove considerable.

In any case, enforcement of a Greek or foreign judgment and actual satisfaction of a lender is usually lengthy, especially when auctions are involved (see below, question 7.4), given that legal defences (other than to claim payment) are available to the obligor(s) during the enforcement procedure as a consequence of the typically excessive requirements of the latter. The length of the process is also heavily dependent on if there are claims of other creditors participating in the enforcement and auction proceedings with general and/or special privileges, as per the GCCP provisions.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Under the GCCP's general rules of enforcement of security, the mortgagee/pledgee of mortgaged/ pledged immovable/movable assets may seek satisfaction through the issuance of an enforceable title (in principle, either non-appealable court decisions, including payment orders, or notarial deeds), which is followed by seizure of the property for auction. The GCCP includes specific rules as to the actions and periods within which enforcement proceedings shall be effectuated.

As to the allocation of proceeds from the auction of a specific asset, in case of multiple creditors participating in the respective proceedings with claims which are higher than the auction proceeds, the following order of priority applies. First, limited enforcement expenses are covered. Then, State claims from VAT due (including surcharges), dismissal compensations, employment claims of the last two (2) years prior to the auction and social security claims due until the day of the auction are fully covered. Finally a maximum of 1/3 of the balance goes to creditors with general privileges (mainly State claims from taxes other than VAT), and 2/3 thereof satisfies the claims of special privileges (i.e. those having a security over the auctioned asset).

The above mandatory auction is avoided in case of: a pledge of claims under the provisions of l.d. 17.7.1923, where the credit institution arguably acquires full ownership thereof and is entitled to liquidate the claim, with the obligation to refund to the borrower any amount exceeding its secured claim; and financial collateral arrangements under the provisions of the collateral law, which provide for the satisfaction of the creditor through sale, set off or application of the financial instruments and/or cash in discharge of the relevant obligations.

No regulatory consents are required.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Greece or (b) foreclosure on collateral security?

No restrictions apply. However, it has been argued that foreign lenders do not enjoy the benefits of l.d. 17.7.1923.

7.6 Do the bankruptcy, reorganisation or similar laws in Greece provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Bankruptcy or reorganisation (reconciliation) proceedings involve suspension of enforcement proceedings, which, however, apply for a limited period of time (usually not more than one year). In the case of reconciliation, collateral security rights may be amended, as provided by the reconciliation agreement reached between the debtor and its creditors.

7.7 Will the courts in Greece recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. An arbitral award will be recognised by Greek courts under the provisions of the New York Convention for its contracting states, and under the provisions of the GCCP for any other case.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

As already mentioned, in case of bankruptcy the court usually imposes a temporary moratorium on individual prosecutions (i.e. prohibiting the lender from commencing or continuing enforcement procedures against the debtor who has been declared bankrupt). In addition, a security agreement is subject to the clawback provisions of the Greek bankruptcy code (security agreements are in principle protected from clawback if established by virtue of the provisions of the collateral law or law 4112/1929, as well as if carried out in the framework of a reconciliation plan). Finally, the Greek bankruptcy code provides that creditors with a real security on an asset of the bankruptcy estate are satisfied solely by the liquidation of such asset, with an option however to waive their security and be satisfied by the whole bankruptcy estate, in which case their claims are subordinated as per the Greek bankruptcy code provisions. Securities under the collateral law are in principle not affected by the bankruptcy proceeding.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

According to the Greek bankruptcy code, transactions (i.e. donations or other transactions with disproportionately small consideration, payments of non-outstanding debts, establishment of *in rem* securities) held during the suspect period are subject to clawback, upon request of the bankruptcy administrator or a creditor. The suspect (preference) period is determined by the bankruptcy court and may not start earlier than two years from the date of issuance of the court decision declaring bankruptcy. Furthermore, transactions carried out within a period of five years preceding the declaration of bankruptcy are conditionally subject to clawback.

During bankruptcy proceedings, the following priority of payments applies: first, specific costs incurred in the bankruptcy proceedings are covered; then, State claims from VAT due (including surcharges), dismissal compensations, employment claims of the two (2) years prior to the declaration of bankruptcy and social security claims due until the day of the declaration of bankruptcy are fully satisfied; then, general privileges up to 1/3 of the remaining amount (mainly claims from financing of the insolvent company during implementation of any reconciliation agreement and State claims from taxes, other than VAT) are paid, whereas the other 2/3 satisfy special privileges (i.e. secured claims). Finally, unsecured claims are covered.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The Greek bankruptcy code is applicable to all types of companies, except for the following legal entities which are subject to special liquidation provisions: credit institutions as provided by article 68 of law 3601/2007; insurance undertakings as provided by articles 10 and 12a of Greek l.d. 400/1970; and investment firms, as provided by article 22 of law 3606/2007.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

As aforementioned, the only enforcement processes that do not involve court proceedings are those provided by (a) l.d. 17.7.1923, and (b) the collateral law.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Greece?

Yes, it is legally binding and enforceable.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Greece?

An obligor's waiver of sovereign immunity is legally binding and enforceable under the laws of Greece, subject to any overriding mandatory provision establishing an immunity right in favour of that obligor.

10 Other Matters

10.1 Are there any eligibility requirements in Greece for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Greece need to be licensed or authorised in Greece or in their jurisdiction of incorporation?

In principle, loans to a Greek company may be granted either by: credit institutions (an authorisation by the Bank of Greece is required in case of a non-EU bank); other entities licensed by the Bank of Greece to carry out lending business; or members of the same corporate group. In addition, as aforementioned, the security agent under the bond loans law shall be a credit institution or an investment firm licensed to operate in Greece.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Greece?

Lenders and equity investors need to obtain special legal and tax advice when participating in financings in Greece.

Note

This chapter is up-to-date as at January 31, 2014.

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KPP Law (Kerameus, Papademetriou, Papadopoulos Law Offices) consists of Greek and foreign lawyers with advanced levels of education and considerable professional experience.

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Hong Kong

Vincent Sum

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Hong Kong?

It has been reported that syndicated lending activity in 2013 increased by more than 80% compared to the previous year. This was a product of, among other things, increased demand from borrowers in Mainland China. The increase in lending activity in Hong Kong was consistent with a material increase in lending activity across the Asia Pacific region generally, involving larger average loan sizes and more multibillion dollar loans.

In July 2012, the Legislative Council in Hong Kong passed the New Companies Ordinance (Cap. 622) ("**CO**"). The majority of the provisions of the new legislation took effect on 3 March 2014 and they have several implications for financing transactions, including with respect to the registration of charges and the rules relating to the giving of financial assistance, among other things.

1.2 What are some significant lending transactions that have taken place in Hong Kong in recent years?

Significant transactions by loan size in 2013 included the US$8 billion loan to Alibaba Group Holding Ltd by a large syndicate reported to consist of over 20 institutions, and the US$6 billion syndicated term loan to CNOOC Canada Holding Ltd., in connection with the widely reported acquisition by China National Offshore Oil Corporation (one of China's largest oil companies) of the Canadian energy company, Nexen Inc. Other significant deals included the US$1.525 billion loan to Focus Media Holding Ltd. by a syndicate of lenders in connection with the private equity buy-out of Focus Media by a consortium, including Carlyle Group LP.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Subject to the prohibition on giving financial assistance (addressed in section 4 below), there is, in principle, nothing to restrict a company guaranteeing the borrowings of other members of its corporate group, provided that it is in the guarantor's best interests to do so (see question 2.2).

It should be noted that section 500 CO prohibits, subject to specified exceptions, a company giving a guarantee in connection with a loan made to a director of the company, a director of the company's holding company or to another company controlled by one or more such directors.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

A guarantee must serve the guarantor's own commercial interests rather than just the interests of its corporate group as a whole. The directors of the guarantor have a fiduciary duty to act *bona fide* in what they consider to be the best interests of the company and for a proper purpose.

Whether or not the guarantee does benefit the company is a question of fact to be determined by the directors having regard to the circumstances surrounding the transaction and the guarantor. Corporate benefit may be more difficult to demonstrate in the case of a proposed upstream or cross guarantee.

If the directors breach their duty to act in the best interests of the company they can be personally liable. In certain circumstances, if the creditor had actual or constructive knowledge of such breach, a liquidator of the guarantor may be able to apply to court to set aside the guarantee and recover any benefits conferred on the creditor, such as payments made under the guarantee.

2.3 Is lack of corporate power an issue?

A Hong Kong company formed on or after 31 August 1984 has the power to give guarantees, subject to any limitation or restriction in its articles of association. It should be noted that by virtue of section 98 CO, Hong Kong companies no longer have a memorandum of association although the provisions of any pre-existing memorandum are deemed to be incorporated into the articles of association.

Subject to certain exceptions, the power of the directors to bind the company is regarded as free of any such limitation or restriction under the articles in favour of a person dealing with the company in good faith. However, it is still best practice to check the guarantor's constitutional documents to ensure that there are no relevant restrictions or limitations on the company's power.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

As a general rule, no, although the directors of a company giving a guarantee may wish to seek shareholder approval in circumstances in which they have corporate benefit concerns (see question 2.2 above). A valid and enforceable guarantee will also need to adhere to the principles of contract law.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no such limitations, although the greater the potential value of the guarantee, the more important it will be for the directors of the guarantor to be able to demonstrate corporate benefit to the guarantor (see question 2.2).

In addition, if the guarantor was or becomes (within the requisite statutory clawback periods) insolvent after entering into the guarantee, the guarantee may be vulnerable to being set aside if it can be shown to constitute, for example, a transaction defrauding creditors (see further question 8.2).

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, although controls do exist in Mainland China, which may be relevant if the guarantor is a Chinese company.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

A large variety of different types of assets and interests, whether tangible or otherwise, are available to secure lending obligations under Hong Kong law. The following types of assets are most commonly used as collateral in Hong Kong.

- Real estate, which includes land, any right, interest or easement in or over land, the whole or part of an undivided share in land and any fixtures that are permanently fastened to land such as buildings (see Conveyancing and Property Ordinance (Cap. 219) ("**CPO**")).
- Receivables and claims, which are rights under contracts and include book debts and receivables in the form of loans, notes and other types of financial receivables. Examples of financial receivables include trade receivables and future toll road receivables.
- Financial instruments such as listed and unlisted shares, bonds, exchange-traded funds and other forms of securities, whether they are directly held by the owner or held indirectly through a clearing system (e.g. the Central Clearing and Settlement System ("**CCASS**") operated by the Hong Kong Securities Clearing Company Limited ("**HKSCC**")).
- Cash deposits in bank accounts.
- Tangible movable assets such as ships, aircraft, inventory and machinery.

Other common collateral asset classes include insurance and intellectual property.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is possible to grant security over different types of assets by means of a general security agreement. In practice, however, a separate security agreement is typically used for each type of asset as the perfection requirements are likely to vary. Perfection may involve complying with certain registration formalities, such as a security interest created over land in Hong Kong (registration with the Land Registry); a ship registered under the flag of Hong Kong (registration with the Marine Department); or a trade mark registered in Hong Kong (registration with the Intellectual Property Department). Failure to comply with applicable registration formalities may result in a loss of priority over claims from subsequent secured creditors with security over the relevant asset.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Land and Plant

Security can be taken over land (which, as defined in the CPO, includes any permanent fixtures attaching to the land such as a plant in the form of a building) and is most commonly created by way of a statutory legal charge (typically referred to as a mortgage in Hong Kong) or an equitable mortgage. A statutory legal charge over land should be in writing, executed as a deed, and expressed to be a legal charge under the CPO. The mortgagee under a legal charge has the powers, rights and protections given to it under the CPO which include, among other things, the power to sell and the right to possess the property in the event of a default by the mortgagor. An equitable mortgage is an informal, but enforceable, security arrangement that may arise where the title deeds of a property are deposited with the lender. If the equitable mortgage is executed as a deed, the lender will benefit from most of the powers and protections of a mortgagee under a legal charge, except in relation to the power to sell the property.

Any instrument that gives effect to the creation or transfer of a security interest in land in Hong Kong should be registered with the Land Registry within one month from the execution of the instrument in order to preserve the priority of the security interest over any subsequent interests (see section 5 of the Land Registration Ordinance (Cap. 128) ("**LRO**")). An unregistered instrument will be void against any subsequent purchaser in good faith or mortgagee for valuable consideration (see section 3 LRO).

If the mortgagor is a Hong Kong incorporated company or, in the case of a mortgage over property situated in Hong Kong, a non-Hong Kong company that maintains a registered place of business in Hong Kong (registered with the Companies Registry under Part XVI CO), particulars of the security interest (including a certified copy of the security instrument) must also be registered with the Companies Registry within one calendar month from the date of its creation (see sections 335 and 336 CO) in order to perfect the security interest.

Machinery and Equipment

Security can be taken over machinery and equipment, which generally constitute movable property not permanently attached to land and, therefore are not considered as land within the meaning of the CPO. The most common methods of granting security over machinery and equipment in Hong Kong are by way of a fixed or floating charge for the benefit of a secured party. Security can also be created over machinery and equipment by way of a mortgage (legal or equitable), pledge or lien.

A charge provides the secured party (or chargee) the right to appropriate the charged property, i.e. the machinery and equipment, to discharge the debt in the event of a default by the chargor (the collateral provider). It creates an encumbrance over the machinery

and equipment but does not transfer ownership or possession of it to the chargee (although a document creating a charge will usually grant the chargee with a power of attorney to compel a transfer of ownership in the event of a default by the chargor).

A charge may be fixed or floating. In the case of a fixed charge, the encumbrance attaches to specifically identified property – in this case machinery and equipment – immediately upon the creation of the fixed charge (or, in the case of a fixed charge over future machinery and equipment, immediately upon the relevant machinery or equipment coming into existence as the chargor's assets). The fixed charge deprives the chargor of the right freely to deal with, or maintain control over, the charged assets without the consent of the chargee. In contrast, a floating charge is a charge over unascertained assets within a defined category, which crystallises into a fixed charge upon the occurrence of a specified event, at which point the charge attaches to the specific assets then constituting the property in existence within the defined category. Applied here, the chargor, as owner, retains control over the charged machinery and equipment and has the right to deal with, use and dispose of the machinery and equipment in the ordinary course of business. New and replacement machinery and equipment would automatically become subject to the floating charge. Notwithstanding the label the parties may give a charge, whether a court would regard it as floating or fixed will depend upon, among other things, the extent to which the chargor can in fact deal with, and exert control over, the charged property.

While a chargor typically will prefer a floating charge (as this preserves its ability to freely deal with the property), a secured party typically will prefer a fixed charge given certain disadvantages of a floating charge, including the fact that, in a liquidation of the chargor, the claim secured by a fixed charge ranks above the liquidator's expenses and certain statutorily preferred claims, such as certain claims of employees. A floating charge, on the other hand, ranks below such claims and expenses.

In addition, a person who acquires an interest in property subject to an uncrystallised floating charge will generally acquire the interest free of the charge. On the other hand, the rights of a chargee under a fixed charge will only be defeated by a third-party purchaser of the charged property who acquires it in good faith without notice of the fixed charge. If the fixed charge has been duly registered, a purchaser will in any event be deemed to have knowledge of the charge.

In the event of a liquidation of the chargor, section 267 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance ("**CWMPO**") provides that a floating charge created within the 12 months preceding the commencement of the winding-up may be void unless the debtor was solvent immediately after the creation of the charge.

Alternatively, security over machinery and equipment can be taken by way of a legal or equitable mortgage. Under a legal mortgage, legal title to the collateral is held by the lender (the mortgagee), subject to a condition requiring the lender to transfer title back to the borrower (the mortgagor) upon full performance or redemption of the secured obligations (e.g. on discharge of the debt in full). An equitable mortgage may exist where the parties intended to create a legal mortgage but there was no transfer to the lender of legal title to the secured property.

Finally, it is also possible to create security over machinery and equipment by way of a pledge, which requires a constructive or actual transfer of possession of the property, or by way of a lien, which involves the retention of possession by the lien holder in order to secure a debt in the form of, for example, unpaid servicing fees on the relevant machinery or equipment. A lien may arise by express agreement or by operation of law.

Where the security is given by a Hong Kong incorporated company or, in the case of security over property situated in Hong Kong, a non-Hong Kong company that maintains a registered place of business in Hong Kong (registered with the Companies Registry under Part XVI of the CO), registration requirements under sections 335 and 336 CO are applicable (see above).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security can be taken over receivables. Where the receivables in question are governed by Hong Kong law, perfection requirements and rules relating to priority will be governed by Hong Kong law, regardless of the governing law of the contract creating the security interest. The most common methods of granting security over receivables in Hong Kong are through an assignment by way of security or a charge.

An assignment of receivables by way of security to a secured party will typically provide for reassignment of the receivables once the secured obligations have been performed or redeemed (e.g. when the debt has been fully discharged).

An assignment may be a legal assignment or an equitable assignment. A legal assignment is an assignment that complies with the requirements under section 9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) ("**LARCO**"). An assignment will be an effective legal assignment if:

- it is an absolute assignment whereby the assignor's entire legal interest in the receivables is transferred to the assignee;
- the assignment is in writing signed by the assignor, or by an agent authorised by it;
- the subject matter of the assignment is legal debts; and
- express written notice of the assignment is given to the obligor.

An assignment which does not meet one or more of the above criteria will be an equitable assignment. Equitable assignments, which are enforceable in the name of the assignor, are common as assignors often prefer to avoid providing written notice to obligors, especially where it is commercially impractical to do so (e.g., where large volumes of receivables involving multiple obligors are continuously created and assigned).

An assignment is perfected once the requirements specified under section 9 LARCO have been satisfied (see above). Where competing claims to the same receivables exist among multiple assignees, the order in which notices of assignment were given to the obligor will determine priority. A perfected assignment where notice of the assignment has been given to the obligor will take priority over an earlier assignment with respect to which notice either was not given to the obligor or was given, but subsequent to the perfection of the later assignment (unless the assignee of the later assignment had knowledge at the time of the assignment of the existence of the earlier assignment).

The purchaser may alternatively create a charge over receivables for the benefit of a secured party (see question 3.3 above for details of the features of these types of charges).

Security created over receivables of a Hong Kong incorporated company or, in the case of receivables situated in Hong Kong, a non-Hong Kong company that maintains a registered place of business in Hong Kong (registered with the Companies Registry under Part XVI of the CO) is registrable under sections 335 and 336 CO (see above).

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Security may be taken over a bank account (including the cash deposited in the account) situated in Hong Kong by way of a fixed or floating charge (see question 3.3 above for details of the features of these types of charges).

While the Hong Kong court generally will recognise security governed by a foreign law over a Hong Kong bank account, Hong Kong law perfection requirements are still applicable. Charges over bank accounts are not strictly registrable under the CO, although it is common practice to register such security interests that are granted by a Hong Kong incorporated company or a non-Hong Kong company that maintains a registered place of business in Hong Kong (registered with the Companies registry under Part XVI CO) as if such security interests were required to be registered under sections 335 or 336 CO.

3.6 Can collateral security be taken over shares in companies incorporated in Hong Kong? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Security can be taken over shares in a Hong Kong incorporated company by way of a mortgage or charge. Shares in a Hong Kong company may be in certificated form or in scripless form held indirectly through a clearing system such as the CCASS operated by the HKSCC.

Security over shares in certificated form may be created by way of a legal mortgage, where the shares are transferred to the mortgagee (or its nominee) who becomes the registered holder, with an agreement by the mortgagee to transfer the shares back to the mortgagor on repayment of the debt by the mortgagor. Alternatively, the mortgagor may create a security interest over the shares by way of a charge or equitable mortgage whereby the mortgagor remains the legal owner of the shares at the time the security is created, but the share certificates are physically deposited with the secured party together with other relevant supporting documents (such as a signed blank share transfer form and contract notes) so that a transfer of ownership of the shares to the secured party may be effected if the security becomes enforceable. If a charge or equitable mortgage is created over a company's shares, the company is usually notified of the security interest.

If shares are held in scripless form with CCASS, then security is usually created by way of a charge over certain rights of the chargor relating to the shares, such as rights against CCASS and the relevant participant of CCASS. Notice of the security interest must be given to the participant.

It is common practice for a security interest over shares to be registered with the Companies Registry if the collateral provider is a Hong Kong incorporated company or a non-Hong Kong company that maintains a registered place of business in Hong Kong (under sections 335 and 336 CO – see above). Although a security interest over shares is not specified as a registrable charge under the CO, declared dividends relating to the shares may be considered as book debts, which fall within one of the categories of registrable charges under the CO.

Security over shares can be granted under a New York or English law governed security document (as Hong Kong courts will generally give effect to the contracting parties' choice of foreign law provided certain conditions are satisfied – see question 7.1 below). However, irrespective of the choice of law, perfection requirements under Hong Kong law would apply where the *lex situs* of the shares is Hong Kong.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security can be taken over inventory, usually in the form of a floating charge. A floating charge is usually more appropriate than a fixed charge or a legal mortgage as a form of security over inventory, given the need for the chargor to deal with the charged assets in the ordinary course of business and the turnover of inventory (see the response to question 3.3 above for a detailed discussion about charges and mortgages). New inventory may automatically become the subject of a floating charge and, upon the occurrence of an enforcement event, the floating charge would crystallise into a fixed charge which attaches to the specific inventory items then constituting the charged property. A floating charge must be perfected by registration at the Companies Registry under sections 335 and 336 CO, where applicable (see above).

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A Hong Kong company may grant a security interest to secure its obligations as a borrower under a credit facility. The secured obligations may include not only payment obligations but also other types of obligations (e.g. an obligation to comply with covenants and undertakings). In general, a company may grant a security interest in order to secure its obligations as a guarantor of the obligations of other borrowers or guarantors of obligations under a credit facility. However, there are restrictions in certain circumstances, as discussed in response to section 4 below.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Stamp duty

Stamp duty is generally not payable on the creation or enforcement of a security interest, unless it involves a transfer of title, whether in a legal mortgage or upon enforcement, with respect to certain types of assets. Stamp duty is chargeable in Hong Kong under the Stamp Duty Ordinance (Cap. 117) for transfers of interests in land, debt instruments in bearer form and shares (subject to certain exemptions where shares are transferred pursuant to a stock lending and stock borrowing transaction).

Registration fees

Registration fees are payable with respect to each instrument that is registered with the relevant registry. The relevant registries (and the registration fees currently applicable) in Hong Kong are the Companies Registry (HK$340), the Land Registry (HK$200 to HK$450 depending on, among other things, the nature of the instrument being registered and the value involved), the Trade Marks Registry (HK$800), the Patents Registry (HK$325) and the Designs Registry (HK$590).

Notarisation fees

Security documents are not required to be notarised in Hong Kong.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

No. Registrations and filings at various registries in Hong Kong generally take several weeks. See question 3.9 regarding registration fees.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No regulatory or similar consents are required in order to create a security interest in Hong Kong, except in certain circumstances involving the transfer of shares (in a legal mortgage) in, or an assignment of, assets of a telecommunications company that holds a carrier licence (such as a 3G licence), in which case an approval from the Office of Telecommunications Authority ("OFTA") is required. It is common practice to seek a comfort letter from the OFTA even if the creation of a security interest does not involve a transfer of shares or assets (such as where a charge or equitable mortgage is created). The comfort letter ideally should state that the creation of the security interest does not violate any laws or regulations and the terms of the relevant licence.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No. In Hong Kong, priority depends on various factors relating to the creation and perfection of the security interest (such as the form of security created and the timing of perfection or registration of a security interest) and not on the nature of the obligations which are being secured.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

With respect to land, as discussed in question 3.3 above, a statutory legal charge or an equitable mortgage (executed as a deed) must be created under the CPO in order for a mortgagee to be entitled to take advantage of the protections and rights under the Ordinance. A statutory legal charge over land must be in writing, executed as a deed and expressed to be a legal charge under the CPO.

A mortgage over a ship registered under the flag of Hong Kong is required to be in a prescribed form and registered with the Hong Kong Marine Department. The prescribed form requires only basic information about the relevant transaction and details of the parties involved. Supplemental agreements between the parties may be filed using the prescribed form.

Where an instrument contains the grant of a power of attorney, it is required under the Powers of Attorney Ordinance (Cap. 31) to be executed as a deed. A Hong Kong law governed charge typically includes the grant of a power of attorney by the chargor to the chargee and is therefore typically executed as a deed. Furthermore, where it is unclear whether valuable consideration is given, a security agreement should be executed as a deed as it is generally binding and enforceable despite the lack of consideration. To be validly executed as a deed, a document must comply with certain formalities applicable to deeds, including a clear marking on the face of the document that it is intended to be a deed.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Yes. Under Hong Kong law, where a person has acquired shares in a company and any liability has been incurred (by that or any other person), for the purpose of that acquisition, it is (subject to certain limited exceptions) not lawful for the company or any of its subsidiaries to give financial assistance directly or indirectly for the purpose of reducing or discharging the liability so incurred (section 275 CO). The term "financial assistance" is a broadly defined term that includes a guarantee, security, indemnity and loan, among other things. A company that guarantees or grants security to support a loan incurred by the borrower to acquire shares of the company would fall within the general prohibition of the law. However, financial assistance may be given in certain circumstances (broadly, if the financial assistance does not exceed 5% of the paid up share capital and reserves of the company or is pre-approved by shareholders) if the detailed requirements of certain statutory authorisation procedures in sections 283 to 285 CO are met. Such requirements include the need for the directors of the company giving the assistance to make a solvency statement in respect of the company.

(b) Shares of any company which directly or indirectly owns shares in the company

Yes. The general prohibition discussed in (a) above and the relevant exceptions may also apply where a direct or indirect subsidiary of a holding company (other than a holding company incorporated outside Hong Kong) provides financial assistance to support a loan incurred by the borrower to acquire shares of the holding company.

(c) Shares in a sister subsidiary

Although the prohibition does not expressly prohibit a company from providing financial assistance for the purpose of acquiring shares in a sister subsidiary of the company, it is important for the directors of the company to ensure that, by providing such financial assistance, they are not acting in breach of their fiduciary duty to act in good faith in the best interests of the company and that the transaction is for the commercial benefit of the company. Whether commercial benefit exists is a matter of fact and should be determined in light of all the surrounding circumstances. Directors may seek shareholders' approval to support their position.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Hong Kong recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The concepts of agency and trust are well recognised in Hong Kong. In syndicated lending in Hong Kong, it is common for the agent bank to act as security trustee and, thus, hold security as trustee for the secured lenders. A security trustee can enforce its rights in a Hong Kong court.

5.2 If an agent or trustee is not recognised in Hong Kong, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable, as the agent and trustee concepts are recognised in Hong Kong.

5.3 Assume a loan is made to a company organised under the laws of Hong Kong and guaranteed by a guarantor organised under the laws of Hong Kong. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The loan and guarantee can be transferred in one of two key ways: by assignment, or by novation.

Assignment:

Provided that the loan agreement does not contain any restrictions on assignment, Lender A can assign the benefit of the loan to Lender B without the need for the consent of the borrower although only the benefit, and not the burden, of an agreement can be assigned. To ensure that the loan can be enforced by Lender B in its own name, a legal assignment will be required. The assignment will only be a legal assignment if: (i) it is in writing signed by the assignor; (ii) it is absolute (and not conditional or revocable); (iii) notice is given to the assignee (who is usually a party to the assignment contract); and (iv) written notice of assignment is given to the borrower. If the loan agreement prohibits assignments, the consent of the borrower will be required.

To ensure that Lender B can enforce the guarantee in its own name, it will also be necessary for the guarantee to be legally assigned to Lender B. To avoid any argument that the guarantee is discharged as a result of the assignment of the loan, the guarantor's consent to the assignment should be obtained.

Novation:

Alternatively, Lender A could novate the contract to Lender B. In a novation, both the benefit and burden of the contract are transferred to the transferee. The consent of each of the borrower, Lender A and Lender B would be required. A novation would have the effect of extinguishing the original contact between the borrower and Lender A and replacing it with a new contract between the borrower and Lender B. This would have the effect of releasing the guarantee given in respect of that contract. It will therefore also be necessary for the guarantee to be transferred to Lender B with the guarantor's consent or alternatively for Lender B to enter into a new guarantee agreement with the guarantor.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Hong Kong does not levy withholding tax on either interest payable on loans, proceeds of a claim under a guarantee or proceeds of enforcing security.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Tax advantages for foreign investors and creditors

There are no incentive regimes in Hong Kong that are offered only to foreign investors or creditors. However, Hong Kong maintains a favourable tax regime with low profits tax rates, and the absence of capital gains, interest and dividend taxes makes it an attractive jurisdiction to potential investors and creditors. Furthermore, there are certain tax facilities available in Hong Kong to encourage investments in general. These include accelerated depreciation allowances on plant and machinery and, provided certain conditions are met, availability of special deductions for certain expenses such as capital expenditure on the provision of certain fixed assets (such as manufacturing machinery and computer hardware and software) and expenditure for building refurbishment. Preferential profits tax treatment may also be available, including a preferential profits tax rate or an exemption for certain profits derived from investments in a select list of bonds and other debt instruments, and a preferential profits tax rate for qualifying reinsurance business on profits from insuring offshore risks.

While not limited to foreign entities, authorised companies that participate in insuring offshore risks receive an exemption of 50% on their profits tax.

Taxes which apply especially to foreign investors

Since October 2012, Hong Kong has applied a special Buyer's Stamp Duty of 15% (of the stated consideration paid or market value, whichever is higher) on real estate acquisitions for purchasers who are companies and foreign individuals who are not permanent residents of Hong Kong. The special stamp duty is imposed on top of the required stamp duty payable on all real estate transactions.

6.3 Will any income of a foreign lender become taxable in Hong Kong solely because of a loan to or guarantee and/or grant of security from a company in Hong Kong?

Hong Kong operates on a territorial, source-based taxation basis. In general, a company carrying on a business in Hong Kong is subject to tax on profits derived from and arising in Hong Kong. Interest income of banks will therefore normally be taxable if the income is derived from a source in Hong Kong. The general rule for determining whether interest income of a financial institution is taxable in Hong Kong is that if the interest income received by or accrued to a financial institution arises through the carrying on by the financial institution of its business in Hong Kong, the income will be taxable in Hong Kong. This is the case even if the loan that is being made is available only outside of Hong Kong.

As regards the granting of security from a company, whether the grant gives rise to tax implications depends on the collateral involved and the form of the grant. A grant of shares as security may give rise to stamp duty at the time of the grant if it involves a transfer of title such as in a legal mortgage of shares, except where the shares are transferred pursuant to a stock lending and stock borrowing transaction. See question 3.9 above.

The existence of a guarantee ordinarily would not give rise to any tax implications. However, if the guarantee is provided by the borrower by way of a deposit or another loan, then the interest

payable to the lender by the borrower may not be deductible for the borrower unless the interest on the other loan or deposit is also taxable in Hong Kong.

Hong Kong has entered into double tax agreements with a number of jurisdictions. Where a double tax agreement applies, taxes payable outside of Hong Kong may be credited against Hong Kong profits taxes on the same profit.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

See question 3.9 relating to various costs involved.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

There are no adverse consequences to the borrower in such a scenario. There are no thin capitalisation rules that apply in Hong Kong, although anti-tax avoidance rules may apply under certain circumstances to disallow the deduction of interest expenses by the borrower (see, for example, question 6.3 relating to guarantees).

7 Judicial Enforcement

7.1 Will the courts in Hong Kong recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Hong Kong enforce a contract that has a foreign governing law?

Subject to limited exceptions, the Hong Kong court will recognise, and give effect to, the contracting parties' choice of foreign law, where that choice is made in good faith and is legal and sufficiently certain. The court may refuse to apply a foreign law if doing so would be contrary to Hong Kong public policy and/or if the foreign law was chosen with the intention of evading the laws of the jurisdiction which has the most real and substantial connection with the subject matter of the contract.

Hong Kong mandatory rules and legal principles will apply in some circumstances, such as those relating to a transfer of an interest in land in Hong Kong.

7.2 Will the courts in Hong Kong recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Judgments given by the courts in New York and England and Wales are capable of being recognised and enforced in Hong Kong at common law, subject to compliance with certain requirements. The requirements include, among others, that the judgment is final and conclusive and was rendered by a court, which had competent jurisdiction. The limited grounds on which enforcement of a foreign judgment may be challenged do not allow a re-examination of the merits of the judgment.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Hong Kong, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Hong Kong against the assets of the company?

Obtaining a judgment from the Hong Kong court

Timing will largely depend on whether or not the defendant attempts to defend the claim, or takes other steps that would slow the progress of the proceedings, such as contesting the jurisdiction of the Hong Kong court to hear the claim.

If the defendant does not seek to defend the claim, it may be possible to obtain default judgment (which is administrative in nature and does not involve a consideration of the merits of the case) within around one month of the proceedings being served on the defendant.

If the defendant does file a defence which has no legal merits, it may be possible to obtain summary judgment (i.e. a judgment on the merits but without a full trial) in around 3 to 6 months. A plaintiff may also consider seeking the early determination of its case on a point of law or a strike-out of the defence.

Enforcing a judgment of the Hong Kong court against the assets of the company

There are several methods of enforcing a judgment against assets located in Hong Kong; the method(s) used will depend upon, among other things, the type(s) of asset in question. It would ordinarily take approximately two months or more to complete one of the available enforcement procedures.

Enforcing a foreign judgment

The entire process from registering, or commencing an action on, the foreign judgment (as applicable) to enforcing it over the assets of the judgment debtor by one of the available enforcement procedures would ordinarily take around four to six months (but could take materially longer if the judgment debtor seeks to resist enforcement).

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There are no significant restrictions, although the exact steps that will need to be taken and the consequent timing of the process (and need for any regulatory consents) will depend upon the nature of the security interest and property in question, as well as the proprietary remedies pursued by the secured creditor.

If court intervention is necessary, the enforcement process may take longer and be more expensive. In addition, a creditor exercising a power of sale will ordinarily owe the debtor (and surety) certain duties, which may require reasonable precautions to be taken to obtain the full market value of the property. While this may dictate in favour of a public auction, there is no general requirement that a sale of the secured assets should be conducted in this way.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Hong Kong or (b) foreclosure on collateral security?

In general, there are no such restrictions specifically applicable to foreign lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in Hong Kong provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Compulsory winding-up

Once a winding-up order has been made or following the appointment of a provisional liquidator, no action or proceeding may, except with the leave of the court, be proceeded or commenced against the company. This does not, however, prevent a secured creditor from appointing a receiver pursuant to the terms of its security agreement, although if the receiver needs to take possession of assets of the company, he or she will need leave of the court to do so. Such leave is ordinarily granted as a matter of course.

Voluntary winding-up

Unlike a compulsory winding-up, there is no statutory moratorium, although the court has a discretion to stay particular creditor actions and proceedings. However, the court will ordinarily be very reluctant to exercise its discretion to prevent a secured creditor from enforcing its security.

Schemes of arrangement

If a moratorium is agreed as part of the terms of a scheme of arrangement, it will take effect once the scheme becomes effective and will bind all creditors subject to the scheme. There will be no stay of proceedings prior to the scheme becoming effective unless the court has appointed a provisional liquidator or a liquidator to the scheme company.

7.7 Will the courts in Hong Kong recognise and enforce an arbitral award given against the company without re-examination of the merits?

Hong Kong is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by virtue of China's accession to that treaty. The Hong Kong Arbitration Ordinance (Cap. 609) ("**AO**") is largely based on the UNCITRAL Model law.

The AO stipulates that both Hong Kong and foreign awards will be enforceable in the same manner as a Hong Kong court order. Enforcement may only be refused if the respondent proves that one or more of the limited grounds set out in the AO applies. These relate to matters such as procedural fairness and the status of the award, but not to questions of fact or law (although, if the award was made in a non-New York Convention country, the Hong Kong court has a discretion to refuse enforcement for any other reason the court considers it just to do so).

Parties to an international arbitration with its seat in Hong Kong may choose to preserve a right to appeal to the Hong Kong court on a question of law. Such a right will apply automatically if the arbitration in Hong Kong is domestic rather than international.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

See the response to question 7.6 above.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In certain circumstances, a security interest can be challenged by a liquidator or other relevant parties. An overview of the key grounds for such challenges is set out below:

Unfair preference:

Pursuant to section 266 CWMPO, if an insolvent company does something or suffers something to be done that puts a creditor in a better position in the event of an insolvent liquidation than they would otherwise have been and the company was influenced by a desire to prefer that creditor, an unfair preference occurs. A liquidator may apply to set aside such a transaction if it occurred within six months prior to commencement of the liquidation or, in the case of a transaction with an associate, two years prior to such commencement.

Floating charge:

Pursuant to section 267 CWMPO, a floating charge granted by a company within 12 months prior to the commencement of the company's liquidation is invalid if the company was insolvent at the time of granting the charge or became insolvent as a consequence, except to the extent of any new money advanced to the company at the same time as or after the charge was created.

Extortionate credit transactions:

Pursuant to section 264B CWMPO, any credit transaction entered into within three years prior to the commencement of the liquidation may, on the application of a liquidator, be set aside or varied by the court if it involves grossly exorbitant payments or otherwise grossly contravenes ordinary principles of fair dealing. There is a presumption that the transaction is extortionate unless the presumption can be rebutted.

Fraud – transactions to defraud creditors and fraudulent trading:

A transaction may be set aside pursuant to section 60 of the CPO if it can be proven that it was entered into with the intent to defraud creditors. There is no time limit or insolvency requirement for such a claim.

In addition, if in the course of the winding up it appears that any business of the company has been carried out with intent to defraud creditors or for any fraudulent purpose, the court may, on the application of a liquidator, Official Receiver, creditor or contributory, declare pursuant to section 275 CWMPO that any persons who were knowingly parties to the carrying on of the business in that way are personally liable for all or any of the company's debts (as the court may direct).

Similarly, if an officer of the company is guilty of misfeasance or breach of duty, pursuant to section 276 CWMPO, the court may, on the application of a liquidator, Official Receiver, creditor or contributory, compel the officer to repay or restore the money or property of the company.

Preferential creditors:

Secured creditors are generally entitled to recover out of the proceeds of their security in priority to all other claimants.

However, if the security is by way of a floating charge, the claims of preferential creditors will rank ahead of the claims of the floating charge holder. Preferential creditors in Hong Kong are primarily: (i) employees with certain claims in respect of, for example, unpaid wages, severance, long service and other relevant leave entitlements; and (ii) the Hong Kong Government in respect of unpaid taxes falling due in the 12 months immediately prior to the commencement of the liquidation. In a winding up of a bank or insurance company, certain other categories of claim are also given preferential status.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Voluntary liquidation is not available to unregistered companies or banks in Hong Kong. Such entities can only be wound up by order of the court. Unregistered companies include any company, partnership or association which has more than eight members and is not registered under the relevant Companies Ordinances or the Limited Partnerships Ordinance. Foreign companies registered under Part XVI of the CO are also considered "unregistered" for the purposes of winding-up.

The winding-up provisions of the CWMPO are also varied in some respects in the case of a winding-up of a bank or insurance company, by virtue of the provisions of the Banking Ordinance (Cap. 155) ("**BO**") and Insurance Companies Ordinance respectively.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

A secured creditor may in certain circumstances be in a position to exercise a power of sale over secured property which is already in its possession, or take other out-of-court steps such as to appoint a receiver or exercise rights of set-off. However, a creditor, or an office holder in the context of insolvency proceedings, that is not in possession of the assets of the company, would require the assistance of the court to forcefully take possession of such assets, if the party in possession of the assets refuses to surrender them.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Hong Kong?

If the parties have agreed that a foreign court is to have exclusive jurisdiction in relation to any disputes between them, the Hong Kong court will ordinarily respect that agreement and should grant a stay of any proceedings commenced before it. If, on the other hand, the parties have agreed that the foreign court is to have non-exclusive jurisdiction, that is likely to be one of a number of factors the Hong Kong court will take into account on an application by one of the parties for a stay of the Hong Kong proceedings on the basis of *forum non conveniens*.

The fact that parallel proceedings may already be afoot in a foreign jurisdiction will not of itself cause the Hong Kong court to stay proceedings but will be a relevant consideration on a stay application.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Hong Kong?

The Hong Kong Court of Final Appeal (in *Democratic Republic of the Congo & Ors. v. FG Hemisphere Associates LLC* [2011] 5 HKC) has held that the doctrine of absolute sovereign immunity applies in Hong Kong. This means that an entity entitled to immunity will be able to assert immunity in relation to all transactions and in respect of all assets, regardless of their commercial or sovereign nature.

Whilst it is possible for a state to waive immunity, such a waiver must be express, unequivocal and made at the time when the court is being asked to exercise jurisdiction against the state in question. This means that pre-dispute contractual waivers of sovereign immunity will not be enforced by the Hong Kong court.

The absolute doctrine of state immunity should not impact the ability of an arbitral tribunal with its seat in Hong Kong to assume jurisdiction over a foreign state because arbitration is a consensual process. It is widely considered that an arbitration agreement will also operate as an effective waiver of immunity from the supervisory oversight of the Hong Kong court in relation to an arbitration seated in Hong Kong.

Finally, it would appear that the doctrine of sovereign immunity has no application to a claim before the Hong Kong court against the People's Republic of China (the "**PRC**") on the basis that, since 1997, the Hong Kong Special Administrative Region has been a part of the PRC. It may be, however, that the PRC could seek to claim immunity under the related doctrine of crown immunity.

10 Other Matters

10.1 Are there any eligibility requirements in Hong Kong for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Hong Kong need to be licensed or authorised in Hong Kong or in their jurisdiction of incorporation?

Any individual or company that carries on the business of making loans is required to be licensed as a money lender under the Money Lenders Ordinance (Cap. 163) ("**MLO**"). The Licensing Court is responsible for the determination of applications for and granting of money lenders' licences, and will therefore consider whether an applicant is a suitable person to be granted a licence. There are exemptions available under the MLO that exempt certain persons from being required to hold a money lenders' licence. Exempted persons include any authorised banking institution that holds a Hong Kong banking licence under the BO and any bank incorporated or established outside of Hong Kong that is regulated by an overseas banking supervisory authority and that carries on banking business in the place where that banking supervisory authority is located. Certain types of loans are also exempt from the licensing requirement of the MLO. Exempted loans include any loan made by a holding company to its subsidiary or by a subsidiary to its holding company, any loan made to a company that has a paid up share capital of not less than HK$1,000,000 or an equivalent amount in any other approved currency and any loan made to a company secured by a mortgage, charge, lien or other encumbrance registered, or to be registered, under the CO.

There are no eligibility requirements for any person to be an agent or a security agent, although if the agent engages in any regulated activities in Hong Kong under the Securities and Futures Ordinance (Cap. 571), it may be required to obtain the relevant licence or licences depending on the nature and scope of the activities involved.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Hong Kong?

Excessive Interest

There are regulations in Hong Kong aimed primarily at protecting consumers from being subject to excessive rates of interest. Any person (other than an authorised banking institution regulated by the Hong Kong Monetary Authority) who lends or offers to lend at a rate of interest exceeding 60% *per annum* commits a criminal offence under section 24 MLO, and could be subject to a substantial fine and imprisonment. Any such agreement and any security provided by the borrower will not be enforceable. In addition, any agreement for the repayment of a loan or for the payment of interest on a loan in respect of which the effective rate of interest exceeds 48% *per annum* will, having regard to that fact alone, be presumed to be a transaction which is extortionate, as provided under section 25 MLO. A Hong Kong court may give directions to alter the terms of an extortionate agreement. However, the presumption could be rebutted if the court is satisfied that the rate of interest is not unreasonable or unfair given the surrounding circumstances. The factors the court would consider include, without limitation, the debtor's age, experience, business capacity, market rates for similar transactions and the degree of risk faced by the lender. The regulations discussed above do not apply to loans made to a company with a paid up share capital of HK$1,000,000 or more.

As a general rule, a party is not permitted to impose a penalty on another party, including a penalty for late payment. However, an exception to the rule is that contracting parties are free to agree on a default interest rate for late payment so long as it reflects a genuine estimate of the loss that would be suffered by the non-defaulting party.

Consumer Protection

Where a party to a contract deals as a consumer under the Unconscionable Contracts Ordinance (Cap. 458) (the "UCO"), the contract, or the part of the contract that is held by a court to be unconscionable, will not be enforceable. A consumer is one who neither makes the contract in the course of a business nor holds himself out as doing so (see section 3 UCO). It should be noted that in determining whether a contract or a part of a contract is "unconscionable", the Hong Kong court would consider the circumstances relating to the contract at the time the contract was made. For example, it has previously been decided by the Hong Kong court that the costs provisions in a credit card agreement were unconscionable because of the relative strengths of the bargaining positions of the credit card company or bank.

Where a lender is an authorised banking institution regulated by the Hong Kong Monetary Authority, the lender will be subject to the Code of Banking Practice issued by The Hong Kong Association of Banks, which governs, among other things, the proper conduct of authorised banking institutions in dealing with individual customers.

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India

Dave & Girish & Co.

Mona Bhide

1 Overview

1.1 What are the main trends/significant developments in the lending markets in India?

Indian loan markets have been growing in the last year. In spite of the financial crisis in the West, Indian banks stood unaffected and have shown undisturbed growth. Interest rates in India have also been rising. One interesting development in the last year was the decision of the Reserve Bank of India to allow applications for the formation of new banks in India. Some Indian companies have faced financial difficulties in the last year and banks have opted to restructure loans in some cases.

1.2 What are some significant lending transactions that have taken place in India in recent years?

In view of the rise in interest rates, Indian companies are now choosing to borrow from overseas lenders. Recent significant loans taken out by Indian banks were from banks in Europe. Indian banks have tried to borrow at cheaper rates from banks outside India and then lend to borrowers inside India at higher rates. This has enabled Indian banks to earn a profit.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Section 372 A of the Companies Act, 1956 provides that no company shall directly or indirectly provide any loan to any other body corporate, or give a guarantee or provide security in connection with a loan made by any other person, or to any other person by any body corporate if such guarantee or loan exceeds 60% of its paid up share capital and free reserves or 100% of its free reserves, whichever is higher. If the loan/guarantee exceeds such amount, or if the existing loans/guarantees already given earlier, together with the new proposed loans/guarantees, exceed the limits mentioned above, the loan/guarantee will have to be authorised by a special resolution passed by the shareholders. However, the board can proceed without a special resolution if a resolution was passed earlier in a meeting of the Board authorising a guarantee to be given in accordance with the provisions of Section 372A, if there are exceptional circumstances which prevent the company from obtaining previous authorisation by a special resolution passed in a general meeting of shareholders and if such guarantee is confirmed within twelve months in a general meeting or at an annual general meeting held immediately after the passing of the Board resolution, or which ever happens earlier. The lending company is also required to maintain a register for loans provided to body corporates under the same management and record the names of such companies and every firm in which a partner is a body corporate under the same management as the lending company along with all other details regarding the loan/guarantee. This information has to be recorded in the register within three days of the transaction. However, the Companies Act, 1956 has now been replaced by the New Companies Act, 2013. Section 186 (2) (b) of the Companies Act, 2013 is not yet notified and therefore the provisions relating to guarantees are still governed by Section 372 A of the Companies Act, 1956.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Yes, guarantees provided without consideration are treated as void under the Indian Contract Act, 1872. Directors could be personally liable for having acted for their own advantage or for having violated their duty of care when the guarantee was issued. The directors cannot derive advantage for their own personal gains by using the authority of their position as a director. The directors are expected to exercise proper care and act with business prudence. Every interested director also has a duty to disclose his interest to the Board of Directors and the Board of Directors have to consider and decide whether such guarantee can be provided.

2.3 Is lack of corporate power an issue?

The principle of *ultra vires* applies to companies under the Indian Companies Act, 1956. Acts carried out by officers/directors of a company without authority are not enforceable against the company.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Yes, see the answer to question 2.1 above. In addition to what is stated above, there is a requirement to maintain registers for loans and guarantees advanced by the company. The Central Government

has also issued guidelines for company loans to directors and their relatives. The guidelines require that if a loan is proposed to be advanced by a public company or its subsidiary to its directors or their relatives, an application for permission will be filed with the Department of Company Affairs along with details prescribed under the Guidelines, which include information on the net-worth of the company for the past three years, etc.

Section 185 of the Companies Act, 2013 (Loan to Directors) has been notified and Section 186 of the Companies Act, 2013 (Loan and investment by the Company) is yet to be notified. The aforesaid Sections will govern the provisions relating to guarantees and will have to be complied with. However, since Section 186 of the Companies Act, 2013 is not yet notified, the provisions relating to guarantee are still governed by Section 372 A of the Companies Act, 1956.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Section 372A of the Companies Act, 1956 provides that a company cannot issue a guarantee which exceeds 60% of the paid capital and free reserves or 100% of its free reserves, whichever is more. The New Act has a similar provision which is Section 186 under the New Act.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

In case the guarantee is issued in favour of a non-resident company, then it can only be issued as per the guidelines issued by the Reserve Bank of India.

Guarantees in favour of non-resident entities are also permitted to be issued by banks and authorised dealers in foreign exchange, subject to the provisions of the guidelines/circulars/master circulars issued by the Reserve Bank of India from time to time. Hence guarantees, which were issued within the permissible limits or for which specific approvals were obtained, can be enforced without any other permission. However, those guarantees which did not fall within the existing permissible limits prescribed under FEMA/RBI Circulars and for which no specific permission from the Reserve Bank of India was obtained, would not be enforceable against the guarantor.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Most commonly offered collateral include:

(a) Mortgages of immovable properties.
(b) Hypothecation of movable assets.
(c) Guarantees.
(d) Standby letters of Guarantee.
(e) Escrow Accounts.
(f) Lien over Bank deposits.
(g) Pledge of Shares and securities.
(h) Floating Charge over a banker's goods/inventory/stock.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

In India we follow a system of using different documents, depending on the nature of assets. Registration for perfection is a must for security over immovable properties.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, security by way of a mortgage can be provided over immovable property, plant and machinery and other immovable assets. The mortgage over an immovable property has to be stamped and would also require registration with the Registrar of Assurances for perfection.

A hypothecation charge is also evidenced by a written document. Charges created on assets of corporate entities are registered with the Registrar of Companies also. However, creation of a charge in favour of a non-resident as and by way of a mortgage of an immovable property for securing a debt is not permitted under FEMA.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, receivables can be hypothecated or assigned. If the receivables have to be held as collateral, then hypothecation is a commonly used mechanism. Often the Receivables are assigned to secure payments under a contract. While not strictly required under law, it is always advisable to issue an intimation of the assignment to the debtor so as to avoid a situation where the debtor continues to pay the assignee even after the assignment is completed. Also if a notice is not provided, the debtor will be validly discharged if he makes the payment to the assignee.

A hypothecation or the deed of assignment as the case may be needs to be registered with the CERSAI (a registering authority). If the transferor is a company, then necessary forms will also be required to be filed with the Registrar of Companies.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, bank accounts can be lien marked in favour of a charge holder. In such a case, the documents marking the lien will be required to be executed and filed with the bank. A confirmation will also be necessary from the bank with respect to the bank's recognition of the charge. Where the bank account is for a corporate entity, necessary forms will also have to be filed with the Registrar of Companies. Banks can also retain funds in escrow as security.

3.6 Can collateral security be taken over shares in companies incorporated in India? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares and securities can be taken as collateral. Shares are often in dematerialised form. In such cases, a tri-partite agreement has to be entered into between the charge creator, the lender and the Depository Participant. Where shares of a company are offered as

security, it is necessary that the information is sent to the company whose shares are being pledged/charged. The company would also be required to file necessary forms disclosing the beneficial interest in the shares with the Registrar of Companies.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

An inventory is constantly moving and changing in view of sales and purchases. The most common method of using an inventory as a security to avail finances is to charge the inventory under a floating charge. This charge will also have to be perfected by the filing of Form No. 8 with the Registrar of Companies.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, a company can grant security for securing its obligations under a credit facility, as well as a guarantor under a guarantee.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Most notarised documents are also required to be stamped. Notarisation fees are nominal, ranging approximately from 500 to 1,000 Rupees. Stamp duties vary from state-to-state and also vary depending on the nature of the document. Registration fees are also payable as per the provisions of the Registration Act, and vary depending on the document proposed to be executed.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The registration process may take about a day or two. Expenses on stamp duty vary depending upon the type of document and depending on the state in which the document is executed.

3.11 Are any regulatory or similar consent required with respect to the creation of security?

Except where the charges are in favour of non-resident entities, there is no requirement for consent from any regulatory authority. Consents, however, are necessary under Section 293 of the Companies Act, 1956 where the security is created by a public company and where the borrowings exceed the paid up capital of the company and reserves set apart for specific purposes.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Generally, a security extinguishes when the underlying debt is repaid, therefore, in cases of revolving credits, the documents need to have the necessary language to ensure that the security remains in force in spite of the revolving nature of the facility.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Yes, where the collateral is provided by a company it will be necessary that the document is executed under a common seal and that the seal is affixed in the presence of officers/directors, and where affixing of the common seal is mentioned in the Articles of Association to require a Board Resolution, a Board Resolution approving the affixing of the common seal will also be necessary. Most security documents are executed in one original and one counter-part.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

Acquisition financing is not very prevalent in India. However, there is no specific prohibition.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will India recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes, the appointment of a security trustee is commonly used and recognised. The security trustee holds the security for one or multiple lenders. Each time a lender changes, the security trustee executes a deed of accession allowing the new lender to share the security which is held by the security trustee.

5.2 If an agent or trustee is not recognised in India, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

As mentioned above, the concept of security trustee is recognised in India. However, in consortium and syndicated lending, often one of the banks is appointed as the lead bank and all powers with respect to enforcement of security, issuance of notices, etc. are given to the lead bank under the loan document itself. In some cases, one of the banks is appointed as an agent on behalf of the other banks. The appointment is made on the terms contained in an agency letter which is signed by the agent and other banks.

5.3 Assume a loan is made to a company organised under the laws of India and guaranteed by a guarantor organised under the laws of India. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Yes, if Lender A transfers its loan to Lender B in India, the lender is required to enter into an assignment document and the assignment has to be in writing and is required to be registered and stamped. For assigning the guarantee, it will be necessary that the

guarantor is made aware of the assignment and consent is obtained in writing for such transfer from the guarantor. A new guarantee being executed with the borrower and the lender is another option which is more secure.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

If the loan is a domestic loan granted by a bank in India, there will not be any requirements for deduction of tax from the interest paid. In cross-border loans there will be a requirement to deduct tax at the source from the interest payments. However, if the country where the lender is located has a double tax avoidance agreement ("DTAA") with India, then the provisions of such DTAA will apply.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

See the answer above.

6.3 Will any income of a foreign lender become taxable in India solely because of a loan to or guarantee and/or grant of security from a company in India?

Yes, under Section 195 (3), any income of a non-resident is subject to a withholding requirement.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No other significant costs will be incurred except for stamp duty and registration costs as mentioned above, if the documents are brought in India.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Yes. Cash flow in and out of India is regulated under the Foreign Exchange Management Act, 2000. Any borrowings made outside the country for an Indian resident company has to be within the External Commercial Borrowings guidelines issued by the Reserve Bank of India.

7 Judicial Enforcement

7.1 Will the courts in India recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in India enforce a contract that has a foreign governing law?

Yes, Indian Courts would recognise a foreign law to be a governing law, provided that foreign law was chosen by mutual agreement by parties, provided that the parties resided in different countries, and the law that is selected by the parties was the law of the place where either of the parties resided or was the law of the place where the contract was performed/agreed to be performed.

7.2 Will the courts in India recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes, Indian Courts would generally recognise and enforce a judgment passed by New York Courts or English Courts without re-examination of facts, except if the judgment falls within the exceptions mentioned in Section 13 of the Civil Procedure Code, 1908.

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties litigating under the same title except:

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud; or

(f) where it sustains a claim founded on a breach of any law in force in India.

If the judgment falls within any of the exceptions mentioned above the Indian Court would re-examine the issues and decide the matter and pass its own judgment.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in India, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in India against the assets of the company?

(a) In cases where the case is absolutely based on a written contract, summary procedure is available for an early judgment which could take upto five years. However, not every case can fall in this category and therefore it can take longer for disputed cases.

(b) So long as the foreign judgment does not fall within the exceptions mentioned above, it may take about four to five years to obtain a decree from the Indian Court in terms of a judgment passed by a foreign Court in India.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

In India, there is a statute which allows banks to enforce the security created in their favour without approaching the Court. The sale, however, should be in accordance with the prescribed procedure

which does require an auction. The procedure to be followed for the enforcement is as prescribed under the SARFAESI Act. The following requirements in the procedure could have an impact on the timing and the value of the security:

(i) The right of the Borrower to appeal against the enforcement under Section 17 of the SARFAESI Act.

(ii) Where there is more than one secured creditor, the creditor who intends to enforce the security has to have consent of creditors representing not less than three quarters of the value of the amount outstanding as per that date.

(iii) Appointment by the board of directors of a trustee under Section 13(4)(c) of the SARFAESI Act who is deemed to be an agent of the Borrower.

(iv) The SARFAESI Act does not extend to non-resident lenders.

Where the lender is a foreign lender the loan should have been advanced within the parameters of the external commercial borrowing guidelines issued by the Reserve Bank of India or with the approval of the Reserve Bank of India. Where neither of the above were followed the enforcement can only be carried by the foreign lender with the permission of the Reserve Bank of India.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in India or (b) foreclosure on collateral security?

No, there are no restrictions that would apply to foreign lenders filing suits in the Indian Courts for the enforcement of security, except that the security, when created, must have been permissible under FEMA, valid and enforceable and all consents, wherever necessary for creation of the security under FEMA, must have been obtained.

7.6 Do the bankruptcy, reorganisation or similar laws in India provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Where the company is set up under a statute or a special enactment, the procedure with respect to bankruptcies of such entities is as prescribed under those enactments. Bankruptcies of all other companies which are set up under the Companies Act, 1956, whether private or public, are governed by the procedure prescribed thereunder. The provisions require that all creditors' dues are paid in the prescribed priority subject to payment of all statutory dues and thereafter the employees and labour dues and thereafter the payment to secured creditors and then the unsecured creditors.

7.7 Will the courts in India recognise and enforce an arbitral award given against the company without re-examination of the merits?

Unless the award falls under the certain exceptions as mentioned under the Indian Arbitration and Conciliation Act, 1996, the same will be enforceable as a decree of the court and the courts would recognise the arbitral award.

In case the arbitration is a cross-border arbitration, it will be necessary that the award does not fall within any parameters prescribed under Section 13 of the Civil Procedure Code, 1908 mentioned above.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The bankruptcy may give rise to several disputes and contests not only by other secured creditors but also by the liquidator. Hence, it is very important that, at the time of creation of the security itself, all necessary perfection mechanisms are adopted. These, as explained earlier, include stamping, registration, affixing of a common seal, etc.

In case the net worth of a company is wiped out, the company can be referred to the Board of Industrial and Financial Reconstruction. In such a case all claims against the company arising under contracts executed by the company, whether of secured or unsecured creditors, are paid in the manner decided by the Board. The Board, in cases where there is a need, appoints an operating agency which formulates a scheme of revival for the company. In such cases the Board may recommend a moratorium on repayment of dues for a period or may reschedule the debt repayment instalments.

Apart from this if a company is unable to pay a debt exceeding Rs. 1,00,000, despite a notice of demand having been issued, and the debt remains outstanding over a period of twenty one days from the date of issue of the notice, a winding up petition can be filed against the company under Section 434 of the Companies Act, 1956. In such case, the Company Court would also prioritise the payments to the creditors.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes, if a company is in liquidation, the law provides priority for repayment in the following order:

(i) taxes and other statutory dues;

(ii) employee dues;

(iii) secured creditors/lenders/secured bond holders;

(iv) unsecured creditors/lenders/unsecured bond holders;

(v) sundry creditors;

(vi) preference shareholders; and

(vii) equity shareholders.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The word bankruptcy is not used in the Indian Companies Act, 1956 (the "Companies Act"). The Companies Act does provide for winding up of a company for non-payment of its dues as mentioned above. However there are many other entities to which the provisions of the Companies Act will not apply. These are organisations formed under statutes and also certain public sector entities formed by the government. The statutes under which such entities are formed would govern its operation and winding up. Also some of the Indian banks are formed under the Banking Companies (Acquisitions and Transfer of Undertakings) Act and the winding up of such banks would be governed by such statute and not the Companies Act.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in enforcement?

As mentioned earlier, under the SARFAESI Act, a lender has a right

to enforce the security without approaching a Court. However, only lenders qualifying under the SARFAESI Act can exercise such rights and foreign lenders would not qualify for such action under the SARFAESI Act.

The Transfer of Property Act also provides for rights of a mortgagee to enforce a security created by a charge, which is registered as a legal mortgage through a private sale without approaching the Court.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of India?

Yes, a party would be bound if it has submitted under a contract to the jurisdiction of a foreign Court. However, in certain cases the Indian Courts jurisdiction would apply by default, i.e., when the contract is executed in India or is performed in India or if the defendant resides in India, etc. Further, in cases where there is a breach or violation of an Indian law, the Indian regulatory authority would have discretion to decide and award punishments or fines. In such cases even if a party submits to a foreign court's jurisdiction, the Indian Court/regulatory body/forum can decide the issue before it.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of India?

Yes it is.

10 Other Matters

10.1 Are there any eligibility requirements in India for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in India need to be licensed or authorised in India or in their jurisdiction of incorporation?

Yes, in order to carry out the business of lending in India it will be necessary for the lender to be licensed as a Bank or registered with the Reserve Bank of India or as a Non-Banking Finance Company. If the lender is a non-resident the loan will have to be in compliance with the external commercial guidelines or would require specific permission for lending in India from the Reserve Bank of India.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in India?

The following material considerations are necessary before lending:

(i) External Commercial Borrowing guidelines issued by the Reserve Bank of India.

(ii) Master Circular on Risk Management and Inter-bank dealings issued by the Reserve Bank of India on July 2, 2012.

(iii) KYC check on the Borrower.

(iv) Security/guarantees.

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DAVE & GIRISH & CO.
Advocates

Dave & Girish & Co. was founded in the year 1978 and is a pioneer in the field of banking and securitisation. The firm has offices in Mumbai and Bangalore and associate offices in Delhi and Hyderabad. Dave and Girish is known for its cross-border banking, international finance and corporate law practices. Dave & Girish & Co. was the first law firm to have become a member of the International Swaps and Derivatives Association and it was also the first firm to document a securitisation transaction in India. It is highly regarded in the field of structured finance and derivatives and is known for its skills on drafting and documenting and negotiating intricate financing documentation. The firm represents multinational banks and major corporate groups in India.

The firm was started by the Late Mohanlal Dave and is currently headed by Mr. Girish Dave who is a luminary in the field of banking and corporate law. His latest transactions include an offshore syndicated loan and a Japanese Bond Issue.

Chapter 40

Indonesia

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Indonesia?

Currency Law

The regulations on transaction settlement payments and the collection of export proceeds have been revised under Law No. 7 of 2011 on currency (Currency Law). The Currency Law: (i) reconfirms the Rupiah as the legal and official tender of the Republic of Indonesia; (ii) deals with the requirements for the issuance, printing and minting of Rupiah bank notes and coins; and (iii) regulates the use of the Rupiah to settle transactions and provides that the Rupiah must be used in certain transactions conducted within Indonesia. These provisions have given rise to interpretational issues. International payments are not affected, provided they relate to trade and financing. Payments between two domestic parties must be made in Rupiah even if they relate to trade and finance. However, the Minister of Finance has recently made a presentation which clarified that the requirement to use Rupiah is limited to cash payments. Payments made using wire transfer or banking instruments such as letters of credit need not be made in Rupiah. In addition, parties (including domestic parties) can waive the requirement to use Rupiah by agreement. Please note this presentation is not a formal regulation, and may not be followed by the Indonesia courts; in practice, the risk of prosecution is low and the market appears to have accepted the flexibility offered by the Minister.

External debt and export proceeds

Regulation No. 13/22/PBI/2011 on Compulsory Reporting of Withdrawal of Foreign Exchange from External Debt (Regulation 13) came into force on 2 January 2012 and Regulation No. 14/25/PBI/2012 on Receipt of Foreign Exchange from Export Proceeds and Withdrawal of Foreign Exchange from Foreign Debt (Regulation 14) came into force on 1 January 2013. They aim: i) to stabilise exchange rate volatility caused by instability in the supply of foreign currency to the domestic market; and (ii) to create a reporting system that will enable the collection of important financial data. Under Regulation 14, all drawdown of external debt (that is, debt owed by a resident debtor to a non-resident creditor and denominated in any currency other than Indonesian Rupiah) must be made through a Foreign Exchange Bank. Drawdown under loan agreements signed before 2 January 2012 will not be subject to Regulation 14 and Regulation 13 but if the principal amount of the loan is subsequently increased, any increase will be subject to Regulation 14.

Export proceeds and the effect on security

Regulation 14 also stipulates that all resident exporters must collect foreign exchange export proceeds through a Foreign Exchange Bank rather than into an offshore account. Where there is an agreement not to receive export proceeds through a Foreign Exchange Bank or a payment obligation of the exporter, export proceeds did not need be received through a Foreign Exchange Bank until 30 June 2013. Further confirmation from Bank Indonesia is generally required to confirm the timing of the subsequent sweep and the legality of this practical solution.

1.2 What are some significant lending transactions that have taken place in Indonesia in recent years?

As the largest issuer of bonds, the Government of Indonesia regularly taps the local market to finance the state budget. The Indonesian government bond forms vary from conventional and retail government bonds to government *sukuk* in several tenors. Municipal bonds are issued by the province or district government for financing public utilities projects.

Although both government and corporate bonds are listed on the Indonesia Stock Exchange (IDX), they are mostly traded Over-the-Counter (OTC). Bank Indonesia (BI) also issues short-term bank certificates known as Certificates of the Central Bank.

The last of Indonesian Government bonds were issued in late 2013, amounting to USD 1,500,000,000, with coupon rate 6.125%. The maturity date of these bonds will be 2019. There continued to be a trend of high demand for the offering among investors for the short term international market.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, a company guarantee is commonly acceptable in financing practice.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Under Indonesian law, the validity of a legal act performed by an Indonesian company may be contested for want of a corporate

benefit. Furthermore, under Indonesian law, there is uncertainty as to whether the issuance of a guarantee or a third party security or a stipulation in an agreement for the benefit of third parties by a company in order to secure the fulfilment of obligations of a third party is or can be regarded to be in the furtherance of the objects of that company (the "*Ultra Vires* Doctrine"), and consequently, whether such guarantee or third party security may be voidable or unenforceable under the laws of the Republic of Indonesia. In determining whether the issuance of a guarantee and third party security is in furtherance of the objects of a company, it is important to take into account the provisions of the articles of association of that company and whether that company derives certain commercial benefit from the transaction in respect of which the guarantee and third party security is issued.

Based on the *Ultra Vires* Doctrine, validity or enforceability can in principle only be challenged by that company itself, i.e. arguably through (a) the shareholders of that company, (b) the board of directors of that company, or (c) the board of commissioners of that company, or by a receiver or trustee in bankruptcy. By obtaining the written consent of all of the shareholders, board of directors and board of commissioners of the relevant company authorising that company to enter into a guarantee and third party security for the benefit of the company for whose benefit it creates such guarantee or third party security and confirming that such transaction is in the interests of that company, those parties should not be able to successfully challenge the validity or enforceability of that guarantee on the basis of the *Ultra Vires* Doctrine.

2.3 Is lack of corporate power an issue?

Yes, the Indonesian Company Law and the articles of association of an Indonesian company normally stipulate certain requirements to obtain a corporate power (approval) from the organs of the company i.e. board of commissioners' approval and/or shareholders' approval. Lack of corporate approval would legally affect the validity of the corporate guarantee and cause the board of directors to be held liable against any loss in relation to such provision of corporate guarantee/security.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Please refer to our explanation in question 2.3 above.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

On the amount of guarantee, it is not specifically stipulated in the regulations. Please note, however, that Indonesian Company Law stipulates that the board of directors must request shareholders' approval to encumber the assets of the company having a value that exceeds 50% of the net assets in 1 (one) transaction or more, whether or not related to each other. Thus, it could somehow be interpreted that a guarantee needs to also consider the assets of the company.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange control obstacles for the enforcement of a guarantee. The enforcement of a guarantee will be done through a court order. Please note, however, that the Indonesian court system recognises three levels of courts, namely the district court, court of appeal and Supreme Court. This means that if a borrower still challenges a decision from the judges of a district court and files an appeal to the court of appeal, the guarantee cannot be enforced by the lender pending the decision of the judges of the court of appeal. This process would continue up to the Supreme Court, which can certainly take years for enforcement.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

To secure the lending obligations, we can classify the common types of security as follows:

- Immovable assets – i.e. land, buildings, fixtures and vessels with gross weight of 20 cubic metres or more and aircraft – form of security granted: **mortgage**.
- Movable assets – i.e. machinery, inventory, raw material and vehicles – form of security: **fiduciary transfer**.
- Intangible assets – i.e. shares – form of security: **pledge**.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

A special agreement is required to create security over each type of assets. The procedure for each type of security is as follows:

- Mortgage:

A mortgage deed must be signed before the Land Officer with jurisdiction over the land to be mortgaged. This deed must be in Bahasa Indonesia (the official language of Indonesia) and in the prescribed official form. The signed mortgage deed must be then registered at the relevant land offices. The mortgage is established at the moment it is entered in the land book located at the relevant land offices.

- Fiduciary security:

A fiduciary security deed must be signed before the notary. This deed must be in Bahasa Indonesia (the official language of Indonesia) and in the prescribed official form. Based on this deed, the transferor (borrower) transfers its legal title to the transferred assets to the transferee (lender) for the period during which the debt remains outstanding. The fiduciary security is effective when the fiduciary security office issues a fiduciary certificate.

- Pledge:

A pledge agreement can be executed in a notarial deed or executed privately, setting out the pledge's particulars. The pledge is effective when the pledge is recorded in the shareholders' register of the relevant company.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Please refer to questions 3.1 and 3.2.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, the proper form of security over receivables is fiduciary transfer. Please refer to question 3.2 above.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, the most common form of security over a cash deposit is a pledge over the bank account. However, the fiduciary registration office has expressed the view that a bank account cannot be the subject of an Indonesian security interest and the enforceability of a pledge over a bank account is yet to be tested in court. Although its enforceability is doubtful, it is common practice to secure cash deposits with a pledge over a bank account.

3.6 Can collateral security be taken over shares in companies incorporated in Indonesia? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, collateral security over shares in companies incorporated in Indonesia can be taken. A pledge of Indonesian shares can be enforced provided the governing law is Indonesian law. See the procedure discussed above.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over the movable property can be taken by way of fiduciary transfer.

The Fiduciary Security must be made by a notarial deed and in the Indonesian language. The debt so secured can be in the form of:

- existing debts;
- future debts already agreed upon in a certain amount; or
- debts the amount of which can be determined at the time of execution based on the principal agreement.

The goods encumbered by a Fiduciary Security must be registered, including goods located outside Indonesian territory.

The fiduciary transferee shall apply for the registration of the Fiduciary Security and attach to the application a registration statement with the stipulated data. Upon registration on the date of receipt of the registration application, the applicant will obtain a Fiduciary Security Certificate stating the date of the application. The Fiduciary Security is created on the date of its registration in the Fiduciary Register Book (*Buku Daftar Fidusia*). The fiduciary security certificate has force of execution equal to a final court verdict.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, it can.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Registration fees for mortgages are normally based on the value of the secured amount under the mortgage (the lender has a choice whether to use the actual value of the assets or the principal amount of the loan), and can be costly. There is also a registration fee for fiduciary transfers. However, the amount is nominal. Notary fees concerning fiduciary transfers and pledges of shares vary and are at the notary's discretion. Stamp duty of IDR 6,000 (below US$ 2) is payable on any agreement signed by the parties.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Please refer to question 3.9 above, particularly on the registration fee for mortgages. With regard to the estimated time for filing and registering a mortgage or Fiduciary Security, it would approximately take one month, while for the shares pledge it can be done once the pledge agreement has been executed.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Normally, creditor consent is required (unless the relevant security provider does not have any debt). A shareholder approval is also required in the situation as we have described in our response to question 2.5.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

If it is a revolving credit facility and the initial loan has been repaid, the security needs to be re-created every time the facility is given. However, we understand, in practice, some creditors have different views. They are of the view that no re-creation of security is required since the initial security covers the entire facility.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Yes, please refer to question 3.9 above.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Financial assistance is not an issue: there are no such prohibitions or restrictions other than those that may be set out in the articles of association of the company concerned. In addition, a company guaranteeing and/or giving security to support borrowings incurred to finance or refinance the direct or indirect acquisition of such shares may be deemed *ultra vires* unless there is direct commercial benefit. See also question 2.5 above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Indonesia recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Indonesia indeed recognises the role of an agent for the above-

mentioned purpose. They are known as a "security agent". The security agent is appointed by the lenders in a separate agreement. This agreement, among others, stipulates the period of appointment, rights and obligations of the security agent, termination, etc.

5.2 If an agent or trustee is not recognised in Indonesia, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

5.3 Assume a loan is made to a company organised under the laws of Indonesia and guaranteed by a guarantor organised under the laws of Singapore. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Yes, Lender A may use a "cessie mechanism", commonly known as an "assignment of claim receivables", and assign its rights to Lender B by executing the "Cessie Deed". Regarding the guarantee, all related guarantee deeds must be re-executed in favour of Lender B.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Yes, there are requirements to deduct or withhold tax from interest payable on loans made to domestic or foreign lenders, as stipulated in Income Tax Law. For cross-border loans, the withholding tax rate can usually be reduced if the lender resides in a jurisdiction which has a tax treaty with Indonesia.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

No tax incentives would be given to a foreign creditor. However, foreign creditors may enjoy a certain tax rate to the extent its country has a treaty with Indonesia.

6.3 Will any income of a foreign lender become taxable in Indonesia solely because of a loan to or guarantee and/or grant of security from a company in Singapore?

No, unless, under the "force of attraction" rule, such loan or guarantee or grant generates income for the foreign lender attributable to its Indonesian business, if any.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Please refer to question 3.9 above, particularly on the registration fee for mortgages.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, but recurring administrative requirements relating to the reporting of payment of interest and principal apply, and foreign loans received by certain categories of Indonesian borrowers require prior governmental approval.

7 Judicial Enforcement

7.1 Will the courts in Indonesia recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Indonesia enforce a contract that has a foreign governing law?

Indonesian law recognises a choice of foreign law as the governing law of a loan agreement except to the extent that: (i) a loan term or a provision of that law is clearly incompatible with Indonesian public policy; and (ii) the Indonesian court must give effect to mandatory rules of the law of another jurisdiction with which the situation has a close connection.

Theoretically, courts in Indonesia can enforce a contract that has a foreign governing law. In practice, however, there have been cases where Indonesian courts have refused to give effect to choice of foreign law clauses for other specified or unspecified reasons. A foreign choice of law is not permitted for security agreements or guarantees, and these agreements must be governed by Indonesian law.

7.2 Will the courts in Indonesia recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Indonesian courts will not recognise judgments of foreign courts and accordingly it will be necessary for any matter in which a judgment has been obtained in a foreign court to be re-litigated in the Indonesian courts in order to enforce in Indonesia the cause of action giving rise to the foreign judgment and such Indonesian courts may attribute such importance to the foreign judgment as they may deem appropriate.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Indonesia, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Indonesia against the assets of the company?

(a) It would take approximately 6 months to obtain a judgment in the district court. However, if the counter party (defendant) appeals to the higher courts (court of appeal and supreme courts), it may take years.

(b) Foreign court judgments cannot be enforced in Indonesia.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

On default, a security interest can be enforced through a public auction or private sale.

Public sale or auction

In theory, a public auction can be conducted without a court judgment or order if the owner of the assets is co-operative. In practice, however, a court order is required.

In the case of listed shares, however, the Indonesian Civil Code clearly specifies that an auction held by two brokers can be conducted in the market. In this case, no court order is required so long as a power of attorney to dispose of the shares has been given (usually at the time the pledge is created).

Private sale

A private sale is permitted if this means that a higher sale price can be achieved for the parties. Private sale requires consent from the owner of the assets, which is normally included in the relevant security documents.

For mortgage and fiduciary transfer, private sale can only be conducted:

- After the expiry of one month from written notification of the intended sale to interested parties and publication of this notice in at least two daily newspapers with circulation in the area where the asset is located.
- Where no third party has voiced an objection against the private sale. The law is unclear as to who these third parties may be, although it is safe to assume that they include, at least, the borrower's other creditors.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Indonesia or (b) foreclosure on collateral security?

The above enforcement method as explained in question 7.4 also applies to foreign lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in Indonesia provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, it is known as Suspension of Payments (moratorium). The procedure is started by the debtor or its creditor petitioning the Commercial Court for a suspension of payments. The Commercial Court must then grant a provisional moratorium, and appoint a supervisory judge and an administrator or receiver to assist the debtor in managing its estate. The debtor will be entitled to manage and dispose of its assets jointly with the administrator. During this suspension period, the debtor does not have to make payments to its unsecured creditors and secured creditors cannot enforce their security without the court's consent. The purpose of a suspension of payments is to enable the debtor to propose a composition plan.

For creditors holding a mortgage, a pledge, a fiduciary security or any other *in rem* security right may enforce its right against the secured assets as if there were no bankruptcy. However the aforesaid right is limited by the so-called "stay period". A stay is a restriction on the right of secured creditors and third parties to exercise their right. This stay applies for a time period of at most 90 (ninety days) as of the date of the bankruptcy judgment. The stay does not apply to claims of creditors whose rights are secured by cash deposits and the rights of creditors to set-off debts. By law, the 90-day stay will expire on an earlier date in case of an early termination of the bankruptcy or upon the commencement of the state of insolvency.

7.7 Will the courts in Indonesia recognise and enforce an arbitral award given against the company without re-examination of the merits?

A foreign or international arbitral award can be recognised and enforced in Indonesia as Indonesia has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards through Presidential Decision No. 34 of 1981. The procedures for recognition and enforcement of foreign arbitral awards are further regulated by Law No. 30 of 1999 on Arbitration and Alternative Dispute. However, before the enforcement, the award needs to be registered to the District Court of Central Jakarta. Please note, however, that the Chairman of the District Court of Central Jakarta may refuse to issue the writ of execution if it views that the award violates public order. The decision rejecting the enforcement can be appealed at the Supreme Court and must be decided by the Supreme Court within 90 (ninety) days as of the registration of the appeal. A decision approving the enforcement of the award cannot be appealed.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The mortgage, the pledge and the fiduciary transfer are "*in rem rights*" which are "*absolute*" and "*exclusive*" and create preferential rights to the holder of the security even in bankruptcy. Bankruptcy of the mortgagor, the pledgor and the fiduciary transferor does not, in principle, affect the security right of the mortgagee, pledgee and transferee in that the assets in question are not regarded as being part of the bankruptcy assets. However, the creditors should note the "stay" period as we have elaborated in response to question 7.6, which restrict the ability of the creditors to enforce their rights.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes, there are.

On the preference period with respect to the security, we believe that there should be no preference period, except that: once the bankruptcy estate is declared in the state of insolvency, the secured creditors must exercise their privileged right over the collateral within 2 (two) months as of the point the bankruptcy estate is declared to be in the state of insolvency. Otherwise, the appointed receiver is required to request the delivery of the collateral to be sold by the receiver. If the receiver has enforced the collateral, the proceeds that will be distributed to the secured creditors need first to be deducted by not only the amount of the mandatory preferred claims (which will also apply if the secured creditors enforced the collateral by themselves), but also the bankruptcy costs.

On the clawback rights, under Articles 41 and 42 of the Indonesian Bankruptcy Law, for the interest of the bankruptcy assets, only the receiver could request for the nullification of a preferential transfer transaction conducted by the debtor before its bankruptcy, if such transaction was considered detrimental to the creditors

("Bankruptcy Preferential Transfer"). To nullify a Bankruptcy Preferential Transfer the receiver must prove the following requirements:

(i) the preferential transfer was performed by the debtor before it was declared bankrupt;

(ii) the debtor was not obligated by contract (existing obligation) or by law to perform the preferential transfer;

(iii) the preferential transfer prejudiced the creditors' interests; and

(iv) the debtor and such third party had or should have had knowledge that the preferential transfer would prejudice the creditors' interests.

If the preferential transfer transaction was conducted within the period of one (1) year before the company's bankruptcy, provided that the transaction was not mandatory for the debtor and unless it could be proven otherwise, both the debtor and the third party with whom the said act was performed were deemed to know that such transaction was detrimental to the creditors when such transaction belongs to one of the following three categories:

(i) a transaction in which the consideration that the debtor received was substantially less than the estimated value of the consideration given;

(ii) a payment or granting of security for debts which are not yet due; or

(iii) a transaction entered into by the debtor with a certain relative or related parties.

There is no provision under the Bankruptcy Law which stipulates a specific period when the Bankruptcy Preferential Transfer claim can be made. However, request for the nullification of a Bankruptcy Preferential Transfer shall be made by the receiver. The claim can be made only if the debtor has a receiver.

If the underlying security documents are nullified due to the Bankruptcy Preferential Transfer, then the security will also become invalid.

On other preferential creditors' rights, there are several kinds of creditors, generally regulated in the Indonesian Civil Code ("**ICC**"), Indonesian Bankruptcy Law, and Law No. 6 of 1983 which was last amended by Law No. 16 of 2009 regarding the General Provision of Taxation ("**Tax Law**"), which have preferential rights with respect to the *in rem* security as follows:

A. **Specific expenses stipulated by the Tax Law.**

- legal expenses arising solely from a court order to auction movable and or immovable goods;
- expenses incurred for securing the goods; and
- legal expenses, arising solely from the auction and settlement of inheritance.

B. **Preferred creditors ranked above the secured creditors.**

Tax claims and court charges which specifically result from the disposal of a movable or immovable asset (these must be paid from the proceeds of the sale of the assets over all other priority debts, and even over a pledge or mortgage), and the legal charges, exclusively caused by sale and saving of the estate (these will have priority over pledges and mortgages).

C. **The receiver's fee**.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

No, there are no entities which are excluded from bankruptcy proceedings.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No, there are no processes other than court proceedings which are available to a creditor to seize the assets of the company in enforcement.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Indonesia?

Yes, the submission to foreign jurisdiction should be binding and enforceable.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Indonesia?

Sovereign immunity has not been explicitly legislated in Indonesia. The Republic of Indonesia has subscribed to the doctrine of restrictive sovereign immunity by its entry into the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965. However, if a party is a state-owned company and enters into a commercial contract, it can be argued that such state-owned company has waived its entitlement (if any) to sovereign immunity.

In practice, the Government of Indonesia ("**GOI**") does not use sovereign immunity as the basis of defence in a dispute which relates to its obligation under a commercial agreement.

Nevertheless, the GOI specifically does not waive any immunity in respect of:

- actions brought against the Republic arising out of or based upon U.S. federal or state securities laws;
- attachments under Indonesian law;
- present or future "premises of the mission" as defined in the Vienna Convention on Diplomatic Relations signed in 1961;
- "consular premises" as defined in the Vienna Convention on Consular Relations signed in 1963;
- any other property or assets used solely or mainly for government or public purposes in the Republic or elsewhere; and
- military property or military assets or property or assets of the Republic related thereto.

The GOI is subject to suit in competent courts in Indonesia. However, Law No. 1 of 2004 on State Treasury prohibits the seizure or attachment of property or assets owned by the GOI.

10 Other Matters

10.1 Are there any eligibility requirements in Indonesia for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Indonesia need to be licensed or authorised in Indonesia or in their jurisdiction of incorporation?

There are not necessarily any eligibility requirements for a lender to be a bank. Lenders to a company in Indonesia do not need to be licensed in Indonesia. However, we normally assume that the lenders have proper licences under its jurisdiction.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Indonesia?

Other than the above, we believe there are no matters that need to be considered when participating in financings.

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He returned to ABNR after a few months' post with a major Indonesian power company as its senior legal manager, and currently heads the ABNR team which monitors regulations in connection with energy and mineral resources projects.

ABNR
COUNSELLORS AT LAW

Ali Budiardjo, Nugroho, Reksodiputro, usually abbreviated to ABNR, was established in Jakarta in 1967 as a partnership of legal consultants in Indonesian business law. The firm is one of Indonesia's largest independent full-service law firms. The commitment we make to clients is to provide broad-based, personalised service from top quality teams of lawyers with international experience that includes groundbreaking deals and projects. ABNR's reputation has been recognised around the world by independent industry surveys and law firm guides. ABNR was selected, based on its high level of integrity and professionalism, to be the sole Indonesian member of the world's largest law firm association Lex Mundi and of the prestigious Pacific Rim Advisory Council (PRAC).

Italy

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Italy?

In recent years, in addition to the effects of the global financial crisis, several austerity measures have been implemented in Italy, halting any growth in the short-term. The result for the lending market has been that new lending transactions have been limited, and an increasing number of existing borrowers have started restructuring loans entered recent years.

During the same period, the willingness to avoid risk has boosted the secured lending market compared to the unsecured lending market. In particular, lenders have started to look for security by means of a company's assets (trade receivables, securities, etc.) in order to grant new loans. Even financial institutions are now only able to borrow money on the medium term basis when they provide the appropriate collateral.

Towards the end of 2013 and at the beginning of 2014, the Italian lending market improved as a result of the approval by the Italian government of some urgent measures for the revival of the economy. Among them, Law Decree no. 145 of 2013, which was converted into Law no. 9 of 21 February 2014 (the "**Destinazione Italia Decree**") and which aimed to boost the competitiveness of the Italian market. It aimed to do this by means of, among others, the simplification of the regulatory framework and the boosting of credit for business activities, including the diversification and improvement of access to finance. With specific reference to the finance sector, the Destinazione Italia Decree has introduced significant new regulations aimed at supporting and expanding the sources of financing of companies as alternatives to the banking system.

1.2 What are some significant lending transactions that have taken place in Italy in recent years?

Some significant lending transactions have been:

A EUR 1,818,000,000 project financing granted by the European Investment Bank in favour of Società di Progetto Brebemi S.p.A. for the construction of the highway between Brescia and Milan, and the intermediated loan of an amount equal to around EUR 595,000,000 granted by the European Investment Bank to a pool of primary Italian banks – lenders of the project company – and secured by the guarantees issued by SACE S.p.A. (This deal has been awarded as IFLR Project Finance Deal of the Year 2013.)

The EUR 600,000,000 M/T refinancing of the existing exposure of RCS Mediagroup S.p.A. by Intesasanpaolo, Mediobanca, UniCredit, BNP Paribas, BPM – Banca Popolare di Milano, Banco di Bergamo, and Banca Popolare Commercio Industria.

The EUR 250,000,000 financing granted to Astaldi S.p.A. by Banca IMI S.p.A., Banco Bilbao Vizcaya Argentaria S.A. – BBVA, Milan Branch, BNP Paribas, Italian Branch, Crédit Agricole Corporate & Investment Bank, Milan Branch, Credit Suisse AG, Milan Branch, Deutsche Bank S.p.A., HSBC Bank plc., Milan Branch, ING Bank N.V., Milan Branch, NATIXIS S.A., Milan Branch and UniCredit S.p.A..

The EUR 11,000,000,000 financing of Banca IMI/Intesa San Paolo, Bank of America Merrill Lynch, BNP Paribas, Citi, HSBC, JP Morgan, Mediobanca, Morgan Stanley, Société Générale, UBS and Unicredit to Snam S.p.A., refinancing the indebtedness *vis-à-vis* ENI S.p.A.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Pursuant to Italian law, apart from the specific provisions in respect of financial assistance, as better described below, a company belonging to a group can grant a guarantee in respect of borrowings of other members of the group, provided that it has a specific economic interest (even if it is an interest of the group to which the securing company belongs) in guaranteeing or securing such financial obligations of its parent company or any other company belonging to the same group. The existence of such interest for the securing subsidiary has to be assessed on a case-by-case basis.

In addition to the above, please consider that granting guarantees in Italy is an activity reserved for banks and financial intermediaries. Notwithstanding, granting securities in respect of borrowings of other members of the group is not considered as exercising financial activities *vis-à-vis* the public and, accordingly, is not subject to prior regulatory consent or authorisation.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

As described above, the existence of any interest has to be assessed on a case-by-case basis. In the absence of any interest, the

controlling entity and the directors of the securing company are liable for the unlawful activities performed.

2.3 Is lack of corporate power an issue?

Yes. If the company issuing the guarantee lacks corporate power to do so, the guarantee may prove to be invalid and, even if the guarantee may be issued, as explained above, the directors of the company are liable for such activity.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No specific governmental consent of filing is required under Italian law, apart from what is specifically provided for financial assistance issues; however, legal issues are often raised by the directors and/or auditors of the Italian securing subsidiary.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There is no specific test in order to assess the corporate interest or the maximum amount of the relevant guarantee. However, the potential total payment that might arise under the guarantee shall not be disproportionate to the asset of the company in a manner that may lead to the company insolvency.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

As of today, there are no provisions under the laws of Italy, pursuant to which the enforcement of a guarantee is subject to any exchange of control.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

There are different types of collaterals on movable and immovable assets generally used to secure lending obligations. These include mortgages, pledges (over shares, quotas, accounts and receivables), assignments of receivables (for instance, trade receivables and VAT receivables) by way of security and special lien on movable assets. Among these types of collaterals, pledges are particularly used in the context of "repo transactions" (realised through repurchase agreements) performed by means of GMRA standard documentation.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Under Italian law, for each type of asset a specific security agreement is required, since each type of arrangement is subject to different formalities in order to be validly enforceable.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Collateral securities may be taken on the above-mentioned assets, provided that, on the basis of the nature of each asset (i.e. movable or immovable), a specific security interest is perfected.

In general terms, movable assets and receivables can be subject to a pledge or to a special lien, each of which requires different formalities to be performed.

Immovable assets, such as land or buildings, are subject to a mortgage, which is perfected through the registration of the security in the local public registry.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

A security over receivables may be granted through a pledge or an assignment by way of security.

Each of the above-mentioned security agreements imply the notification of the security created to the debtors.

In particular, the assignment is valid and binding as against the assigned debtor, the seller and third parties (such as a receiver appointed in respect of the seller) if the debtor has accepted the assignment with a certain date or has received notice thereof through a court bailiff.

Where the assigned debtor is a public entity, specific rules apply, including formalities regarding the execution of the agreement and the notification.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

It is possible to take a collateral security over bank accounts (technically the receivables *vis-à-vis* the account bank) by means of a pledge over bank accounts.

Such security collateral allows: (i) the pledgor to freely dispose of the deposits in a pre-default scenario; (ii) to freeze the cash, and interrupt any withdrawal, from the pledged accounts further to acceleration of the pledgor's obligations; and (iii) upon default, to enforce the pledge and directly sweep the positive balance of the accounts so as to recover their credit (being understood that any amount in excess of the secured obligations has to be returned to the pledgor).

Please note that under special legislation (i.e. Legislative Decree of 21 May 2004, No. 170), applicable in certain circumstances to pledge over bank accounts, even if a bankruptcy proceeding has been opened in respect of the pledgor, the lenders may withhold any amount standing to the credit of each of the pledged accounts and apply such amounts in discharging the secured obligations, informing in writing the pledgor and the bodies of the insolvency proceedings about the manner of enforcement and the relevant proceeds.

3.6 Can collateral security be taken over shares in companies incorporated in Italy? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Pledges over shares and quota of Italian companies are generally allowed. Different formalities are required in case of limited liability companies (i.e. pledge over quota), such as the registration of the pledge in the relevant companies register, or joint-stock companies (i.e. pledge over shares), such as endorsement of the pledge in the relevant share certificates and annotation in the

shareholders' book. Please note, however, that pledges over public shares are subject to certain law restrictions.

Under Italian law, the granting of a pledge over shares or quota by means of security documents governed by a foreign law is allowed, provided that all the formalities in respect of the enforceability of the security documents *vis-à-vis* third parties have been performed pursuant to the provisions of Italian law.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Article 46 of Legislative Decree No. 385 of 1993 (the "Banking Law"), for example, provides for the establishment of a special privilege in favour of banks that grant loans to companies. The special privilege may be granted over, *inter alia*: installations; wares; commodities; livestock; machinery; equipment; and receivables arising from the selling of such goods.

Such provisions of law apply only to loans granted by banks.

If the lender is not a bank, certain equipment may be subject to particular forms of pledge. However, all the assets can be subject to a pledge without impairing the capability of the borrower to use them in the course of its businesses.

The application of this special privilege has been extended by Law Decree no. 145 of 2013, converted into Law no. 9 of 21 February 2014, to bonds and similar securities issued by enterprises in accordance with Articles 2410 and *ff.* or Article 2483 of the Italian Civil Code that have a medium or long-term maturity and which are reserved to qualified investors.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes. For further details, please make reference to question 2.1 above.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

This may depend on the nature of the collateral and on the formalities to be executed in order to ensure the perfection of the security interest.

In particular, mortgages, pledges over quotas, and pledges and assignments of receivables towards public entities require the relevant arrangements to be notarised. To the contrary, pledges over shares, and pledges over bank accounts and trade receivables do not need to be notarised. The cost for the notary intervention varies depending on the value of the agreement and the activity requested of the notary.

With regard to the tax costs, in general terms, the collateral securities are subject to indirect taxes at a proportional rate that varies depending on the type of deed or contract. In this sense, please note that the most common forms of securities used in the context of financial operations are subject to the following indirect taxes:

i) Mortgages on real property: mortgage tax at a rate of 2% of the secured amount.

ii) Assignments of receivables: registration tax applied at a rate of 0.5% of the amount of the receivables assigned.

iii) Pledge over assets (other than real property) and right over such assets or personal guarantees: registration tax applied at a rate of 0.5% if the pledgor is someone other than the borrower (indeed, please note that guarantees granted by the borrower itself to secure its own liabilities are subject to a registration tax of €200); the taxable base is represented by the secured liability or, if lower, the amount of the cash or securities constituting the guarantee.

In addition, pursuant to Article 15, par. 3, of the Presidential Decree of 29 September 1973, No. 601, a specific regime is provided for taxation of securities collateral in respect of a loan which has a maturity of longer than 18 months (i.e. at least 18 months plus 1 day, a so-called "*medium/long term*" loan).

Indeed, if the medium/long term loan is: (i) granted by an Italian bank (or an EU bank); and (ii) executed within the boundaries of Italian territory, it may be subject, in case a specific option is exercised, to a 0.25% substitute tax (on the amount of the loan) *in lieu* of any other applicable indirect tax (even if referred to the securities executed in connection to the loan). In other terms, the application of the substitute tax leads to exemption from all other taxes and duties (e.g. registration taxes, mortgage dues, stamp taxes) ordinarily applicable on deeds, contracts and formalities relating to the loan transaction and to its related execution, amendment and extinction.

Law Decree n. 145 of 2013, converted into Law no. 9 of 21 February 2014, extended the applicability, on an optional basis, of the substitute tax to guarantees granted in relation to financing structured as bond issue or debentures similar to bonds. Such tax shall apply to any subrogation, substitution, postponements and cancellations even partial, including the supply of credit entered into in relation to the above transactions, the transfer of guarantees also resulting from the sale of said bonds; as well as modification or termination of such transactions.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

It depends on the nature of the collateral arrangements and the number of security interests created. In general terms, this would not take too long. The notarial costs are usually included in the costs for the establishment of the relevant security interest.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Except for consent that may be required in connection with the object of the collateral (if any), no consents are required, apart from corporate authorisation.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Certain formalities are required, depending on the type of security granted.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Pursuant to Italian law, and in particular Articles 2358 and 2474 of the Italian Civil Code, the general rule is that financial assistance by a company for the acquisition or subscription of its own shares or quotas is prohibited for both joint stock companies and limited liability companies, unless specific requirements are satisfied. The prohibition on financial assistance includes all transactions aimed at facilitating the purchase or subscription of the company's own shares or quotas, by means of any form of financing (both direct or indirect), or refinancing or securities and guarantees granted by a company for the benefit of third parties.

For the joint stock companies, the law provides for an exception. In particular, Italian law permits a stock corporation to provide loans or guarantees to third parties for the acquisition or subscription of such corporation's shares, provided that certain conditions are satisfied and a special procedure ("whitewash" procedure) is followed. However, companies continue to be prohibited from accepting their own shares as a form of guarantee.

The amount of guarantees or loans provided as financial assistance cannot exceed the amount of distributable profits or available reserves.

(b) Shares of any company which directly or indirectly owns shares in the company

Please make reference to question 4.1 (a) above.

(c) Shares in a sister subsidiary

It is doubtful under Italian law whether securing the borrowings incurred to finance or refinance the acquisition of shares in a sister subsidiary may fall under the financial assistance restrictions.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Italy recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

There is no specific regulation of "Trust" under Italian law, apart from tax and fiscal regulation. The trusts regulated by foreign law are recognised by Italian courts, but they are not commonly used in an Italian law governed lending transaction.

The creation of roles similar to that of a trustee is allowed through Italian law instruments.

More in particular, pursuant to Article 1703 *et seq.* of the Italian Civil Code, one or more parties can appoint another party to act as their agent ("*mandato*"), and such appointment is often included in intercreditor agreements.

According to the above, under syndicated loans governed by Italian law, the lenders in a pool appoint a bank (usually belonging to the pool) to act as an agent ("*mandatario*") for the other lenders and exercise their rights and powers under the facility agreements and the relevant security documents, on the basis of decision-making processes usually provided for in the intercreditor agreement.

5.2 If an agent or trustee is not recognised in Italy, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

In this respect, please make reference to question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of Italy and guaranteed by a guarantor organised under the laws of Italy. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The assignment of the credits arising from the loan agreement – or the loan agreement itself – is to be notified to the debtor and the guarantor.

Moreover, pursuant to Article 14 of Regulation No. 593 of 2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations ("**Rome I Regulation**"), the law governing the assigned claim shall determine whether the receivables are capable of being assigned, the relationship between the assignee and the debtor, the conditions under which the assignment can be opposed against the debtor and whether the debtor's obligations have been discharged. Moreover, pursuant to Article 9 of the Rome I Regulation, overriding mandatory provisions must be applied whatever the law applicable to the contract might be.

The assignment of the guarantees are subject to certain formalities, which are specifically provided for under Italian law, such as, for instance: (i) in case of assignment of receivables, the notification to the debtor; (ii) in case of mortgage, registration of the assignment in the land register; (iii) in case of pledge over quotas, registration in the companies register; (iv) in case of pledge over shares, registration in the shareholders' book and endorsement in the share certificate; and (v) in case of a special privilege, registration in the relevant register held by the competent court.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

In general terms, interest distributed by an Italian company and received by a foreign lender is subject to 20% withholding tax. Such a rate could be lowered pursuant to the relevant double tax treaties in force between Italy and the country of residence of the lender, if applicable.

In case of a payment of the proceeds of a claim under a guarantee or the proceeds of enforcing securities, in accordance with one interpretation of Italian tax law, any such payment would be equal to the payment under the loan and therefore may be subject to the same withholding tax.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Please refer to question 3.9 above.

6.3 Will any income of a foreign lender become taxable in Italy solely because of a loan to or guarantee and/or grant of security from a company in Italy?

In general terms, granting a loan to an Italian resident entity does not meet the concept of permanent establishment and therefore the lender remains a taxpayer not resident in Italy for fiscal purposes. However, it is important to outline that, according to Italian domestic laws, the interests paid by an Italian entity are considered as arising from Italy and therefore to be taxed in the Republic. Special provisions could be applicable on the basis of the double taxation treaties.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Notarial fees depend on deeds, contracts and formalities relating to the loan transaction executed in Italy by way of notarial deed. From this perspective, it is important to point out that in some cases (e.g. in case of a mortgage deed related to real estate located in Italy, or of a pledge over quotas of an Italian limited liability company), the deed/contract must necessarily be executed by way of notarial deed.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

If a lender is resident for tax purposes in a State or territory qualified by Italian Tax Administration as a "black-listed" country, the borrower would be subject to specific mandatory duties in order to be able to deduct the relevant incurred costs.

7 Judicial Enforcement

7.1 Will the courts in Italy recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Italy enforce a contract that has a foreign governing law?

According to the general principle of the freedom to choose foreign law, Italian courts may give effect to the choice of law made by the parties. However, the application of a foreign law may not prevent the Italian judge from applying overriding mandatory provisions of Italian law, whenever relevant.

Notwithstanding the above, please consider that security interests over assets which are located in Italy, in order to be enforceable in Italy, need the formalities provided for under Italian law to be perfected.

7.2 Will the courts in Italy recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The courts of the Republic of Italy will recognise as a valid judgment and enforce any final, conclusive and enforceable judgment obtained in an English court in accordance with and subject to the provisions of EU Regulation No. 44/2001 of 22 December 2000 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, which came into force in the Republic of Italy on 1 March 2002.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Italy, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Italy against the assets of the company?

Under the Italian legal system, there is uncertainty with reference to the timing of an enforcement procedure, in particular where such enforcement has to be performed on the basis of a foreign judgment. Accordingly, even if there is no ground to provide any timing on the enforcement procedure, pursuant to certain unofficial statistics, the average duration of an enforcement proceeding in Italy is more than seven years. With reference to the enforcement of a foreign judgment, absent any data on the relevant timing, it may be assumed that the average duration may be less than seven years.

However, please note that, when the loan agreement is governed by a foreign law, certain formalities may be adopted to grant the lenders with a document of execution ("*titolo esecutivo*") in order to speed up the enforcement procedure of the securities granted under Italian law.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Under general provisions of Italian law, enforcement of securities is conducted in accordance with the enforcement procedures ruled under the Italian code of civil procedure, which mainly provides for a public judiciary to sell the secured asset and repay the creditors on the basis of the relevant priority. In certain cases (e.g. assignment of receivables and pledge over receivables) the creditor is entitled to satisfy itself using the proceeds arising under the pledged (or assigned) claims.

In addition, in order to speed up the enforcement over real estate property, certain additional procedures have been recently implemented under Italian law, such as an auction directly managed by the notary public or computerised auctions.

Finally, some special legislations implementing the directive on financial collateral (such as Legislative Decree of 21 May 2004, No. 170) allow the creditors to avoid the above-mentioned procedures and to apply a faster enforcement procedure and also the parties, upon agreement, may avoid the procedural enforcement procedures by means of public auction or, if the asset or good to sell has a market price (such as a financial instrument), by means of an authorised intermediary.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Italy or (b) foreclosure on collateral security?

No, they do not.

7.6 Do the bankruptcy, reorganisation or similar laws in Italy provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Upon the occurrence of bankruptcy proceedings (apart from the securities governed by a special legislation such as Legislative Decree of 21 May 2004, No. 170), creditors are generally prevented from individually and separately attaching the collateral secured.

During insolvency proceedings, the distribution and allocation of payments, upon liquidation of assets, can only be made on the basis of the distribution plans prepared by the receiver and authorised by the court. The receiver is also entitled, subject to certain provisions, to cancel or continue performing current agreements based on the requirements of the insolvency proceedings.

Moreover, even if privileged creditors, the lenders shall submit their 'recover credit' request to the bankruptcy procedure and the same could be satisfied only at the conclusion of the latter. In this respect, please note that, upon the opening of the procedure, creditors are granted a specified term in order to tender their claims.

7.7 Will the courts in Italy recognise and enforce an arbitral award given against the company without re-examination of the merits?

Under Article 806 of the Italian Code of Civil Procedure, parties may submit disputes to arbitration. In addition to the above, under Article 4 of Law No. 218/1995, the jurisdiction of Italian courts can be derogated by contract in favour of foreign courts or of foreign arbitration.

Pursuant to Article 824-*bis* of the Italian Code of Civil Procedure (applicable to arbitrations where the place of arbitration is in Italy, even if dealing with international disputes), arbitral awards have, as from the date of signature, the same effects as court decisions. Moreover, with reference to foreign arbitral awards, with Italy being a contracting state to the 1958 New York Convention, foreign arbitral awards are recognised and may be enforced in Italy even if the state of origin is not a party to the Convention.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

As explained above, lenders are privileged creditors on the basis of the collateral granted under the security documents, provided that the relevant formalities have been performed. Nevertheless, upon the opening of a bankruptcy procedure, the lenders shall submit their 'recover credit' request to the bankruptcy procedure and same could be satisfied only at the conclusion of the latter.

Some special legislation, such as Legislative Decree of 21 May 2004, No. 170, allows the creditors to avoid the above-mentioned procedures and to apply a faster enforcement procedure.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Preferential creditor rights are provided under the Italian bankruptcy provisions, such as bankruptcy procedure costs, tax debts and employees' claims.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Only an entrepreneur carrying out a commercial activity is subject to bankruptcy proceedings. Accordingly, under Italian law, no public entities or other entities such as investment funds may be declared bankrupt.

In addition to the above, special bankruptcy proceedings are applicable with respect to those companies which have a high number of employees and economic losses, as well as for regulated entities such as banks and insurance companies.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Creditors may not avoid the above-mentioned court enforcement procedures, except where the relevant security interests are governed by some special legislations implementing the directive on financial collateral (such as Legislative Decree of 21 May 2004, No. 170) or the parties have agreed to avoid the enforcement procedures by means of a public auction or, if the assets or goods to sell have a market price (such as a financial instrument), by means of an authorised intermediary.

In addition to the above, please consider that the possession of a document of execution (*titolo esecutivo*, such as a notarised deed) may speed up the enforcement proceeding, thus the counterparty could always challenge the enforcement proceedings towards the courts.

Finally, creditors may apply for some safety measures *vis-à-vis* the debtor in order to avoid the detriment of the debtor's estate (*mezzi di conservazione della garanzia patrimoniale*) in case material adverse changes over the debtor's assets occur which, however, do not constitute an enforcement proceeding *strictu sensu*.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Italy?

The parties to a contract may freely choose the law applicable to the whole or a part of the contract, and select the court that will have jurisdiction over disputes, provided that any such choice does not conflict with any provisions of Italian law of mandatory application. Generally, the principles setting limits to the recognition of foreign laws (such as public policy or mandatory principles of law) do not apply to commercial relationships.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Italy?

Generally speaking, a party may waive its sovereign immunity; however, some matters are unquestionably subject to Italian law

and a waiver of certain immunities will not be recognised or allowed by the courts.

10 Other Matters

10.1 Are there any eligibility requirements in Italy for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Italy need to be licensed or authorised in Italy or in their jurisdiction of incorporation?

To carry out lending activities in Italy, a foreign entity needs to be either a bank or a financial intermediary authorised to lend money to the public on a professional basis. In particular, the lending activity may be performed either by (i) an Italian bank or financial intermediary, or (ii) a non-Italian entity passported or authorised to perform such activity in Italy.

Such limitations apply to the activities carried out in Italy *vis-à-vis* persons or entities established in Italy. Otherwise, even if the loan is secured by real estate located in Italy, should the borrower be a person or an entity established outside Italy (and the lending activity be carried out outside Italy), the lending activity will not be subject to Italian regulatory limitation.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Italy?

Please make reference to the answers above.

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Francesco Ago joined the firm in 1974 and became a partner in 1986. He is a business lawyer specialised in providing assistance to Italian and foreign clients in Finance (Structured Finance, Securitisations, Covered Bonds, Acquisition and Leveraged Finance, Real Estate Financing, Export Finance, Leasing and Asset Finance), Capital Markets (IPOs and other Equity Offerings, Debt Offerings, including Convertibles and Equity-linked Instruments, and Private Placements (Including to Management and Employees), Insolvency and Restructuring (Insolvency and Pre-Insolvency Proceedings and Financial Restructuring).

Highlights

He has assisted the main financial institutions, companies and Italian and foreign entities in complex and innovative transactions; he has assisted the major privatisations of the Republic of Italy in respect of legal matters, complex corporate transactions as well as the application of new schemes and legal techniques elaborated in the international financial markets in Italy.

Education

Graduated in Law, University of Rome, La Sapienza, 1973; admitted to the Bar, Italy, 1977; MCL, Georgetown University, Washington D.C. (USA), 1978.

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Gregorio Consoli joined the firm in 2002 and became a partner in 2013. He is a business lawyer specialised in providing assistance to Italian and foreign clients in structuring and documentation of debt transactions with focus on bond issuances, structured finance transactions, securitisation of receivables, asset acquisition finance and secured lending transactions, project finance and real estate financing.

Recent Highlights

Since 2009, he has been a leader in the covered bonds market. Gregorio has assisted banks, financial companies and investors in relation to securitisation and asset finance transactions. He has assisted major investment funds and other investors in the purchase of financial assets.

He has given assistance in relation to lending and other financing transactions (project financing and construction loans) including assistance to the EIB in relation to the 1.8 billion financing in relation to the Brebemi project (IFLR Project Finance Deal of the Year 2013).

He has also given assistance in relation to the issuance of hybrid bonds, high yield bonds and other capital market transactions.

Education

Graduated in Law, L.U.I.S.S. Guido Carli University, Rome, 2001; admitted to the Bar, Italy, 2004; Ph.D, Business Law, L.U.I.S.S. Guido Carli University, Rome, 2008.

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Languages

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Japan

Taro Awataguchi

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Japan?

Japanese lending has traditionally relied upon mortgages over real estate to secure loans. In the case of small and medium-sized entities, personal guarantees by representative directors of the borrowers have been also common (a guideline called "*keieisha-hosho* guideline" on this type of guarantee became effective on February 1, 2014). While new types of asset backed or cash flow financing such as (i) asset-based lending (ABL), (ii) debtor-in-possession (DIP) financing, and (iii) project financing are developing in Japan, the traditional practice of lending against real estate collateral remains the preferred method among Japanese banks.

1.2 What are some significant lending transactions that have taken place in Japan in recent years?

Since the great earthquake and *tsunami* of March 11, 2011, there has been growing anti-nuclear sentiment in Japan and intensified analysis by policymakers regarding Japan's energy demands. Financing the costs of alternative clean energy solutions (such as solar, wind, hydro-power and geothermal) through project financing structures is one of the key focuses in Japan now and for the next decade.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, guarantees from related companies are available in Japan.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

In general, there are no enforceability concerns. However, if only a disproportionately small benefit or no benefit at all is received by the guarantor, in a bankruptcy proceeding of the guarantor, the guarantee may be subject to avoidance by a bankruptcy trustee.

2.3 Is lack of corporate power an issue?

Corporate power is necessary for a guarantor to grant guarantees.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

The Civil Code (Act No. 89 of April 27, 1896, as amended) requires that any guarantee agreement must be in writing. Shareholder approval is not required. Depending upon the materiality of the amount guaranteed, board of directors' approval may be required. In practice, the loan and/or guarantee agreement will contain a representation and warranty as to board of directors' approval, and such approval will be a condition precedent to funding any loan.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Japanese law does not provide net worth, solvency or similar limitations on the amount of a guarantee. (Please note that, where an obligor has the obligation to furnish a guarantor, such guarantor must be a person with capacity to act, and have sufficient financial resources to pay the obligation. This does not apply in the case where the creditor designated the guarantor.)

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No. However, please note that a payment exceeding JPY30,000,000 from a resident in Japan to overseas by way of bank remittance may be subject to reporting requirements.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

In Japan, many types of property may be pledged to secure lending obligations, including real property (buildings and land), plant, machinery, equipment, receivables, accounts, shares and inventory.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Different types of security interests may be created by one security agreement; however, as discussed in questions 3.3 to 3.8 below, the security interest in each type of asset must be perfected separately.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

(1) Real property (land)

Under Japanese law, a typical security interest upon real property is a mortgage (*teito-ken*). For a revolving facility with a maximum claim amount (*kyokudo-gaku*), a revolving mortgage (*ne-teito-ken*) is applicable.

A mortgage on land or a building is created by an agreement between a mortgagor and a mortgagee. In order to perfect the mortgage against a third party, the mortgage must be registered with the Legal Affairs Bureau ("LAB") having jurisdiction over the property. There are approximately 500 LABs throughout Japan.

Under Japanese law, the land and any building on the land are treated independently. Therefore, the mortgagor of the land and the mortgagor of any building on the land could be different entities. It is, therefore, important to separately create and perfect the mortgage as a first lien upon both the land and the building. In Japan, almost all land (by parcel) and buildings (by building) are already registered with the LAB. The registration of the mortgage is made as an addition to such existing registration. Therefore, it is necessary to investigate the title and confirm whether the property is encumbered by an existing mortgage. Typically, a mortgage registration includes (i) the name and address of the debtor and mortgagor, (ii) the origin and date of the mortgage, (iii) the priority, and (iv) the claim amount (in the case of a revolving mortgage, the maximum claim amount). Though various covenants and other provisions may be included in the mortgage agreement, the full mortgage agreement is not recorded. Only the registerable items including those enumerated above will appear in a registration.

(2) Plant

A typical "plant" consists of land, a building, machinery and equipment. As mentioned above, land and a building can be collateralised by a mortgage (*teito-ken* or *ne-teito-ken*). Machinery and equipment are classified as movables, and will be collateralised by a security interest (*joto-tanpo*) (discussed below).

In addition, Japanese law provides for two comprehensive security interests for property located in a factory. One is a factory mortgage (*kojo-teito-ken*), and the other is a factory estate mortgage (*kojo-zaidan-teito-ken*). A factory mortgage over the land covers all machinery and equipment located in the factory. A factory estate mortgage is a very strong security interest that can actually eliminate pre-existing security interests over movables in the factory estate. Notice regarding the factory estate is published in the Japanese official gazette and if an existing security interest holder fails to object within a certain period (specified from one to three months), the existing security interest is extinguished. Both a factory mortgage and a factory estate mortgage require identification of each piece of machinery and equipment, and therefore require more burdensome procedures and costs than normal types of mortgages. The factory mortgage and factory estate mortgage are not common and are used mostly for large factories.

(3) Machinery and equipment

Machinery and equipment are movables. Movables can be collateralised by way of assignment as security (*joto-tanpo*). This security interest can be created by a security agreement between an assignor and an assignee. In order to perfect this security interest, the target movable must be "delivered" from the assignor to the assignee. Delivery can be made by (i) physical delivery, (ii) constructive delivery, or (iii) if a movable assignment registration (*dosan-joto-toki*) is filed with the LAB, the registration itself is deemed delivery from the assignor to the assignee. The LAB located in the Nakano Ward of Tokyo is the exclusive designated LAB for any movable assignment registration.

In creation of *joto-tanpo*, it is necessary to identify the target movable by whatever means is enough to specify it, such as kind, location, number and so forth. This identification rule is also applicable in perfection of *joto-tanpo* by way of physical or constructive delivery. In perfection by movable assignment registration, there are two statutory ways to identify the target movable: (i) specification by kind and a definitive way to specify the target (such as a serial number); and (ii) specification by kind and location. The former is usually used for a fixed asset, and the latter is usually used for inventory (aggregate movables).

Note that the movable assignment registration is compiled by the assignor (not by the target movable). Therefore, unlike a real estate registration which can be searched by the property, a movable assignment registration cannot be searched by the target movable, and priority cannot be registered because there is no registration system to reflect the priority. There is continued debate as to whether a second lien (*joto-tanpo*) is valid. Anyone can search whether an assignor has already filed a movable assignment registration and obtain an outline certificate of the registration for a fee of JPY 500. If there is no existing movable assignment registration filed with the LAB, a certificate of non-existence of movable assignment registration will be issued. However, this does not mean there is no physical or constructive delivery. Therefore, it is necessary to perform due diligence with respect to possible physical or constructive delivery by an assignor. If a movable assignment registration has been filed with the LAB, the outline certificate describes (i) the existence of such registration, (ii) the timing of the assignment, and (iii) the name and address of the assignee, but it does not provide detailed information regarding the target movable. A comprehensive registration certificate is only accessible to limited persons, and in practice, a lender will ask the debtor to obtain the latest comprehensive certificate.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

A security interest in receivables (claim) may be taken by a pledge or assignment as security (*joto-tanpo*). These security interests can be created by a security agreement between the pledgor/assignor and pledgee/assignee.

In creation of the security interest, it is necessary to identify the target receivable enough to specify it (such as kind, date of origination and other items to the extent applicable). If the target is a claim to be generated in the future (*shorai-saiken*, "future claim"), the period (beginning and end dates) must be specified in the security agreement and in connection with perfection. If there is an agreement made between the debtor and the obligor of the target receivable which prohibits pledge/assignment of the target receivable, the pledge/assignment is basically invalid, with two exceptions: (i) if the pledgee/assignee is unaware of the prohibition

agreement without gross negligence, the pledge/assignment shall be valid; and (ii) the pledge/assignment will become valid retroactively from the time of the pledge/assignment (to the extent not harmful to a third party) if the obligor of the target receivable consents to the pledge/assignment, even if there has been a prohibition agreement.

The pledgee/assignee can assert the security interest against the obligor of the target receivable upon (i) notice to the obligor from the pledgor/assignor, or (ii) acknowledgment of the obligor. The pledgee/assignee can assert the security interest against a third party (such as a double pledgee/assignee or bankruptcy trustee of the pledgor/assignor) upon (i) notice to the obligor of the target receivable from the pledgor/assignor by a certificate with (a stamp of) a fixed date, (ii) an acknowledgment of the obligor of the target receivable by a certificate with (a stamp of) a fixed date, or (iii) a claim pledge/assignment registration with the special LAB located in Nakano Ward of Tokyo. The registration can be made with the LAB upon creation of the security interest without notice to the obligor. In such a case, practically, the notice to the obligor of the target receivable will be sent upon the event of default of the pledgor/assignor, and the notice must be accompanied by a registration certificate (this notice can be sent by the pledgee/assignee).

The claim assignment registration is not compiled based upon the target receivable, but by the assignor. Therefore, unlike the real estate registration, the receivables pledge registration cannot be searched by the target receivables, and, as with movables, priority cannot be registered.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

There are various types of bank deposits in Japan. We will discuss two typical deposit claims used for a pledge: (i) a term deposit (*teiki-yokin*); and (ii) an ordinary deposit (*futsu-yokin*). Validity of a pledge over a term deposit is well established; however, there has been debate as to the validity of a pledge over an ordinary deposit because there is no Supreme Court decision addressing this issue. Nevertheless, a pledge over an ordinary deposit is often used for structured financing. As a pledge or assignment of a deposit is usually prohibited by the deposit agreement, a pledge without the bank's consent is invalid. A pledge over deposits is usually created by a standard form of pledge agreement created by the depository bank, including consent by such bank. If the bank's consent is made with a fixed date stamp, that consent constitutes perfection against a third party. If the lender is itself the depository bank, the bank can either set off or exercise the pledge over the deposit claim.

3.6 Can collateral security be taken over shares in companies incorporated in Japan? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Under Japanese law, shares of companies incorporated in Japan can be pledged or assigned as security (*joto-tanpo*). The articles of incorporation of a Japanese company will specify whether the shares are represented by physical certificates. If the shares are "certificated" (physical certificates issued), then a pledge can be created by physical delivery of the certificates to the pledgee, and perfected against the issuing company and any third party by continuous possession of the certificates by the pledgee. As this type of pledge is unregistered and thus unknown to the issuer (*ryaku-shiki-shichi*), any dividend will be paid to the pledgor, and upon an event of default, the pledgee must seize the dividend before it is paid to the pledgor. In contrast, if the name and address of the pledgee and target shares are registered on the shareholders' list at the request of the pledgor (*toroku-shichi*), the dividend can be paid directly to the registered pledgee.

If the shares are not certificated, a pledge may be created by a security agreement between the pledgor and pledgee, and must be perfected against the issuer and any third party by registration of the pledge on the issuer's shareholders' list.

After January 5, 2009, all share certificates of all listed companies became null and void. The shares and shareholders of all listed companies are now subject to the book-entry system controlled by the Japan Securities Depositary Center, Inc. (JASDEC). A pledge over listed shares is created and perfected by registering the pledge with the pledgor's account established at the applicable institution under the book-entry system.

Please note that a company which is not listed may, in its articles of incorporation, restrict the transfer of shares and make any transfer subject to the approval of the issuer (such as consent by the board of directors).

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, inventory is usually regarded as an aggregate movable. Creation and perfection are as discussed in question 3.3 above.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, subject to the other items discussed within this chapter regarding guarantees and security interests.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Registration taxes are imposed on (i) mortgage registration (0.4% of the claim amount (as for revolving mortgage, 0.4% of the maximum claim amount)), (ii) movable assignment registration (JPY 7,500 per a filing (up to 1,000 movables)), and (iii) claim assignment registration (JPY 7,500 per a filing (up to 5,000 claims) and JPY 15,000 per a filing (exceeding 5,000 claims)).

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

No, except for the factory estate mortgage which requires the procedures discussed in question 3.3 above.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No regulatory consents are required to grant security, except for general consents for transfers required by the terms of the asset itself (such as licences).

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Taking an example of a revolving mortgage over real property, loans up to the registered maximum amount will be secured by the mortgage in accordance with the priority of the original registration filing.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

In general, most of the official documents must be signed with a registered chop. The chop registration certificate is also necessary (for example, for filing an official registration). In many cases, there are alternative ways available to foreign lenders.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company: no.

(b) Shares of any company which directly or indirectly owns shares in the company: no.

(c) Shares in a sister subsidiary: no.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Japan recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

In the practice of Japanese syndicated loans, an agent usually exists for the syndicated group. However, even if one of the syndicated secured lenders serves as such an agent, it cannot enforce the security interest held by other creditors. In addition, enforcement on behalf of other creditors may be prohibited by the Attorney Act (Act No. 205 of June 10, 1949).

Under the general rule of the Civil Code and other related laws, it is generally understood that the "secured creditor" and the "security holder" must be the same person/entity ("Same Person/Entity Principle"). However, under a security trust system, separation between the "secured creditor" and the "security holder" can be achieved. Until 2007, based on the Secured Bonds Trust Act (Act No. 52 of March 13, 1905), such security trust system only applied to bonds. In 2007, a new Trust Act (Act No. 108 of December 15, 2006) provided for a more general security trust system. Under the new system, if a trust is created with a security interest as the trust property and the terms of the trust provide that the beneficiary is the creditor whose claim is secured, the trustee can be a security trustee ("Security Trust"). As the holder of the security interest, the security trustee may, within the scope of affairs of the Security Trust (subject to the instruction by trust beneficiaries in many cases), file petitions for enforcement and take other actions necessary, including distribution of proceeds.

One of the benefits of using a Security Trust is that no individual transfer and perfection procedures are necessary when a secured creditor assigns its secured claims because the security holder does not change under the Security Trust.

However, this new Security Trust system is not used often. While the Trust Act was amended to provide for the Security Trust system, other Japanese laws have not been amended to conform and retain features of the Same Person/Entity Principle. This lack of harmonisation creates practical enforcement risks that have yet to be tested in Japanese courts.

5.2 If an agent or trustee is not recognised in Japan, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Under Japanese practice, when a Security Trust is not used, secured creditors (such as syndicated loan lenders) elect a "security agent" for administrative purposes only ("Security Administrative Agent").

The basic difference between the security trustee and the Security Administrative Agent is that the Security Administrative Agent is not a holder of all collateral security for all secured creditors. As a result, (i) perfection must be obtained individually for each secured creditor, (ii) when a secured creditor assigns its secured claim and its collateral security, individual perfection procedures to transfer the collateral security are required, and (iii) each secured creditor has to take enforcement actions under its own name (subject to the majority approval of the syndication group).

Under Japanese law, when several secured creditors share the single/same collateral in the same ranking, there are two possible legal structures (where applicable): (i) "independent and in the same ranking security" ("Same Rank Security") where each secured creditor owns independent security of the same ranking; and (ii) "joint share security" where all secured creditors share one security ("Joint Security"). The basic difference is that each secured creditor may enforce its security in the Same Rank Security, while unanimous consent of all secured creditors is required to enforce security in the Joint Security. However, secured creditors in a Same Rank Security often enter into an inter-creditor agreement prohibiting individual secured creditors from enforcing the collateral security without majority consent. Violation of the inter-creditor agreement does not invalidate the enforcement, but only constitutes a damage claim of the other secured creditors.

5.3 Assume a loan is made to a company organised under the laws of Japan and guaranteed by a guarantor organised under the laws of Japan. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

If the loan transfer is not prohibited by the terms of the loan documents, the loan can be transferred by agreement between Lenders A and B, and the guarantee is automatically transferred to the same assignee (Lender B). In order to perfect the loan transfer against the guarantor, according to a prevalent theory, either (i) a notice to the borrower, or (ii) consent by the borrower is sufficient. However, practically, it is sometimes prudent to send a certified notice to both the borrower and guarantor.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Yes. Under the Income Tax Act of Japan (Act No. 33 of 1965) ("Income Tax Act"), a 20.42% withholding tax (including Special Reconstruction Income Tax, which is imposed until December 2037) is levied on the interest paid to foreign lenders under a loan.

However, if Japan and the country where the foreign lender resides are parties to a tax treaty (such as the United States or the United Kingdom), the withholding tax rate may be lowered or the obligation to withhold tax may be relieved entirely. For example, no more than 10% withholding tax is levied on interest paid to US or UK lenders under the tax treaties as of March 26, 2014. Under the tax treaty between the US and Japan, if a lender is a bank, insurance company or registered securities dealer, the obligation to withhold tax in Japan is relieved entirely. As of March 26, 2014, the tax treaties between (i) the US and Japan, and (ii) the UK and Japan are scheduled to be amended, subject to both countries ratifying the amendment. After these amendments, all lenders (including other lenders which are not listed above) are to be exempted from the withholding tax in Japan.

Withholding tax is not levied on interest paid to domestic lenders because that interest is already taxed under the Corporation Tax Act of Japan (Act No. 34 of 1965) ("Corporation Tax Act").

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Under the Corporation Tax Act and other local government tax laws, foreign creditors making loans to Japanese domestic borrowers, but not otherwise having a "permanent establishment" in Japan, are not required to pay (i) the national corporation income tax, (ii) the prefectural and municipal inhabitants' tax, or (iii) the prefectural enterprise tax. Under the applicable tax laws, the effective tax rate on corporations in Japan is (i) 38.01% (including Special Reconstruction Income Tax, which is imposed until March 31, 2014) for the fiscal year commencing on or after April 1, 2012 until March 31, 2014, and (ii) 35.64% for the fiscal year commencing on or after April 1, 2014. Activities in Japan such as (i) having a branch office, (ii) performing operating construction work for more than one year, or (iii) having independent agent(s), may constitute having a "permanent establishment" in Japan. If a tax treaty exists between Japan and the country where the foreign lender resides (such as the United States and the United Kingdom), special preferential tax treatment may be applicable to interest income.

A stamp tax is imposed based on the amount of indebtedness evidenced by a loan agreement and can range from JPY 200 to JPY 600,000. A flat fee stamp tax of JPY 200 is required for a guarantee. Collateral agreements such as mortgages and pledge agreements are not subject to additional stamp tax.

Registration tax is discussed in question 3.9.

Stamp tax and registration tax apply without regard to the foreign or domestic status of a lender.

6.3 Will any income of a foreign lender become taxable in Japan solely because of a loan to or guarantee and/or grant of security from a company in Japan?

No. There is no corporation income tax or individual income tax under the Corporation Tax Act or the Income Tax Act specifically applicable to foreign lenders solely due to the fact they are lending to Japanese borrowers (or accepting a guarantee or security in connection with a loan to a Japanese borrower).

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No. Documents can be notarised to facilitate compulsory execution in the future. If documents are notarised, a creditor does not need to obtain a court judgment when filing an attachment.

Possible additional fees include (i) process fees based on the Foreign Exchange and Foreign Trade Control Act (Act No. 228 of December 1, 1949) ("Foreign Exchange Act") (mainly attorneys' fees), (ii) attorneys' fees and other fees required to draft contracts and process various registrations, and (iii) tax accountant fees.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Before starting to lend in Japan, foreign lenders must acquire a licence as a "branch office of a foreign bank" under the Banking Act (Act No. 59 of 1981) or register as a "money lender" under the Money Lending Business Act (Act No. 32 of May 13, 1983).

Procedures required for a borrower to borrow money from foreign lenders include permission by or reporting to a government authority (in many cases, the Ministry of Finance) based on the Foreign Exchange Act. In most cases, only reporting is applicable. There are some exemptions from the reporting requirement (e.g. loans the amount of which is JPY 100 million or less). Where a loan was made between a resident and a non-resident (including both individuals and corporations), the resident must report to the authority, because a person with a reporting obligation must be a "resident". The *post facto* reporting under the Foreign Exchange Act, however, is usually not burdensome.

7 Judicial Enforcement

7.1 Will the courts in Japan recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Japan enforce a contract that has a foreign governing law?

Yes, in principle, they will.

Article 7 of the Act on General Rules for Application of Laws (Act No. 78 of June 21, 2006) adopts a "party autonomy rule" whereby the formation and effect of a juridical act shall be governed by the law of the place chosen by the parties at the time of the act.

7.2 Will the courts in Japan recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Generally, courts in Japan will enforce a New York or English court judgment without re-examination of the merits; however, courts in Japan may evaluate the merits to the extent necessary to determine that the judgment satisfies the criteria for recognition.

Article 118 of the Code of Civil Procedure (Act No. 109 of June 26, 1996, as amended) ("Code of Civil Procedure") and Article 24 of the Civil Execution Act (Act No. 4 of March 30, 1979, as amended) ("Civil Execution Act") establish the mechanism for recognition and enforcement of foreign judgments.

The Civil Execution Act specifically provides that "the judgment granting execution shall be rendered without reviewing the substance of the judgment of a foreign court"; however, it also provides that (i) the foreign judgment must be final and non-appealable, and (ii) the judgment must fulfil the four conditions in Article 118 of the Code of Civil Procedure:

(i) The foreign court must have had jurisdiction over the defendant.

(ii) The defendant must have received adequate service of process.

(iii) The foreign judgment must not violate the public policy of Japan. Particular types of awards, such as punitive damages, may violate this requirement. When a public policy defence is raised, a Japanese court will look beyond the judgment to the underlying transaction. A defendant can also raise a public policy defence if the procedures through which the judgment was rendered were not consistent with Japanese public policy.

(iv) Reciprocity is assured. Japan has reciprocity with both the United States and England.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Japan, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Japan against the assets of the company?

It differs depending upon the circumstances, but generally it would take approximately six months to one year to complete such proceedings.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

If a secured lender intends to foreclose the secured assets non-consensually, it may file a petition for a public auction of the collateral with the court, if applicable (typically, real estate). Before payment is made by the winning bidder at the real estate auction, a private sale would take place if there is a consensual arrangement with the debtor.

Other than regulatory consents that may be specific to the nature of the collateral as a regulated asset, no general regulatory consents are required to enforce collateral.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Japan or (b) foreclosure on collateral security?

In general, there are no restrictions on foreign lenders seeking to file suits against a company in Japan or to foreclosure on collateral.

7.6 Do the bankruptcy, reorganisation or similar laws in Japan provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, the in-court insolvency proceedings described below provide a stay against the enforcement of certain claims.

Japanese law provides for two types of restructuring proceedings (Corporate Reorganisation and Civil Rehabilitation) and two types of liquidation proceedings (Bankruptcy and Special Liquidation).

In a Corporate Reorganisation proceeding, unsecured creditors are stayed from exercising their rights and secured creditors are stayed from exercising their security interests.

A Civil Rehabilitation proceeding is basically a debtor-in-possession proceeding. Secured creditors are not stayed from exercising their security interests in a Civil Rehabilitation proceeding (but may become subject to a suspension order by the court having a similar effect).

In a Bankruptcy and a Special Liquidation, secured creditors are not stayed from exercising their security interests (but, in Special Liquidation, may become subject to a suspension order by the court).

7.7 Will the courts in Japan recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. The Code of Civil Procedure does not specifically discuss the enforcement of a foreign arbitral award. However, Article 45 of the Arbitration Law (Act No. 138 of August 1, 2003) discusses recognition of arbitral awards generally, providing that "an arbitral award (irrespective of whether or not the place of arbitration is in the territory of Japan; this shall apply throughout this chapter) shall have the same effect as a final and conclusive judgment". The Arbitration Law is based upon the UNCITRAL Model Law on International Commercial Arbitration. Japan is also party to various international protocols and bilateral treaties, such as the New York Convention that addresses recognition and enforcement of foreign arbitral awards. Japan acceded to the New York Convention on June 20, 1961 and the Convention entered into force on September 18, 1961.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

As stated in question 7.6 above, in a Corporate Reorganisation proceeding, secured creditors are stayed from enforcing their security interests. The claims of secured creditors will be altered by a reorganisation plan approved by creditors' vote and confirmed by the court.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In a Corporate Reorganisation proceeding, the Trustee exercises the right of avoidance. In the case of a Civil Rehabilitation proceeding, the Supervisor exercises the right of avoidance.

If a loan is "new money" and the collateral is fair equivalent value, the secured transaction (collateralisation) is, as a basic rule, not subject to avoidance. However, if the change of the type of the property (e.g. from real property to cash) gives rise to an actual risk of the debtor's disposition prejudicial to the unsecured ordinary creditors (in a Corporate Reorganisation, secured and unsecured creditors), and the debtor had such intention and the lender was aware of the debtor's intention as of the time of the transaction, such transaction may be subject to avoidance.

If a secured creditor obtained security for an existing debt knowing that the debtor became "unable to pay debts", the lien could be avoided. If collateralisation for an existing debt was carried out within 30 days prior to the debtor becoming "unable to pay debts" in the event where the debtor did not owe any duty to provide such security, it could also be avoided.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Among the four insolvency proceedings stated in question 7.6 above, Civil Rehabilitation and Bankruptcy are available for both legal entities (including companies) and individuals, while Corporate Reorganisation and Special Liquidation are limited to stock companies (*kabushiki-kaisha*).

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

A secured creditor may exercise its rights independently from the Civil Rehabilitation, Special Liquidation or Bankruptcy (however, in the Civil Rehabilitation and Special Liquidation, such exercise may be subject to a suspension order by the court).

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Japan?

Under the Code of Civil Procedure, the amendment of which has been effective since April 1, 2012, the parties' agreement on the foreign (non-Japanese) jurisdiction is, as a basic rule, legally valid and enforceable if:

(i) it is made with respect to an action based on certain legal relationships and made in writing;

(ii) the designated foreign court is able to exercise jurisdiction over the case by the foreign law and in fact; and

(iii) the exclusive jurisdiction of the Japanese courts over an action in question is not provided in laws or regulations.

Please note that jurisdiction over actions relating to (i) consumer contracts, or (ii) labour relationships are subject to the independent rule specified under the amended Code of Civil Procedure.

See question 7.2 regarding recognition of foreign judgments.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Japan?

A waiver of sovereign immunity is legally valid and enforceable subject to the conditions in the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc. (Act No. 24 of April 24, 2009) (the "Immunity Act").

The Immunity Act is based on the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) and is effective from April 1, 2010.

10 Other Matters

10.1 Are there any eligibility requirements in Japan for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Japan need to be licensed or authorised in Japan or in their jurisdiction of incorporation?

See questions 5.1, 5.2 and 6.5.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Japan?

No, however, foreign lenders should note that court dockets in Japan are not available online and are not accessible to the general public. In general, there is also less transparency in court proceedings in Japan than in some jurisdictions, fewer hearings and *ex parte* communications are permitted. In particular, this lack of publicly available information can pose concerns for distressed debt investors regarding trading restrictions and non-public information.

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BINGHAM

Bingham's Tokyo office, known as Bingham Sakai Mimura Aizawa, consists of more than 80 lawyers (most of whom are Japanese *bengoshi*). We are one of the largest foreign law firms in Japan and have market-leading practices in financial restructuring, M&A, finance, antitrust, investment funds management, litigation and crisis management. Bingham's Tokyo office draws on the wide array of legal resources available at our 1,000-lawyer firm and has earned a reputation for seamless cooperation with our 12 offices firm wide. Bingham's Tokyo office has been recognised with awards from *Chambers*, *Practical Law Company* and *Asian Legal Business*. *AsianInvestor* named Bingham's Tokyo office Best Law Firm (Japan) in its 2013 service provider awards.

Korea

Woo Young Jung

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Korea?

With active investment in M&A transactions, there have been numerous acquisition finance transactions in Korea. Further, there have also been increased lending activities for the construction of large size power plants in Korea.

1.2 What are some significant lending transactions that have taken place in Korea in recent years?

Bukpyung Coal Thermal Power Plant was one of the largest power plant-related transactions in Korea in 2013. The project phases consisted of the development, construction and operation of two units of a 595MW coal thermal power plant located in Bukpyung National Industrial Complex in Donghae-city, Gangwon-do, Korea. Lee & Ko represented the project owner on drafting and finalising facility agreements on the limited recourse basis and all security documents for the security package.

This transaction is a first long-term facility project financing successfully closed for a commercial coal thermal power plant in Korea. Also, this transaction represented Korea's current market trend in which Korean Gencos participates as an investor in domestic private power plant projects. Korea East-West Power Co., Ltd. participated in the project as one of the equity investors and also as the operator of the power plant.

In the area of acquisition (or leveraged) finance, the financing for MBK Partners' acquisition of 100% shares of ING Life Insurance was one of the largest acquisition finance transactions in Korea in 2013. This deal was significant in that MBK Partners, Korea's largest private equity fund acquired one of the top-five insurance companies in South Korea. Lee & Ko acted as the legal counsel to the lenders in connection with MBK Partners' financing through Life Investment Limited, an SPV created to act as the borrower.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, but please refer to questions 2.2 to 2.6 below.

In addition, in the case of a business group which is subject to restrictions on guarantees as annually identified by the Fair Trade Commission (a "Restricted Group"), companies within such Restricted Group are prohibited from providing a guarantee to another domestic company belonging to the Restricted Group (Article 10-2(1) of the Monopoly Regulations and Fair Trade Act).

Further, a listed company cannot guarantee borrowings of one or more of the other members of its corporate group, unless there is an exceptional case in which such guarantee for its major shareholders is required for business purpose (Article 542-9 of the Commercial Code).

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

There are no provisions in the Commercial Code relating to corporate benefit rules. However, if a director grants security over the company's asset to a creditor or guarantee borrowings without any benefit (or with small benefit) to the company in return, that director may be in breach of his fiduciary duty and held liable to the company for any damages that it sustains. The director can also be held criminally liable for his breach.

2.3 Is lack of corporate power an issue?

In general, a company, otherwise duly incorporated and in valid existence, has the power to perform its guarantee obligations provided that it has taken all necessary action to authorise its entry into the guarantee. In this respect, a company may only act within the scope prescribed under its purpose clause in its articles of incorporation, whether such acts are directly or indirectly related to such prescribed purposes.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental or other consents or filings are required. As discussed in question 2.1 above, in the case of a guarantee by a listed company, the approval of the board of directors and a report at the annual shareholders' meetings is required (Article 542-9(3), Commercial Code).

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Korean law does not provide for net worth, solvency or similar limitations on the amount of a guarantee.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No. However, in the event a resident in Korea provides a guarantee in favour of a foreign party in a loan transaction which is in excess of certain prescribed limits, a prior report is required to be submitted to (and accepted by) the relevant regulator (Minister of Strategy and Finance, the Bank of Korea or designated foreign exchange bank, as applicable) under Foreign Exchange Transaction Act and the relevant regulations (the "FX Regulations").

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

As described below in question 3.3, real property, moveable property, plant machinery and equipment are available to secure lending obligations.

The following are the main types of security under Korean law:

(1) Mortgage (*jeodang-kwon*) or *Kun*-mortgage

Mortgages are most commonly used as security over immoveable property, but can also be created over certain moveable property, such as ships, aircraft and construction equipment.

A "*kun*-mortgage", as distinct from a fixed amount mortgage, is a type of mortgage which secures debts arising from a series of transactions up to a certain fixed maximum amount to be reached at a future date. The *kun*-mortgage is distinctive in that it secures the debt at its maximum amount without regard to any intermediate increases or decreases in the amount of the debt. In practice, *kun*-mortgage is more commonly used in Korea.

(2) Pledge (*jil-kwon*) or *Kun*-pledge

Pledges are most commonly used as security over moveable property, receivables, shares, securities and intellectual property. Moveable property that is subject to mortgages (such as certain ships, aircraft and construction equipment) cannot be subject to a pledge. A "*kun*-pledge" is a type of pledge which secures debts arising from a series of transactions up to a certain fixed maximum amount to be reached at a future date.

(3) Security by assignment (*yangdo-dambo*)

This security is not provided for in the Civil Code, but has been sanctioned by the courts and is used widely by creditors when taking security over moveable property.

This security interest may be taken over any moveable property whether or not such moveable property is otherwise subject to a mortgage or a pledge. A security by assignment is a transfer of ownership in the property as security, with an obligation to retransfer those rights to the security provider after satisfaction of the related obligations.

(4) Security registration under the Security Act (*dambo deung-gi*)

Security registration is a form of security created under the Security Rights on Moveables and Claims Act (the "Security Act") that allows security to be taken over certain tangible moveable property and claims and receivables by way of registration.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Korean law does not allow for a pledge over the general assets of a company such as a debenture.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

(1) Real property

The two most common forms of security created over immoveable property are mortgages and *kun*-mortgages.

The creation of a mortgage is effective upon an agreement between the borrower and lender(s) and registration at the relevant property registry (this also perfects the mortgage).

A *kun*-mortgage is created and perfected in the same manner as a mortgage. However, the agreement creating a *kun*-mortgage must specify the scope (or type) of claims to be secured and the maximum amount to which the *kun*-mortgagee has preferential rights.

(2) Moveable property

The most common forms of security granted over moveable property in secured lending transactions are pledges, security assignments, mortgages (which are only available for construction machinery, automobiles, aircraft and registered ships) and security rights (by way of security registration under the Security Act).

A pledge over moveable property is created and granted by an agreement (not necessarily in writing) between the pledgee and the pledgor and delivery of the subject matter to the pledgee. Delivery includes actual delivery, summary delivery (that is, if the pledgee is already in possession of the moveable property under an existing lease agreement, delivery will be assumed to have taken place) and transfer of possession by instruction. However, it excludes constructive delivery. Constructive delivery occurs where the pledgor enters into a lease agreement, simultaneously with entering into a pledge agreement, and is allowed to be in continuous possession of the moveable property under that lease agreement. In that case, the pledge would only acquire "notional" possession of the moveable property. A pledge over movable property is perfected by continuous possession of the subject matter of the pledge.

A security assignment of moveables is created and granted through a granting contract (not necessarily in writing) and delivery. In contrast to a pledge (see above), delivery of the subject matter can take the form of constructive delivery. A security assignment over moveable property is also perfected by continuous possession of the subject property.

A security right over moveable property is created and granted by an agreement and registration but no delivery is required in that case (Article 2 of the Security Act).

(3) Plant, machinery and equipment

Under the Factory Mortgage Act (the "FMA"), a factory mortgage may be established on the factory comprising the land and buildings. Such factory mortgage also extends to anything which has been attached and become inseparable therefrom, machinery and apparatus installed thereon and any other tangibles offered for the use thereof. This factory mortgage would be established pursuant to Article 7 of the FMA.

In addition to the factory mortgage explained above, another type of factory mortgage is possible under the FMA. This alternative type

of mortgage on a factory, which is called a "factory foundation" mortgage, can be established if the owner of the factory creates a "factory foundation" comprising the land, buildings, machinery and equipment, lease rights (*cheonse kwon and imcha kwon*), superficies right (*jisang kwon*) and industrial property rights. If a factory foundation mortgage is established over such foundation, a mortgage will be established over such machinery and equipment, lease rights, superficies right and industrial property rights in addition to the real property therein.

In respect of real property over which a mortgage cannot be registered, a *yangdo dambo* may be established whereby the title is acquired by the creditor and possession remains with the debtor. However, a y*angdo dambo* does not offer protection against *bona fide* purchasers as will be explained further in question 3.7 below on inventories.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

The most common form of security granted over claims and receivables is pledges. A pledge over claims and receivables is created by a granting contract. However, creating a pledge over a claim represented by a claim instrument requires delivery of the instrument and the execution of the granting contract. For a pledge over nominative claims, perfection is achieved (against the obligor of the claims) by giving notice with a fixed date stamp to, or obtaining an acknowledgment with a fixed date stamp from, each obligor (that is, the person obligated to pay the claims). Security rights (*chae-kwon-dam-bo-kwon*) over nominative claims (that is, claims for which creditors are specified and no claim instrument is issued) can also be created by registration at the relevant registry under the Security Act (Article 3 of the Security Act).

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Since under Korean law cash is not recognised as an asset that can be the subject of a security but a pledge over the account "receivables" is feasible and a common form of security over cash deposited in bank account. As described in question 3.4 above, account receivables may be collateralised by a pledge with a pledge agreement between the pledgee and pledgor and perfected by notice and/or acknowledgment with fixed date stamp.

3.6 Can collateral security be taken over shares in companies incorporated in Korea? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Korean law allows for a security to be taken over shares in a company incorporated in Korea. A common form of security over shares is the pledge which can be divided into a registered pledge and an unregistered pledge.

A registered pledge is created and perfected through the execution of the pledge agreement, recording the pledgee's name on the back page of the share certificate, registration of the pledgee's name and address in the company's shareholders' register, delivery of the share certificate and a copy of the company's shareholders' register to the pledgee and continuous possession of the share certificate along with continued registration on the company's shareholders' register.

On the other hand, an unregistered pledge is created and perfected through the execution of the pledge agreement and delivery of the share certificate.

If the share certificates of the listed company are deposited with the Korea Securities Depository ("KSD"), a registered pledge over those shares is created and becomes effective on the recording of the pledge and the pledgee in the investor's account book maintained by the investment broker or dealer (or depositor's account book maintained by KSD).

According to the Conflicts of Law Act, property rights relating to moveables and immoveables (or other rights which are subject to registration), must be governed by their *lex situs* (that is, the law of the place where the property is located) (Article 23 of the Conflicts of Law Act). Accordingly, a security over shares in companies incorporated in Korea is not possible pursuant to a New York or English law governed security agreement but instead there must be a Korean law governed security agreement.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

A *yangdo dambo* may be established over inventory, products, raw materials, supplies and goods-in-transit. The Supreme Court has recognised that a pool of moveable properties can be subject to a single security interest if that pool can be identified as being separate from the security grantor's other moveable properties by specifying the type, location and quantity of the moveable properties that are included in that pool. Although a *yangdo dambo* is possible on such moveable property, there may be difficulties in perfecting such security interest. In order to protect against *bona fide* purchaser claims, notice may be posted at the place where such inventory is located notifying that the goods are under security assignment to the financing parties as a *yangdo dambo*. Please note that a *yangdo dambo* may not offer complete protection against *bona fide* purchasers in certain cases.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

As a borrower, a company may grant security interests to secure its obligations, as well as a guarantor of obligations of other persons (subject to certain restrictions on provisions of guarantee, see questions 2.1 and 2.2 above).

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The registration costs for a mortgage or *kun*-mortgage would include, among others, registration tax and housing bond, and such costs are calculated on the basis of a secured amount or a maximum secured amount. It is common practice to create a kun-mortgage with a maximum secured amount (which is commonly one hundred thirty percent (130%) of the loan amount to cover the principal, interest and other related costs). Registration tax (including education surtax thereon) is the biggest portion of the registration costs in that it is calculated as 0.24% of the maximum secured amount.

The registration costs for other types of security (e.g., pledges and *yangdo-dambo*) are quite nominal.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

In the case of a mortgage or a *kun*-mortgage registration generally takes three to four business days. As to the other types of security which do not require registration, these do not require a significant amount of time.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Please see question 2.6 above concerning foreign exchange reporting requirements applicable to the provision of guarantees. In addition, in the case of the granting of a mortgage to a non-resident mortgagee over real property in Korea, a prior report with the relevant regulator under the FX Regulations may be required.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There are no special priority concerns involving a revolving credit facility.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

There are no particular documentary or execution requirements; provided that in the case of a non-Korean language mortgage agreement, a Korean translation thereof will be required for registration with the registration office.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

There are no financial assistance rules in Korea. However, if a director grants security over the company's asset or guarantee by the company to support borrowings incurred to finance the acquisition of shares without any benefit to the company in return, that director may be in breach of his/her fiduciary duty, as discussed in question 2.2 above.

In addition, there are certain restrictions on the acquisition of shares as follows:

(a) Shares of the company

A company may acquire its own shares in its own name and for its own account in accordance with certain prescribed methods; provided that the total acquisition price shall not exceed the distributable profit available for dividends (Article 341 of the Commercial Code).

(b) Shares of any company which directly or indirectly owns shares in the company

In principle, a company is prohibited from acquiring its own shares or the shares of its parent company while there are certain limited exceptions (Article 342-2 of the Commercial Code).

(c) Shares in a sister subsidiary

The Commercial Code does not prohibit a sister subsidiary from purchasing the shares of another sister subsidiary.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Korea recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The agent concept is recognised and is commonly used in syndicated loans. Depending on the provisions of the respective loan and intercreditor agreements, an agent can enforce rights on behalf of other lenders and apply the proceeds from the collateral to the claims of the lenders. However, the concept of a security trust (such as the holding of security through a security trustee) does not exist in Korea since, under Korean law, only a lender or holder of a legitimate claim (in connection with a loan transaction) is permitted to have security interest.

5.2 If an agent or trustee is not recognised in Korea, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Please see question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of Korea and guaranteed by a guarantor organised under the laws of Korea. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The assignor (i.e., Lender A) may assign the loan to the assignee (i.e., Lender B) by proving a notice with a fixed date stamp to the borrower and/or acknowledgment with a fixed date stamp by the borrower of such assignment. In the case of a guarantee, it is automatically transferred with the loan unless otherwise agreed; provided, however, that, in practice, it is quite common to notify the guarantor of such loan assignment to avoid any dispute in the future.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Pursuant to Article 98 of the Corporation Tax Act, a 22% withholding tax (including local income tax) is levied on the interest paid to foreign lenders under a loan.

However, if Korea and the country where the foreign lender resides are parties to a tax treaty, the withholding tax rate may be lowered or the obligation to withhold tax may be relieved entirely pursuant to the relevant tax treaty. For example, no more than 10% withholding tax is levied on interest paid to UK lenders.

Generally, the proceeds of a claim under a guarantee or the proceeds of enforcing security are similarly taxed.

For domestic lenders, they are required to pay corporate income tax (up to 24.2%) on the interest income *in lieu* of a withholding tax.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Korea has generally provided a few incentives aimed at foreign lenders, including (i) tax on interest paid by a Korean borrower to foreign lenders would be exempt under the Restriction of Special Taxation Act, and (ii) pursuant to the relevant tax treaty as described in question 6.1 above, certain interest income would be either waived or limited to a ceiling rate.

In addition, if a lender is a financial institution in Korea, such lender would be subject to a stamp duty tax (up 350,000 Korean Won depending on the loan amount) if a loan agreement is executed in Korea.

6.3 Will any income of a foreign lender become taxable in Korea solely because of a loan to or guarantee and/or grant of security from a company in Korea?

Any income of a foreign lender (with no permanent establishment in Korea) will not become taxable in Korea solely because of a loan to or guarantee and/or grant of security from a company in Korea. However, it will be determined by the relevant tax authority on a case-by-case basis after review of the transaction in more detail.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Please refer to question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

If a corporation is "thinly capitalised", and certain other factors are present, the Korean tax authorities may assert that instruments described as debt actually constitute equity for Korean tax purposes. The effect of such re-characterisation would be that payments on the instrument would not be deductible to the borrower (and could be subject to withholding in a manner different from interest payments). Moreover, even if treated as debt, Korean tax authorities may deny a deduction (in whole or in part) for payments of interest by a thinly-capitalised borrower (i.e., a borrower with a debt to equity ratio in excess of 3 to 1).

7 Judicial Enforcement

7.1 Will the courts in Korea recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Korea enforce a contract that has a foreign governing law?

The choice of the foreign law to govern a contract will be recognised as the governing law of a contract under the laws of Korea; provided that in the event of an action, proceeding or litigation in a Korean court (i) Korean law bearing upon the capacity of the Korean party to a contract to enter into contracts, (ii) Korean law, decrees and administrative regulations requiring governmental approvals, authorisations and consents for actions or contracts are executed by the Korean party, and (iii) the mandatory laws of Korea (including the principles of the Conflict of Laws Act of Korea) which will be applied because of their nature irrespective of the governing law in respect of non-contractual claims and disputes, are applied by the Korean courts.

7.2 Will the courts in Korea recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Korean courts in general observe foreign judgments; provided that submission to the non-exclusive jurisdiction of the New York courts or English courts is deemed to be valid and binding under the laws of the State of New York by the New York courts or the laws of England by English courts. In the event that a judgment of such courts is obtained, the same would be enforced by the courts of Korea without a further review on the merits, provided that (i) such judgment was final and conclusive and given by a court having valid jurisdiction in accordance with international jurisdiction principles under the laws of Korea and applicable treaties, (ii) the party against whom such judgment was awarded (a) was served, in a lawful method, the complaint or document equivalent thereto and notice of the hearing date or order with sufficient time to prepare for defence thereof (except in the case of service by public notice or process similar thereto), or (b) responded to the action without being served with process, (iii) recognition of such judgment does not violate good morals, social order or public policy of Korea, and (iv) judgments of the courts of Korea are accorded reciprocal treatment under the laws of the State of New York in the New York courts or the laws of England in English courts.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Korea, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Korea against the assets of the company?

Actual periods may vary depending upon the nature of the case, however, for a case tried in the lowest tier court (Korea's court system has three tiers), it would take approximately 6 months to 1 year in general (inclusive of enforcement process).

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Collateral security may be enforced pursuant to relevant security agreement. In general, in the event a private sale becomes infeasible, collateral security may be enforced in a public auction. Regulatory consents are generally not required, with the exception of certain assets (set forth under relevant laws).

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Korea or (b) foreclosure on collateral security?

Subject to the relevant court's decision, foreign lenders may have to provide security for the payment of the costs of legal proceedings in court.

7.6 Do the bankruptcy, reorganisation or similar laws in Korea provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

The Debtor Rehabilitation and Bankruptcy Act ("DRBA") regulates in-court insolvency proceedings in Korea. In the event that a rehabilitation proceeding has been commenced, secured lenders are prohibited from exercising their own collateral and are paid in accordance with the relevant rehabilitation plan. On the other hand, secured lenders may exercise their collateral in a bankruptcy proceeding.

7.7 Will the courts in Korea recognise and enforce an arbitral award given against the company without re-examination of the merits?

A final arbitral award properly obtained pursuant to arbitration in accordance with the terms of the contract would be enforced by the courts of Korea; provided that (a) none of the grounds for denial of enforcement of foreign arbitral awards provided for in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 exists, and (b) the arbitral award is related to a commercial transaction.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In Korea, the DRBA governs insolvency proceedings. There are two types of insolvency proceedings under the DRBA: rehabilitation proceedings and bankruptcy proceedings. A bankruptcy proceeding is used for orderly liquidation of the debtor's assets, whereas the primary purpose of a rehabilitation proceeding is to rehabilitate a debtor.

In a rehabilitation proceeding, secured creditors' claims are stayed unless they are qualified as common interest claims or have obtained court approval, and will be adjusted by, and repaid under, the rehabilitation plan.

In a bankruptcy proceeding, a secured creditor may freely enforce its right over the collateral security.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In certain cases, security interests of a secured creditor may be invalidated and may be subject to other preferential rights.

(1) Right of cancellation

Under the Civil Code, where (a) a debtor engages in a legal act (including a contract) that harms its creditors (e.g., the debtor's assets are reduced due to such act), (b) the debtor's liabilities exceed its assets prior to or as a result of such act, and (c) the debtor and the beneficiary of such act are aware of the harm to the creditors, then a creditor of the debtor has a right to seek cancellation of such act and return of benefits. This right is not available once a rehabilitation or bankruptcy proceeding is commenced with respect to the debtor.

(2) Right of avoidance

Under the DRBA, the following acts may be avoided by the trustee in bankruptcy proceedings or receiver in rehabilitation proceedings:

(a) Any act of the debtor with the knowledge that it would prejudice creditors. Prejudice includes not only a reduction of assets, but also a preferential treatment.

(b) Any act of the debtor taking place after a "suspension of payment" (which refers to the debtor's explicit or implicit admission that, due to the lack of financial resources, it cannot pay its liabilities continuously as they become due) or an application for commencement of a bankruptcy or rehabilitation proceeding (collectively, the "Triggering Event") that (i) creates a security interest in the debtor, (ii) discharges any obligation of the debtor, or (iii) is otherwise prejudicial to creditors.

(c) Any act of the debtor taking place after or within 60 days before a Triggering Event which (i) creates a security interest in the debtor company, or (ii) discharges any obligation of the debtor, where the debtor is not obligated to give rise to such creation or discharge.

(d) Any gratuitous act (for example, a grant of a gift) of the debtor taking place after or within six (6) months before a Triggering Event.

If the act was carried out by a person who has a special relationship with the debtor, as defined under the DRBA, then more relaxed standards for avoidance are applicable.

(3) Preferential treatment of certain claims

There are certain claims that are awarded with preferential treatment in judicial distribution of proceeds from the sale of a debtor's assets, including taxes levied regarding the assets sold, wages for three months, key money deposits for residential leases, etc. These claims are paid before those paid to secured creditors.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The insolvency proceedings under the DRBA are interpreted to be available to all natural and legal persons. However, most commentators agree that a bankruptcy proceeding cannot be commenced with respect to local governments while some commentators argue that a local government may be put into a rehabilitation proceeding.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No. Court proceedings are required in order for creditors to seize any assets not in their possession for enforcement of their claims.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Korea?

An agreement between parties on the foreign jurisdiction is legally binding and enforceable if:

(i) Korean courts do not have exclusive jurisdiction over the case;

(ii) foreign jurisdiction is permitted for the case;

(iii) the relevant foreign jurisdiction has reasonable nexus to the case; and

(iv) the parties' agreement does not violate general public policy of Korea.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Korea?

Although there is no specific statute or legislation on sovereign immunity *per se*, there is a court precedent in Korea which confirmed that a waiver of sovereign immunity is permissible. Hence, a party's waiver of sovereign immunity could be legally binding and enforceable under the laws of Korea.

10 Other Matters

10.1 Are there any eligibility requirements in Korea for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Korea need to be licensed or authorised in Korea or in their jurisdiction of incorporation?

A person who conducts lending business in Korea must obtain a licence under the relevant supervisory regulations (e.g., the Banking Act). Please also refer to questions 5.1, 5.2 and 6.5 above.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Korea?

A Korean borrower may be required to obtain a prior report/approval from relevant authorities under the FX Regulations in the event foreign lenders provide financing to the borrower and the borrower is providing collateral security to the foreign lenders. The foreign lenders should make sure that the Korean borrower has duly obtained such report/approval on or prior to the transaction.

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Banking & Finance Group at Lee & Ko has been rated top tier by all leading legal magazines and is renowned for its extensive experience and expertise in providing a wide range of legal advice to Korean and foreign financial institutions and corporations on matters that include, among others, general banking, project finance, acquisition finance, structured finance and securitisation, trade finance, lease and transportation finance, derivatives transactions, insurance, mergers and acquisitions and the development of various financial products. Our clientele includes most of the major Korean banks and foreign banks doing business in Korea.

Kosovo

KALO & ASSOCIATES

Vegim Kraja

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Kosovo?

In recent years, the banking sector in Kosovo has been characterised by rapid development and it is considered as one of the most successful sectors in the Kosovan economy. The most significant part of financial capital is foreign based capital and it is considered that the presence of foreign capital has modernised the banking system in Kosovo.

Recently, the Republic of Kosovo has become involved with several international lending institutions such as the European Bank of Reconstruction and Development and the European Investment Bank. As a consequence of this involvement in such lending institutions, the Kosovo lending market has been opened not only for intergovernmental lenders, but also for foreign governmental and private lenders.

Furthermore, according to a report by the Central Bank of Kosovo published at the end of last year, borrowing by businesses in Kosovo has declined. Also, referring to the last report of the Central Bank of Kosovo, non-preforming (bad) loans have increased by 8.5% since the end of September 2013.

1.2 What are some significant lending transactions that have taken place in Kosovo in recent years?

Nearly 70% of the total loans in Kosovo are taken by enterprises. The most significant proportion is taken by enterprises in the trade and industrial sector. There is also some recent evidence that there is a growing number of agricultural loans.

Banks which dominate the financial sector in Kosovo are providing loans to finance local businesses and soft loans to invest in energy efficiency.

Moreover, with the introduction of the new Law on Banks, the Islamic financial institutions governed by Shariah Law have started to operate in Kosovo, mostly providing household loans.

Further, EBRD has provided several financing projects in Kosovo in the form of loans or equity investments in local companies.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

According to the applicable Kosovo legislation there are no legal provisions impeding the granting of the corporate guaranties, except for the insolvency test. A company may guarantee with its movable and immovable properties the obligations of its affiliates. There are no special legal provisions regarding the form of the guaranty, but as aforesaid, there is no legal provision which impedes and restricts a company from becoming a guarantor for its subsidiary and affiliate, except for the insolvency test. Generally, a company may grant third party security (typically by charging its shares or assets) in support of a debt of another person, if such does not contradict the requirements under Article 165 of Law no.02/L-123 "On Business Organisations" (hereinafter referred as "Law on Business Organisations").

According to Article 165A of the Law on Business Organisations a joint stock company may not lend or provide money or any type of credit (including pledging its own shares) to any person or organisation for the purpose of enabling that person or organisation to purchase or acquire, directly or indirectly, whether from the company or a third party, any share or security of the joint stock company.

This prohibition shall not apply to transactions concluded by banks and other financial institutions in the normal course of business, or to transactions relating to an Employee Shares Scheme, provided that the acquisition would not lead to the net assets becoming less than the statutory capital plus non-distributable reserves. A joint stock company shall not accept its own shares as security for any obligation owed to the joint stock company by another person or organisation.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Directors in a Kosovan company shall act with care and diligence towards the company and must act faithfully and loyally towards it.

Moreover, pursuant to Article 75 of Law no.2003/4 "On Liquidation and Reorganisation of Legal Persons in Bankruptcy", (hereinafter referred to as the "Bankruptcy Law") directors (or those in an equivalent position) and officers of the debtor are obliged to reimburse the debtor's estate for damages caused as a result of the transfer of property made prior to the petition-submission date where such transfer (i) is for less than the fair value of the property, and (ii) occurs when such director or officer has actual or non-constructive notice that the value of the debtor's assets has fallen below its liabilities.

2.3 Is lack of corporate power an issue?

Under the Law on Business Organisations the board of directors shall appoint a chief officer (e.g. "CEO" or "managing director") who has authority to act in the corporate name by concluding transactions on behalf of the corporate, representing the corporate's interests (without any power of attorney or other documentary authorisation), save as restricted by the law or bylaws.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Yes. In companies organised as joint stock companies, the approval of the Board of Directors and at least the 2/3 affirmative votes of the general assembly of shareholders is required in order to conduct major transactions. The major transactions can be approved in regular or in extraordinary meetings. According to Article 222 of the Law on Business Organisations, a "major transaction" means a transaction or a related series of transactions which include(s) the purchase or other acquisition, the sale or other transfer, or the pledge or mortgage, of a company's property, property rights, or other rights which have monetary value the value of which, on the date of the company's decision to complete the transaction, comprises 50% or more of the book value of the company's assets based on the company's most recently compiled balance sheet.

However, in companies organised as Limited Liability Companies, unanimous approval of shareholders is needed for transactions that include the sale, lease, pledge, mortgage or other transfer or disposition of all or substantially all of the company's assets.

Moreover, the companies may impose other restrictions for approval of different transactions though the charter or bylaws of the company.

No government approvals are required, except in cases where the borrower is a sovereign or sub-sovereign institution.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No. There are no limitations on the amount of a guarantee, but the companies may not undertake any guarantee beyond the charter capital and the assets under its ownership.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange control regulations on the enforcement of a guarantee.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Kosovan legislation for security of lending obligations recognises 2 (two) types of security: (i) real security (including pledge and mortgage); and (ii) personal security, such as personal guarantee (bail).

There are several types of security mechanisms available under the Kosovan Legislation. These are as follows:

(a) Mortgage

According to Article 172 of Law no.03/L-154 "On Property and Other Real Rights" ("Property Law"), a mortgage is the creation, by agreement or by law, of an interest over immovable property, which gives the mortgage creditor (mortgagee) the right to initiate foreclosure proceedings for such immovable property for the purpose of satisfying a sufficiently identifiable obligation that is secured by mortgage and is overdue.

The mortgage is created by agreement between the owner of the immovable property unit and the mortgage creditor by registering it in the Immovable Property Registry (cadastral office in the municipality).

Pursuant to Article 174(1) of the Property Law, a mortgage agreement shall be concluded in writing and the signatures of the owner and mortgage creditor are required to be certified at the court of the competent territorial jurisdiction where the immovable property is located or at the public notary.

(b) Pledge

Under the Property Law, a pledge is a charge giving actual possession of collateral to the pledgee or a third person, as agreed between the parties, to be held as security for the fulfilment of an obligation ("possessory pledge"). Hence, a non-possessory pledge is effective against third parties (*erga omnes*) upon registration of the pledge in the Pledge Registration Office. Also, a pledge agreement shall be concluded in written form.

(c) Bail/guarantee, as provided under the Law on Obligations

A guarantee is defined by law as an action through which a person secures the fulfilment of the obligation of another person by binding himself personally to the creditor, and may be valid even if the debtor is not aware of such guarantee. It can be undertaken even for a future obligation. Article 998 of the Law on Obligations envisages that the Bail Contract is stipulated in written form.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

According to the Kosovan legislation, the security agreements have an accessory nature towards loan agreements. The security agreements can be concluded as a separated agreement or as a part of a loan agreement.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. The mortgage is created by means of an agreement between the owner of the immovable property unit and the mortgage creditor and by registering it in the Immovable Property Registry (cadastral office in the municipality).

The mortgage, according to Article 160 of the Property Law, is extended to (i) principal items (land), (ii) fruits, and (iii) other fixtures.

Pursuant to Article 174(1) of the Property Law, the mortgage agreement shall be concluded in writing and the signature of the owner and mortgage creditor is required to be certified at the court of the competent territorial jurisdiction where the immovable property is located or at the public notary.

Moreover, the Property Law recognises a commercial mortgage which is named as a "trade association mortgage", enforceable by extra-judicial means, i.e. without initiation of lawsuit in court. The mortgage is qualified as a trade association mortgage if: (i) the owner of immovable property unit is a merchant or a business enterprise; and (ii) the mortgage creditor is a financial institution. The trade association mortgage can be subject to foreclosure with consent of the owner of the encumbered property, as expressed in the corresponding Power of Attorney.

The collateral over machinery and equipment's may be created through the pledge agreement.

The validity of a mortgage agreement is conditional upon notarisation, while for the pledge agreement notarisation is optional.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. The pledge over receivables can be created by means of a pledge agreement as a non-possessory pledge. For the perfection of the non-possessory pledge, the registration of the pledge with the Pledge Registration Office is required.

According to Article 149 of the Property Law, if a claim for money is pledged, the debtor of such claim ("Third Party Debtor") may discharge the claim according to the agreement with the pledgor. If the pledgor or the pledge holder has notified the third party debtor of the pledge, the third party debtor has to effect payment to the pledge holder once the pledged claim falls due.

The notification to the third party debtor must be in writing, contain the names of the pledger and the pledge holder, identify the claim secured by the pledge and give precise instructions for payment to the pledge holder.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. The collateral security can be created over cash deposits in a bank account as possessory or non-possessory. The collateral over cash deposits in a bank account is created by means of a written pledge agreement between the pledgee and pledger, or as part of the loan agreement.

3.6 Can collateral security be taken over shares in companies incorporated in Kosovo? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes. The collateral security can be taken over shares in companies incorporated in Kosovo through the creation of a possessory or non-possessory pledge. The pledge agreement over shares shall be concluded in written form and registered at the Pledge Registration Office and at any archives maintained by the company.

The provisions of the Law on Business Organisation provide the possibility for companies to hold certified or uncertified shares.

Under Kosovar law parties can generally choose the law that will govern the terms and conditions of an agreement, including the pledge agreement at hand. The question is then whether the validity, perfection and priority of the pledge that the pledge agreement purports to create can be governed by a law that is chosen by the parties to the pledge agreement (e.g. New York or English Law). Under Kosovan rules on pledges, Kosovan law mandatorily governs all the rights and obligations in relation to the perfection of pledges over tangible property located in Kosovo.

Furthermore, under the present Law on Real Property and Others Real Rights "a foreign security right of any form or denomination which has been validly acquired and is still valid according to the right of foreign country, has the effect of a valid and effective right of pledge, if the thing encumbered by the security right is brought onto the territory of Kosovo".

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes. Principally, the pledge can be created over any movable item/property or right that is legally transferable, including but not limited to movable property, tangible and intangible property.

The pledge agreement over inventory can be created through the special contract or through the loan agreement.

According to Article 142 of the Property Law, a pledge can extend to such items, as identified in the pledge agreement, which are owned by or otherwise fall under the legal authority of the pledgor after the conclusion of the pledge agreement.

Moreover, a pledge can be created over an inventory or changeable item if the location and content of the inventory is clearly described in the pledge agreement. Each item added to the inventory over which a pledge is created becomes subject to the pledge from the time it is added to the inventory.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions

Yes, subject to prohibitions and restrictions provided in question 4.1.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Pledge and mortgage agreements shall be concluded in writing. For immovable property transactions, including the conclusion of the mortgage agreements, notarisation of the mortgage agreement is required. The notarisation fees are determined through the value of secured obligations.

According to Administrative Instruction No. 02/2012 "On Provisional Notary Fees" for notary acts related to transactions having a value lower than EUR 100,000, the following fees are applicable: (i) EUR 20 for transactions having a value from EUR 0.01 to EUR 2,500; (ii) EUR 30 for transactions having a value from EUR 2,501 to EUR 5,000; (iii) EUR 50 for transactions having a value from EUR 5,001 to EUR 20,000; (iv) EUR 80 for transactions having a value from EUR 20,001 to EUR 60,000; and

(v) EUR 120 for transactions having a value from EUR 60,001 to EUR 100,000.

However, the notarisation of a pledge agreement is not a mandatory requirement.

The Kosovo Cadastral Registration Agency's fee for registration of the mortgage of an immovable property can vary from EUR 20 up to EUR 200. If, through a mortgage contract, the mortgage is registered over more than one immovable property, then the state fee applicable for the registration equals the fee for one property multiplied by the number of properties. The Pledge Office's fees for registration of the pledge depend on the value of the secured obligation, such as:

- For a secured obligation of less than EUR 10,000, the fee is EUR 5.
- For a secured obligation of more than EUR 10,000, the fee is EUR 10.

Practically, the agreements between the legal persons are executed with stamps and signatures of legal persons of the respective companies.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Regarding fees for registration of pledges and mortgages please refer to question 9.9. In relation to timing, electronic registration of a pledge in Kosovo takes longer than 1 business day. However, the registration of the mortgage in the Kosovo Cadastral Agency could take up to 5 working days.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No, except in cases where a concession contract or privatisation contract requires the consent of the contracting authority. Approval of Kosovan Parliament is required for cases of sovereign or sub-sovereign institutions.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

The priority of secured claims does not change, despite the fact that a credit facility has a revolving nature. Thus, secured creditors will have priority for satisfaction of their claims towards unsecured creditors. Also, the secured creditors may register a priority right over a secured claim. The priority right can be registered on a pledge and on a mortgage in the relevant registry.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

As indicated in question 9.9 the immovable property transactions need to be notarised, while the notarisation of a pledge agreement is not a mandatory requirement. Practically, agreements between legal persons are executed with stamps and signatures of legal persons of respective companies. Also, agreements might be signed and executed by means of a power of attorney (procure).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

According to Article 165A of the Law on Business Organisations, a joint stock company may not lend or provide money or any type of credit (including pledging its own shares) to any person or organisation for the purpose of enabling that person or organisation to purchase or acquire, directly or indirectly, whether from the company or a third party, any share or security of the joint stock company.

This prohibition shall not apply to transactions concluded by banks and other financial institutions in the normal course of business, or to transactions relating to an Employee Shares Scheme, provided that the acquisition would not lead to the net assets becoming less than the statutory capital plus non-distributable reserves. A joint stock company shall not accept its own shares as security for any obligation owed to the joint stock company by another person or organisation.

(b) Shares of any company which directly or indirectly owns shares in the company

No. The provisions of the Law on Business Organisations do not provide any restrictions or prohibitions.

(c) Shares in a sister subsidiary

No. The provisions of the Law on Business Organisations do not provide any restrictions or prohibitions.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Kosovo recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The "trustee" and the role of a security trustee (or agent) are not expressly regulated by Kosovan law. This poses important practical questions related to the use of a security trustee in finance transactions where the Kosovan legal system is relevant.

5.2 If an agent or trustee is not recognised in Kosovo, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Kosovan legislation does not expressly recognise the role of agent or trustee. But, given the wide discretion of contracting parties, the parties to the loan agreement may appoint a third party in the capacity of agent or trustee. Moreover, considering provisions of the Law on Property and Other Real Rights governing the pledge agreement, the pledgee and pledgor may deliver the pledge item to a third party (agent).

Moreover, the Property Law recognises commercial mortgages, named as "trade association mortgages", which can be enforced by

extra-judicial means, i.e. without initiation of a lawsuit in court. The mortgage qualifies as a trade association mortgage if: (i) the owner of the immovable property unit is a merchant or a business enterprise; and (ii) the mortgage creditor is a financial institution licensed in Kosovo. The trade association mortgage can be subject to foreclosure/sale with the consent of the owner of the encumbered property, as expressed in the corresponding Power of Attorney created by an authorised estate agent.

5.3 Assume a loan is made to a company organised under the laws of Kosovo and guaranteed by a guarantor organised under the laws of Kosovo. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

According to Article 420 of the Law no.04/L-77 "On Obligational Relationships", Lender A and Lender B shall conclude an agreement for the transfer of a loan. Moreover, it is necessary only to notify the debtor. Also, the security claims should be registered on behalf of Lender B, in relevant registers, such as Pledge and Immovable Property Registry.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

The withholding tax on loan interest is at a rate of 10% of the gross payment.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives provided by the domestic legislation for foreign lenders.

Pursuant to Article 30 of the Law no. 03/L-162, dated 29.12.2009 "On corporate tax", as amended, all payments related to interests and royalties made by a Kosovan tax resident to a foreign tax resident are subject to a withholding tax ('WHT') at the rate of 10%. Notwithstanding the above, in the case that such payments (i.e. interest payments) are made by financial institutions licensed by the Kosovo Central Bank, no WHT is applicable. Moreover, the loans may be subject to bilateral treaties between Kosovo and third parties. Also, according to the provisions of the Law on Foreign Investments, the loans provided by foreign lenders are qualified as a foreign investment.

With regard to registration of mortgages or other securities on behalf of foreign lenders, Kosovan Legislation does not apply any extra charge to foreign lenders.

6.3 Will any income of a foreign lender become taxable in Kosovo solely because of a loan to or guarantee and/or grant of security from a company in Kosovo?

No taxes apply to foreign investments, loans or other securities.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No. Fees apply equally to foreign and domestic lenders. The Kosovo Cadastral Registration Agency's fee for registration of a mortgage of an immovable property can range from EUR 20 up to EUR 200. If, through a mortgage contract, the mortgage is registered over more than one immovable property, then the state fee applicable for the registration equals the fee for one property multiplied by the number of properties. The Pledge Office's fees for registration of the pledge depend on the value of the secured obligation, such as:

- For a secured obligation of less than EUR 10,000, the fee is EUR 5.
- For a secured obligation of more than EUR 10,000, the fee is EUR 10.

However the notary fees are determined through the value of secured obligations.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No there are not.

7 Judicial Enforcement

7.1 Will the courts in Kosovo recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Kosovo enforce a contract that has a foreign governing law?

Theoretically, yes, if the rules of private international law lead to the application of a foreign law, but this has never been tested in Kosovan Courts.

7.2 Will the courts in Kosovo recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes. According to Article 22 of the Law on Enforcement Procedure, the foreign judgments enjoy the status of an enforcement document. Pursuant to Article 11 of the Law on Enforcement Procedure, enforcement of a foreign judgment shall be enforced if the foreign judgment meets requirements provided by laws or international agreements on recognition and enforcement of judgments. The competent courts for enforcement of foreign judgments are basic courts.

The courts will not re-examine merits of the case, but will re-examine if the judgment violates principles of mandatory law and constitutional order in Kosovo.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Kosovo, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Kosovo against the assets of the company?

In the first case, depending on whether the respondent will exhaust legal remedies, such as an appeal in the second instance court, the conclusion of judicial proceedings may take 1 to 3 years.

In the second case, the procedure for recognition of foreign judgments may take from 3 to 9 months.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Yes. According to Article 99 of the Law on Enforcement Procedure, the sale of seized items shall be done by means of a verbal public auction, or by means of a direct settlement between the purchaser on one side and the enforcement body, or other authorised subject, on the other.

Provisions of the Law on Enforcement Procedure make it possible to organise two public auction sessions for selling seized items. According to Article 100(2) of the Law on Enforcement Procedure the first auction shall be organised within 30 days of the date the collateral is seized.

In case items registered as collateral fail to sell, the enforcement body shall announce the failure of the auction and shall invite the creditor to propose the second auction within 15 days. The second auction shall take place within 30 days of the proposal for the second auction.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Kosovo or (b) foreclosure on collateral security?

No. The foreign lenders may freely file a law suit or foreclosure on collateral (proposal for enforcement of collateral) security in the Kosovan courts without any applicable restriction.

7.6 Do the bankruptcy, reorganisation or similar laws in Kosovo provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

According to Article 33 of the Bankruptcy Law (Law no.2003/4), from the date of submission of the petition, all actions or acts of any kind aimed to satisfy the claim against the debtor shall be suspended, due to the imposition of a moratorium by the competent court.

7.7 Will the courts in Kosovo recognise and enforce an arbitral award given against the company without re-examination of the merits?

Primarily, the court will recognise and enforce a domestic and foreign arbitral award upon request of the party. The Law on Arbitration does not provide any provision that compels the court to re-examine the merits of the case. However, the court may set aside an arbitral tribunal if the applicant proves the following:

(i) a party to the arbitration agreement did not have the capacity to act;

(ii) the arbitration agreement is not valid under the law determined as applicable by the parties or the arbitral tribunal, or, in the absence of such determination, under the law applicable in Kosovo;

(iii) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iv) the award deals with an issue not contemplated by, or not falling within the terms of, the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the provisions of this Law or a valid arbitration agreement, no the condition that such defect had an impact on the arbitral award.

The tribunal may also be set aside if the court finds that:

(i) arbitration is prohibited by law; or

(ii) the enforcement of the award leads to a result which is in conflict with public policy (public order).

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

According to Article 34 of the Bankruptcy Law, the secured creditor (i.e. holder of a registered mortgage of immovable property or perfected of movable property) subject to the moratorium is entitled to adequate protection of its secured interest in the estate's property in order to maintain the condition and value of such property as it was as of the petition submission date. In cases where the property subject to a registered mortgage or perfected pledge is not adequately protected, the secured creditor may submit a written request to the court for a decision granting substitute adequate protection.

The court shall issue a ruling on the request for adequate protection no later than 20 days after its submission, in the absence of which the moratorium shall cease to the extent necessary for the creditor to exercise its rights in the secured property.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The Bankruptcy Law provides for the following order/ranking of class of creditors to be satisfied in the case of liquidation due to bankruptcy:

(i) state unpaid obligations (i.e. taxes) if they are lien previously by force of law;

(ii) secured claims, less reasonable cost of sales expenses;

(iii) priority claims, including:

- court expenses;
- administrator's expenses;

- administrator's remuneration;
- administrative expenses required for the maintenance and protection of the estate, including expenses due to the continuation of the operation of the debtor after the petition submission date;
- reorganisation expenses in the cases of aborted reorganisation;
- reorganisation financing and credit in the cases of aborted reorganisation;
- payments and expenses for personnel during the time of case administration; and
- creditors' committee expenses;

(iv) claims for unpaid pre-petition employees' wages (limited to 2 monthly salaries or wages per person);

(v) unsecured claims, including wage claims not subject to higher priority treatment; and

(vi) claims of the shareholders, founders, participants or partners of the debtor.

As part of the process of the validation of claims, the bankruptcy administrator shall evaluate the validity, extent and priority of claims presented against the debtor and of any related perfected pledges or registered mortgages, and shall submit an objection where adequate grounds to do so exist. Pledges and mortgages shall be valid if they are perfected or registered in accordance with applicable law.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

According to Article 1 of the Law on Bankruptcy, this law governs the bankruptcy of legal persons, which includes general partnership, limited partnership, joint stock companies, and limited liability companies. Moreover, the law on bankruptcy does not apply to individual enterprises, insurance companies, financial institutions, pension providers, and enterprises in public and social ownership which have not yet been transformed into private legal entities.

The insurance and financial institutions as regulatory industries are liquidated through the administration of the Central Bank of Kosovo.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

According to the Law on Courts, the competent court to try bankruptcy cases at the country level is Prishtina Basic Court – Department for Commercial Matters. The Law on Bankruptcy does not provide any other process or court proceedings available to a creditor to seize the assets of the debtor.

The Bankruptcy Law does not expressly provide for a settlement agreement as an alternative to the reorganisation plan. However, prior to submission of the petition for the opening of the bankruptcy proceedings, the debtor and its creditors are not prohibited to try to achieve an out-of-court restructuring.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Kosovo?

Yes. The party's submission to foreign jurisdiction is legally binding and enforceable under the Laws of Kosovo if the matter does not fall under the exclusive jurisdiction of Kosovo Courts. Such areas include immovable property, competence on bankruptcy and enforcement procedures, including for aircrafts registered in Kosovo.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Kosovo?

There is no special legal provision that regulates the issue of waiver of immunity by Kosovan sovereign entities, but it is very probable that the Kosovo state authorities have waived sovereign immunity in relation to commercial relations based on the contracting principle of autonomy of will, endorsed in Article 10 of the Law on Obligations.

Moreover, Article 7 of the Law on International Financial Agreements provides that international agreements provide for the possibility to settle disputes arising from such agreements through international arbitration, Kosovo Courts or courts of any jurisdiction as specified in the corresponding agreement. This provision sets the basis for state institutions to waive sovereign immunity and to be subject to arbitration awards and foreign courts judgments.

In addition, Article 7 stipulates that International Financial Agreements can be governed by foreign law, if the parties have agreed this in writing.

10 Other Matters

10.1 Are there any eligibility requirements in Kosovo for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Kosovo need to be licensed or authorised in Kosovo or in their jurisdiction of incorporation?

No. Kosovan legislation does not provide any restriction stating that only licensed banks may lend funds to companies. Thus, either legal persons or natural persons are entitled to lend funds to companies.

Moreover, the foreign licensed banks may act as lender to companies without the requirement to be licensed under Kosovan Law. Also, lenders are not required to be licensed as a financial institution in their jurisdiction of incorporation.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Kosovo?

The foreign lenders engaged in financing (loan) transactions which are not incorporated in Kosovo are not entitled to acquire ownership over immovable property without registering their legal presence under the laws of Kosovo.

Another important issue is that immovable property transactions including mortgage agreements fall under the exclusivity of Kosovan law and courts.

Moreover, the issue of enforcement of judgments is the weakest point of the Kosovan Jurisprudence. With the introduction of private enforcers, however, this issue is expected to improve as it has done in neighbouring countries.

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KALO & ASSOCIATES was the first law firm to set up a commercial practice in Albania in 1994, and has been operating from the jurisdiction of Kosovo since 2008. It provides a full range of legal services in all core aspects of commercial and corporate law for foreign, multinational and domestic companies and agencies across all sectors and industries. The firm acts as counsel for a number of Fortune 500 and Fortune 100 companies, as well as IFIs.

The firm's strongest practice areas are: Banking and Finance; Corporate and Competition; Entertainment Law; Infrastructure and Property; Intellectual Property; Litigation and Arbitration; Natural Resources; Tax and Customs; and Telecoms and Media.

KALO & ASSOCIATES, through their diverse work force with international experience and specialisation, provides its clients with combined legal knowledge.

KALO & ASSOCIATES is a top tier firm in various legal directories and publications, including Chambers Global, Chambers Europe, IFLR1000, Legal 500, etc., and is quoted as being "well respected and deeply entrenched on Albania's legal landscape", "a strong choice for international firms looking to team up with local counsel on significant cross-border transactions", and "a practice that is consistent with what you would expect from a top Washington law firm".

The firm is also a founding member of the South East Europe Legal Group – the biggest and strongest legal alliance in the Balkans (www.seelegal.org), established in 2004.

Luxembourg

Alex Schmitt

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Luxembourg?

Following the financial crisis, Luxembourg has seen a significant increase in refinancing and the restructuring of existing lending and security packages. Luxembourg courts have experienced an increase in litigation relating to the enforcement of security interests governed by the Luxembourg collateral law of August 5, 2005, as amended, (hereinafter the "Luxembourg Collateral Law") implementing Directive 2002/47/EC of the European Parliament and of the Council of June 6, 2002 on financial collateral arrangements. There has also been a significant increase in the issue of high yield bonds listed on the Euro MTF market of the Luxembourg Stock Exchange.

1.2 What are some significant lending transactions that have taken place in Luxembourg in recent years?

Luxembourg has seen increased lending activity on a single name or syndicated basis to corporate borrowers based in Luxembourg pertaining to large groups from Asia, CIS and Europe.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, it can subject to certain conditions. See questions 2.2, 2.3, 2.4 and 2.5 for more information.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

If the guaranteeing/securing company does not receive any corporate benefit from the grant of the guarantee, its directors or managers may face civil liability. The guarantee may also be rescinded for being beyond the scope of a Luxembourg company, which is, according to the Luxembourg Civil Code, established with a view to participating in profits or a court may, depending on the circumstances, consider it to be an abuse of corporate assets. In the latter case, the directors or managers of the company may face criminal liability.

2.3 Is lack of corporate power an issue?

Luxembourg companies must act within the limits of their corporate object, as laid down in their articles of association. The sanctions that are attached to an action that falls outside the company's corporate objects depend on whether the company is a limited or unlimited liability company.

Limited liability companies when granting guarantees to third parties are bound by their authorised signatories (i.e. their directors, managers or proxyholders, as the case may be) if such persons act in accordance with their signatory powers, even if the granting of the guarantee falls outside the corporate objects, unless the limited liability company proves that the beneficiary of the guarantee knew that the grant of the guarantee fell outside the corporate objects, or could not, in view of the circumstances, have been unaware of it, without the mere publication of the articles of association constituting such proof.

Unlimited liability companies are only bound by actions that fall within their corporate objects. The directors or managers of the unlimited liability company that entered into the guarantee may, however, be held personally liable to perform.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

The granting of a guarantee is not subject to governmental approval.

Shareholder approval is normally not required, unless the articles of association of the company require such approval.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Guarantees granted by Luxembourg companies are usually limited to 90% to 95% of their net assets. This limitation is included in order to avoid the guarantee exceeding the financial capacity of the company, which may trigger corporate benefit and later bankruptcy issues.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no Luxembourg exchange controls or similar obstacles to the enforcement of a guarantee.

However, if a guarantee is granted in relation to an obligation expressed in a currency other than Euros, any Luxembourg court order will only be expressed in terms of Euros.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Depending on the type of underlying assets, collateral can be given by way of a pledge, mortgage, antichresis, repurchase agreement, transfer of title for security purposes or fiduciary transfer.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

A separate agreement is usually entered into for each type of asset due to the fact that perfection requirements are not the same for different types of underlying assets.

The Luxembourg security interest encompassing the largest collateral base in terms of types of underlying assets is the pledge over a business (*gage sur fonds de commerce*). See question 3.3 for more information.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

The most common security interest over real property located in Luxembourg is the mortgage. Collateral security by way of a mortgage must be registered with the relevant Luxembourg mortgage office and is subject to registration duties.

Collateral security can be taken over machinery and equipment by way of a pledge over a business (*gage sur fonds de commerce*), which can cover nearly all the assets of the relevant pledgor, such as machinery, equipment, trademarks, patents, the right to the lease, and the inventory (up to 50% of its value only).

A pledge over a business is subject to specific requirements and can only be granted to authorised credit institutions and breweries. A written agreement is required and the pledge becomes enforceable against third parties after its registration with competent public authorities.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Luxembourg collateral security can be taken over receivables if the debtor of the receivables is domiciled in Luxembourg and Luxembourg law is the governing law of the receivables.

Under the Luxembourg Collateral Law, receivables may be pledged or title to them may be transferred for security purposes. The mere entering into the pledge or transfer of title agreement perfects the pledge, but the debtor may validly continue to render performance to the pledgor as long as it has not been informed of the pledge.

In relation to the debtor of the receivables, the collateral giver and collateral receiver must also consider Article 14 of Regulation (EC) No. 593/2008 of June 17, 2008 on the law applicable to contractual obligations (hereinafter the "Rome I Regulation"), which provides that the assignability, the relationship between the collateral taker and the debtor, the conditions under which the assignment or pledge can be invoked against the debtor and whether the debtor's obligations have been discharged, are governed by the law governing the assigned or pledged receivable. Article 14 of the Rome I Regulation only contains rules in relation to the debtor, not to other third parties.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Collateral security by way of a pledge over a bank account can be taken over cash credited to such account. The procedure is essentially the same as a pledge over receivables, as a cash deposit in a bank is, under Luxembourg law, considered to be a claim against the bank. If the bank itself holds security interests over the bank account, including a pledge over the cash deposited (e.g. in relation to its fees or loans made to the collateral provider for instance), it must, as first ranking pledgee, consent to the creation of the pledge and waive its pledge and other security rights in favour of the pledgee so that the pledgee holds a first-ranking pledge.

3.6 Can collateral security be taken over shares in companies incorporated in Luxembourg? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Collateral can be taken over shares in companies incorporated in Luxembourg. Under Luxembourg conflict of laws rules, the security interest must be created, perfected and enforced in accordance with the *lex rei sitae* of the shares (i.e. the law of the place where the shares are located).

The shares of Luxembourg companies are mostly issued in either bearer or registered form.

However, the law of 6 April 2013 on dematerialised securities, which entered into force in Luxembourg on 18 April 2013, introduced the possibility to issue shares also in dematerialised form or convert existing bearer or registered shares into dematerialised shares. Existing Luxembourg law governed pledges over registered or bearer shares remain valid and continue to have effect upon conversion of such shares into dematerialised shares without the need for further formalities other than the registration of the shares in a securities account.

If the share register or the bearer shares of a Luxembourg company are located in England or New York (in practice this would be very unusual in the case of registered shares), security could, in principle, be validly granted under these laws. Collateral givers and collateral takers remain however free to submit their mutual contractual relationship to New York or English law in accordance with the Rome I Regulation but New York or English law would not govern their relationship *vis-à-vis* other parties.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security can be taken over inventory (merchandise) by way of a pledge over a business (*gage sur fonds de commerce*). See question 3.3 for more information.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, it can.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

If the security interest is governed by the Luxembourg Collateral Law, no stamp duties, notarisation requirements or other fees are required in relation to security interests. If they are, however, submitted to registration, a fixed registration duty of EUR 12 must be paid. In certain circumstances, an additional fee of 0.24% on any claims of money mentioned in the security agreements might apply on the secured receivable and has to be monitored so that it does not apply.

For mortgages over real estate, registration taxes (*droits d'enregistrement*) together with registration of the mortgage with the mortgage office (*inscription*) amounts in principle to 0.29% on top the principal amount of the secured debt. Other fees such as notary fees and fixed stamp duties may also become due. For pledges over a business concern that are created in a public deed, the same taxes and fees normally apply.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

No, subject, however, to the registration duties described in question 3.9.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Regulatory or similar consents are in principle not required with respect to the creation of security.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, not in principle.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

There are no particular execution requirements. Authorised signatories must sign the agreements on behalf of Luxembourg companies. If there are parties to the agreement that are not merchants, special rules of evidence may, however, apply.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Luxembourg public limited liability companies (*sociétés anonymes*) may only directly or indirectly advance funds, grant loans or provide security with a view to the acquisition of their own shares by a third party subject to certain conditions that are laid out in the Luxembourg law of August 10, 1915 on commercial companies, as amended.

(b) Shares of any company which directly or indirectly owns shares in the company

No.

(c) Shares in a sister subsidiary

No.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Luxembourg recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The Luxembourg Collateral Law recognises the role of an agent or trustee. An agent or trustee may thus enforce security interests governed by the Luxembourg Collateral Law.

5.2 If an agent or trustee is not recognised in Luxembourg is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

See question 5.1.

5.3 Assume a loan is made to a company organised under the laws of Luxembourg and guaranteed by a guarantor organised under the laws of Luxembourg. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Under Articles 1689 *et seq.* of the Luxembourg Civil Code, assignments of claims are effected between the assignor and assignee by their mere agreement. Enforceability *vis-à-vis* third parties requires, however, that the assignment be notified to the debtor or accepted by it by public deed or under private seal. Furthermore, prior to such notification or acceptance, the debtor can validly discharge its obligations under the claim by rendering performance to the assignor, unless it can be proven that the debtor had knowledge of the assignment.

Pursuant to Article 1692 of the Luxembourg Civil Code, the sale or assignment of a claim comprises the accessories of the claim, such as a guarantee (caution), a privilege and a mortgage.

Luxembourg law does not specifically address assignments of debts.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

a) Luxembourg does not, in principle, levy withholding tax on interest. However, under the EU-Savings Directive implemented in Luxembourg by the law of June 21, 2005, there could be a withholding tax on savings income in the form of interest payments. The directive applies if the payment is done by a Luxembourg paying agent to beneficial owners who are individuals and resident for tax purposes in another Member State.

In addition, the EU-Savings Directive applies if the beneficial owner is a residual entity (i.e. notably an entity with no legal personality and not taxed under general business taxation rules receiving the interest payments).

b) There are no requirements to deduct or withhold tax from the proceeds of a claim under a guarantee or the proceeds of enforcing security.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives provided preferentially to foreign investors or creditors.

As a general rule, capital contribution duties have been abolished in Luxembourg since January 1, 2009 and have been replaced by a fixed registration duty of EUR 75 (e.g. for the incorporation of a Luxembourg company, for amendments to the articles of incorporation of a Luxembourg company, for the transfer of the statutory seat of a Luxembourg company, etc.).

Pursuant to the internal memo issued by the Director of the Indirect Tax Administration dated February 29, 2008 in respect of the law of December 29, 1971 concerning indirect taxes on the raising of capital of civil and commercial companies, as amended, there is a 0.24% registration fee calculated on the amounts mentioned in the transaction documents. It is not compulsory that the transaction documents are filed, recorded or enrolled with any court, or other authority in Luxembourg or that registration tax, transfer tax, capital tax, stamp duty or any other similar tax or duty be paid in respect of or in connection with the execution, delivery and/or enforcement by legal proceedings (including any foreign judgment in the courts of Luxembourg) of the transaction documents, in accordance therewith. However, as an exception from the rule above, in case of the use of the transaction documents, either directly or by way of reference, (i) in a public deed, (ii) in a judicial proceeding in Luxembourg, or (iii) before any other Luxembourg official authority (*autorité constituée*), registration will, in principle, be ordered, which implies the application of a fixed or an *ad valorem* registration duty of 0.24% calculated on the amounts mentioned in the agreements. Indeed, a 0.24% registration duty could be levied on any notarial or other public deed making a precise reference to the transaction documents.

6.3 Will any income of a foreign lender become taxable in Luxembourg solely because of a loan to or guarantee and/or grant of security from a company in Luxembourg?

No, it will not.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No, no other significant costs should arise in relation to the grant of such loan/guarantee/security.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, in principle, they are not. Even transfer pricing rules should not trigger any consequence in such case as bank loans are generally granted under arm's length conditions.

7 Judicial Enforcement

7.1 Will the courts in Luxembourg recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Luxembourg enforce a contract that has a foreign governing law?

Yes, they will recognise a foreign governing law and enforce a contract governed by such law subject to the conditions and restrictions laid down in the Rome I Regulation, which would, subject to certain exceptions, be applicable.

7.2 Will the courts in Luxembourg recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The courts of Luxembourg will recognise as valid, and will enforce without re-examination of the merits of the case, any final, conclusive and enforceable civil foreign judgment for a monetary claim obtained in an English court in accordance with applicable enforcement proceedings as provided for in Council Regulation (EC) No 44/2001 of December 22, 2000 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter the "Brussels I Regulation") and in a New York court in accordance with applicable Luxembourg *exequatur* provisions, which prescribe *inter alia* that the foreign judgment must not violate Luxembourg international public order.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Luxembourg, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Luxembourg against the assets of the company?

(a) If the company fails to appear in court proceedings and fails to defend itself, it would take the foreign lender approximately six months to file, obtain a judgment and enforce the judgment against the assets of the company. If the company appears in court proceedings, the whole procedure may last approximately one year.

(b) If the foreign judgment was handed down by a court located

in a Member State of the European Union, it may take approximately one month for the foreign judgment to be enforced and in case of a judgment from a non-European Union Member State, approximately eight to nine months.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

If the security interest is subject to the Luxembourg Collateral Law, no significant restrictions should impact the timing and value of enforcement.

(a) Enforcement by way of public auction is not the only enforcement method under the Luxembourg Collateral Law.

(b) Regulatory consents would only be required if the collateral consists of shares of a Luxembourg regulated entity, such as, for instance, a credit institution.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Luxembourg or (b) foreclosure on collateral security?

No particular restrictions apply.

7.6 Do the bankruptcy, reorganisation or similar laws in Luxembourg provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

The Luxembourg proceedings regarding bankruptcy (*faillite*), controlled management (*gestion controlée*), suspension of payments (*sursis de paiement*) and composition with creditors (*concordat préventif de faillite*) provide for a moratorium on enforcement of lender claims.

The enforcement of collateral security subject to the Luxembourg Collateral Law is not affected by any moratorium.

7.7 Will the courts in Luxembourg recognise and enforce an arbitral award given against the company without re-examination of the merits?

Luxembourg courts would recognise and enforce a final enforceable arbitral award given against the company without re-examination of the merits, provided *exequatur* of the arbitral award is sought in Luxembourg with the president of the territorially competent district court. Rules for *exequatur* are laid down in articles 1250 and 1251 of the Luxembourg New Civil Procedure Code (*Nouveau Code de Procedure Civile*). Under those rules the president of the competent district court may refuse to grant exequatur to a foreign arbitral award if, for instance, the arbitral award is not final and may still be challenged by the company in arbitral proceedings or if the arbitral award or its execution would violate Luxembourg public order.

Luxembourg is also a member to the New York Convention of June 10, 1958 on the recognition and enforcement of arbitral awards and applies it to other states that are also members of the convention.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

See question 7.6.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Luxembourg bankruptcy proceedings (*faillite*) attract preference period doctrines in relation to agreements that are entered into during the preference period (*période suspecte*, which is the period starting on the date determined by the bankruptcy court as being the date of cessation of payment, which cannot be earlier than six months before the date of the bankruptcy judgment, and ending on the date of the bankruptcy judgment), or in some instances ten days before the preference period. Under these preference period doctrines, transactions may be *per se* void or voided at the request of the bankruptcy administrator.

Preferential rights in favour of tax authorities, employees, the bankruptcy administrator and other parties exist in bankruptcy proceedings.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Luxembourg credit institutions and certain companies carrying out financial sector activities are subject to special suspension of payments or liquidation proceedings contained in the Luxembourg law of April 5, 1993 on the financial sector, as amended (hereinafter the "Financial Sector Law"), and are not per se subject to ordinary Luxembourg bankruptcy proceedings. Insurance companies are subject to special suspension of payments or liquidation proceedings contained in the law of December 6, 1991 on the insurance sector, as amended and are also not per se subject to ordinary bankruptcy proceedings. When ordering liquidation proceedings against credit institutions, certain companies carrying out financial sector activities and insurance companies, the competent court may however decide that certain rules from the bankruptcy regime shall apply.

Special liquidation proceedings may also apply to undertakings for collective investments, investment companies in risk capital and securitisation vehicles.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

The Luxembourg Collateral Law provides for enforcement methods over collateral that are not court driven.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Luxembourg?

Such a submission, and the waiver of immunity, would in principle be valid, subject, for submission to a foreign jurisdiction, to the rules laid out in the Brussels I Regulation or, in case the Brussels I Regulation does not apply, to general Luxembourg law principles, pursuant to which parties may establish the place of jurisdiction for disputes provided that, *inter alia*, they do not violate mandatory rules of jurisdiction in Luxembourg, the place where the chosen jurisdiction is located and the otherwise competent jurisdiction.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Luxembourg?

If the waiver is legally binding and enforceable under the relevant foreign law, it should in principle be binding and enforceable under the laws of Luxembourg.

10 Other Matters

10.1 Are there any eligibility requirements in Luxembourg for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Luxembourg need to be licensed or authorised in Luxembourg or in their jurisdiction of incorporation?

The business of granting loans to the public is a regulated activity in Luxembourg and is subject, in case of Luxembourg-based lenders, to authorisation in Luxembourg. Lenders based in other EU Member States or, under certain circumstances, contracting parties to the European Economic Area Agreement, may, subject to being regulated in these States and to conditions laid out in the Financial Sector Law, provide cross-border lending in Luxembourg.

The Luxembourg regulation authority (*Commission de surveillance du secteur financier*) takes the position that if lenders from non-European Union Member States, or non-contracting parties to the European Economic Area Agreement that are regulated in their home country, only provide general information on their activities to potential Luxembourg borrowers and if the potential Luxembourg borrowers must approach these lenders in their home country in order to enter into a loan with them, no licence is required in Luxembourg.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Luxembourg?

No, there are not.

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Mexico

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Mexico?

In recent years, including 2013, Mexico has enacted significant reforms to its secured transactions laws. For example, Mexico approved a banking law overhaul which removed the single biggest obstacle for small and medium businesses to obtain loans by making it easier for banks to seize assets used as collateral in cases of nonpayment.

For companies, the options of non-possessory pledges which effectively result in a floating lien and guaranty trusts with similar effects still remain, as well as traditional securities such as mortgages and regular pledges, as well as asset based loans (secured working capital loans or fixed asset loans).

The Sole Registry of Chattels, which is now operational, provides legal certainty to creditors or third parties regarding the priority of credits. The Commercial Code amendments and the Amended Registry Regulations permit a proposed lender to make a filing prior to the scheduled closing, which will have the effect of preventing any other lender from making a filing that would have priority over the later. This provides an additional level of comfort.

1.2 What are some significant lending transactions that have taken place in Mexico in recent years?

As a result of this year's reforms, the ability to realise collateral in Mexico has been enhanced in recent years and is causing foreign lenders to reconsider lending against Mexican collateral. Syndicated credits have increased using Mexican operations as collateral in global deals. Financing investment projects through the issuance of securities certificates or debt through the capital markets are also common allowing securitisation of non-performing assets, such as accounts receivable, among others.

However, Mexico's commercial bank credit to the nonfinancial private sector is about 17 percent of gross domestic product. This is below not only developed economies' standards but also emerging markets' credit ratios. By comparison, the credit penetration rate is almost above 40 percent in Colombia, close to 50 percent in Brazil and more than 70 percent in Chile. The recent reforms intend to change such ratios and reactivate the economy.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

A company can guarantee borrowings of one or more other members of its corporate group. It is important to verify that the social purpose allows for the grant of such guarantees and that the individuals that execute the support documents have sufficient authority to do so.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Transactions in which a company guarantees borrowings of one or more members of its corporate group are enforceable. However, if the directors are perceived to have a conflict of interest with the corporation with regards to a particular transaction, they must state this to the other directors and must abstain from any deliberation or resolution on such matter. Otherwise, those directors shall be liable for damages (out of pocket and loss of profit) to the corporation.

2.3 Is lack of corporate power an issue?

Under Mexican law, lack of corporate power can be a significant issue. The corporate purpose must specify the activities that the company can carry out, and on an individual basis directors and officers do not have the authority to act unless they have been granted specific powers to do so.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Shareholder/board approval requirements are governed by the bylaws of each company. This has to be analysed on a case-by-case basis. Governmental filings and other formalities will depend on the type of lending structure designed by the parties and the collateral used in each case. It is always necessary to comply with the relevant requirements for creating security interests, which in Mexico often require that the security agreement be formalised under a formal deed (*escritura*), with the respective registrations at

the existing public registries or the single chattels registry. The issuance of securities in the stock market requires a series of filings and formalities.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no specific limitations as to net worth. However, the value of the collateral itself would be a limitation. If a company has losses or is subsequently involved in insolvency procedures, the value of the collateral will govern specific secured transactions, although the creditor may encounter enforceability issues.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Mexico does not have exchange control obstacles to enforce a guarantee. However, the process for enforcement does imply that the guaranty must have been perfected and registered in accordance with the law, and the enforcer must undergo a time consuming court process. In addition, in the event of a judicial collection process, the payment can be made by the debtor in pesos, independently from any agreement in other currencies.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Mexican laws allow for perfecting security interests on real estate and/or (movable) property or goods. Mexico has a variety of personal property security interests, including among others, the pledge, the mortgage, the industrial mortgage over all assets (available for financial institutions only), and the specialised security interests tied to credits for machinery and equipment or for raw materials that refer to personal property collateral devices (*crédito refaccionario or crédito de habilitación o avío*).

With the non-possessory pledge, the debtor can use as collateral all of its unspecified inventory and receivables, and can automatically subject newly acquired property to the pledge without any further filing. A guaranty trust can provide a similar effect.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Industrial mortgages allow for a general asset security but this type of security is restricted to financial institutions (i.e. banks). For other lenders, the subject to analyse is whether the property is real estate or another type of property. The type of agreement/security interest will depend on the type of asset that is used as collateral, as mentioned above. The process varies significantly in every case. Trusts will need to involve a Mexican financial institution and will require the execution of a formal deed before a notary public but can include several types of assets or even different security interests. Real estate transactions will also involve a formal deed and registration at the specific Public Registry of Property. Other asset transactions will typically involve the execution of the agreement before the notary public and registration at the respective single registry.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Collateral can be taken over real property, plant, machinery and equipment. As explained above, the process will depend on who the lender is (a financial institution or another third party) and on whether the debtor is using all assets as collateral or just specific property, equipment, etc. In any event, the process involves the execution of a formal agreement between the creditor and the debtor before a notary public and the registration of the respective deed at the corresponding registry.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

With the new non-possessory pledge and the guaranty trust, receivables can be collateral security. In a non-possessory pledge, there is no need to notify debtors. However, in a guaranty trust, since the collection rights are actually transferred to the trust that will be the collecting entity, the debtors must be notified.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Cash deposited in bank accounts can be used as collateral in a non-possessory pledge along with the assets of a company and a bank can issue a letter of credit using that cash as the guaranty. The new reforms have also facilitated collection of debts to banks by allowing the bank to place a lien over existing cash in a different account. Before the existence of a non-possessory pledge, the parties could still pledge deposited cash, but it would have involved the actual transfer of the cash to be held in a different account by the creditor or by a mutually agreed third party.

3.6 Can collateral security be taken over shares in companies incorporated in Mexico? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares, as assets, can be pledged. The process involves the endorsement of the respective share certificates and the registration of the pledge at the company's shareholders' registry book. In this case, the pledge requires that the respective share certificates are delivered to the creditor. The pledge has to follow Mexican law requirements (specifically the Mexican Law of Negotiable Instruments and Credit Operations) in order for the pledge to be enforceable even if it is part of a larger transaction under foreign law.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Inventory can be collateral security under a non-possessory pledge. The process involves the execution of the respective pledge agreement before a notary public and its registration in order to attach the inventory as part of the ongoing operations.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Under Mexican law, a company can grant a security interest in order to secure its obligations as borrower under a credit facility and as guarantor of the obligations of others. In both cases, the same process has to be followed. As mentioned above, the process will depend on who the lender is and what the assets (collateral) are.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notary fees are based on a fee schedule which has a direct relation to the value of the assets. It varies from approx. US$ 500 to US$ 5,500 for assets worth up to approx. US$ 1,500,000. For higher values, an additional 0.075% is added.

Registration fees vary significantly. Most of the 32 Mexican States have a fixed fee for registrations, but some local Property Registries still charge registration fees based on the value of the transactions; notwithstanding, this calculation method has been declared as unconstitutional by the Supreme Court in Mexico. Therefore it is important to verify this aspect before proceeding and, as the case may be, challenge payment based on the value of the transaction.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Filing and registration requirements vary significantly on the type of transaction. Securities involving the stock exchange require significant time and pre-filing requirements. For other types of security transactions, there are no previous filings required; time is required for registration. This will vary depending on the State if it is real property and whether the single chattels registry is used. In any event, the priority for filing is important and the date of filing is the one that is taken into account for such priority.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Securities such as Securities Certificates and the introduction to the stock exchange do require regulatory consents, as well as some securities where collateral is constituted by rights or government concessions. All other lending transactions are governed by the will of the parties and require debtor consent.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Priority concerns are always an issue as priority will set the true value of the existing collateral.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Each transaction has its own documentary and execution requirements. Most of the transactions will require execution of the document by each party and verification that the individual that executes it has sufficient powers of attorney, and execution before a notary public and registration of the deed recorded at the appropriate registry.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

The only restrictions in the Commercial Companies Law relate to the acquisition of the shares by the company itself but there are no prohibitions or restrictions for the company to guarantee or give security support borrowings incurred to finance or refinance the direct or indirect acquisition of its shares by a third party (even if it is related). However, the company's purpose needs to be broad enough to support the issuance of guarantees.

(b) Shares of any company which directly or indirectly owns shares in the company

There are no prohibitions or restrictions for the company to guarantee or give support to the finance or refinance of a company which owns shares in the company. However, the company's purpose needs to be broad enough to support the issuance of guarantees.

(c) Shares in a sister subsidiary

There are no prohibitions or restrictions for the company to guarantee or give support to the finance or refinance of a sister company. However, the company's purpose needs to be broad enough to support the issuance of guarantees.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Mexico recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Syndicated lending is allowed. The will of the parties and the provisions of the agreement will govern the transaction.

5.2 If an agent or trustee is not recognised in Mexico, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Syndicated lending with an agent or appointed trustee is enforceable.

5.3 Assume a loan is made to a company organised under the laws of Mexico and guaranteed by a guarantor organised under the laws of Mexico. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Yes, if the loan is transferred, all documents have to be amended accordingly, including the documents associated to the security interests and the respective notices to the debtor must be made.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest payable on loans is tax deductible only to the extent that the proceeds are invested in the borrower's business, thin capitalisation rules are met (please see question 6.5), and do not exceed market price (arm's length transaction). For foreign lenders, tax withholding obligations must be complied with in order to deduct interest; foreign banks are subject to a 4.9% rate of withholding tax. Under Mexico's domestic law, the withholding tax rates on interest for non-Mexican residents are 4.9%, 10%, 15%, 21% or 35%, depending on the type of loan and on the effective beneficiary of the interest. These rates are generally reduced in tax treaties; however, in case of loans between related parties, apart from other requirements, and as consequence of the 2014 tax reform, the Mexican tax authority is authorised to require a formal document from the non-resident lender evidencing that a double taxation exists with respect to the interest for which a treaty is being applied, specifying the provisions of the applicable foreign law producing such double taxation. If interest is paid to a foreign lender or to a related party, amongst others, the following tax returns must be filed in order to deduct interests: (a) an informative tax return of loans granted or guaranteed by foreign residents; (b) an informative tax return containing a description of tax withholdings and payments to foreign residents; (c) a transfer pricing study to support the arm's length principle with respect to related parties' transactions; and (d) an informative tax return containing transactions with related parties. Expenses accrued outside Mexico on a *pro-rata* basis with any party that is not subject to pay Mexican Income Tax are non-deductible. As consequence of the tax amendments in force as of January 2014, payments made to a foreign company that controls or is controlled by the taxpayer will not be deductible when said payments are, amongst others, for interest, and when the foreign company that receives said payments (i) is considered as transparent and its participants do not pay tax on this income, or (ii) considers such payments as non-existent or non-taxable income. In addition, as per the 2014 amendments mentioned before, payments made by a Mexican resident which, in turn, are deducted by a related party, are non-deductible if the related party deducting the payment does not accrue as income earned such payment in the same tax year or the next. There are no specific requirements for deducting or withholding tax from the proceeds of a claim under a guarantee or the proceeds of enforcing security; such proceeds will be taxed only with respect to the interest portion, liquidated damages, if any, and for the portion exceeding the principal amount.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives provided preferentially to foreign lenders with respect to domestic lenders other than reduced income withholding tax rates provided in tax treaties for payment of interest. Foreign lenders are subject to withholding income tax on interest payable on loans, whether or not such loans are guaranteed or secured, at the rates indicated above or, as the case may be, at the rate of the applicable tax treaty. Liquidated damages are also taxed under domestic law at a 35% tax withholding rate but can be reduced in certain tax treaties. As indicated in question 3.9 above, recording before public registries is subject to fees.

6.3 Will any income of a foreign lender become taxable in Mexico solely because of a loan to or guarantee and/or grant of security from a company in Mexico?

No, if the lender has no permanent establishment in Mexico, only interest (and any other amounts different from the principal) is taxed.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No, the costs for granting the loan/guarantee/security for foreign lenders are normally the same as those applicable to lenders in Mexico; please see question 3.9. In addition, it is common practice to agree in the corresponding agreement that all costs (notarial fees, Public Registry fees, etc.) will be at borrower's sole cost and expense. Costs may be incurred upon enforcement in the event of default.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

As indicated in question 6.1, deduction of interest for a borrower that is a Mexican tax resident has more requirements in case of foreign lenders, in particular if a tax treaty is applied or if a borrower and lender are related parties. Thin capitalisation rules, for example, are applicable only to debts contracted with foreign related parties. Under thin capitalisation rules, interest generated on debts held by the borrower with foreign-related parties exceeding triple the amount of the net-worth ("capital contable") – 3:1 – are non-deductible.

7 Judicial Enforcement

7.1 Will the courts in Mexico recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Mexico enforce a contract that has a foreign governing law?

Generally, yes, except for the status and legal capacity of individuals and all rights related to real estate.

The application of foreign governing law is valid, in any other event, as long as the substantive matter is not considered contrary to Mexican law, to fundamental institutions or principles of

Mexican public policy or to public interest; if foreign governing law is provided in a contract for the purpose of evading fundamental principles of Mexican law, it could not be applied.

7.2 Will the courts in Mexico recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Definitive foreign judgments from any country may be recognised and executed in Mexico through the respective homologation procedure, so long as, in general, such judgments are not contrary to law or public policy/interest, or related to real property rights. However, treaties and conventions to which Mexico is a signatory may provide differently in relation to certain countries.

The homologating court cannot examine the substance or legal foundation of the foreign decision; it can only examine its authenticity and enforceability according to Mexican law. The homologating court will decide all issues concerning attachments, bailment, appraisals, seizure, and matters relating to liquidation and enforcement; distribution of moneys from the auction will be turned to the foreign court.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Mexico, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Mexico against the assets of the company?

There is no mandatory prior procedure to file a suit, so it is basically immediate. However, obtaining a judgment and enforcing it, depending on the type of collateral, might take approximately 12 to 24 months. Enforcing a foreign judgment takes approximately 12 months, but if the defendant files a request for expert opinions or raises issues related to the nullity of a foreign judgment, the matter could take 18 to 24 months.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There are no restrictions; however, except for certain non-possessory pledge and guaranty trusts, a trial has to be filed in order to collect, and the enforcement of the decision can include a public auction.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Mexico or (b) foreclosure on collateral security?

There are no restrictions to foreign lenders, compared to those applicable to domestic lenders, related to filing suits or foreclosures on collateral security.

7.6 Do the bankruptcy, reorganisation or similar laws in Mexico provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, as further explained in question 8.1 below, bankruptcy law provides that all creditors must attend the bankruptcy procedure in order to register their credits and will be paid in the order of payment provided by law. Credits secured by a pledge or mortgage have a preferred collection right, except for certain privileged rights such as employee-related claims (wages for the previous year).

7.7 Will the courts in Mexico recognise and enforce an arbitral award given against the company without re-examination of the merits?

Courts in Mexico recognise and enforce arbitral awards without re-examination of the merits, but will analyse whether procedural requirements under the law (i.e. due process) or the arbitration rules were followed.

Notwithstanding the above, Mexican courts will not enforce an award contrary to public law or if the substance of the controversy could not be a matter subject of arbitration.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

When accepting a bankruptcy claim, the judge may impose injunctive measures to protect the assets which may hinder the ability of the creditor to enforce its collateral. Such measures are enforced until an insolvency decision is issued and the reorganisation/bankruptcy process starts. The insolvency decision (*sentencia de concurso mercantil*) prevents creditors from taking any action against the debtor or its property, including enforcement actions against collateral.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes, all preferred and secured credits have to be paid before regular (unsecured) credits. Credits secured by a pledge or mortgage have a preferred collection right, except for certain privileged rights identified as credits against the bankrupt's/bankruptcy estate, such as employee-related claims (wages for the previous year and severance payments). Tax debts have a lower priority than mortgages and pledged credits.

There is what the law denominates as a "retraction period" (270 days) that protects creditors against the fraudulent transfers of assets. Any transfers within such period may be voided by the judge if they are considered fraudulent (i.e. donations).

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Bankruptcy procedures are only applicable to those individuals or entities dedicated to commerce in terms of Mexican law; financial institutions are excluded from the bankruptcy law and are subject to the procedures contained in the specific law regulating its activity.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No, there are not.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Mexico?

Yes, the parties can legally agree a foreign jurisdiction in a contract to the extent that the domicile of any of the parties, or the place to fulfil any of the obligations or the disputed object, is located therein.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Mexico?

The sovereign immunity doctrine does not apply in Mexico.

10 Other Matters

10.1 Are there any eligibility requirements in Mexico for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Mexico need to be licensed or authorised in Mexico or in their jurisdiction of incorporation?

There are no eligibility requirements for lending, but if a company pretends that lending is its main activity, then such company must register as a bank or a financial entity with a restricted purpose (*Sofom*). There are eligibility requirements for withholding rate treatments for foreign lenders, as described above.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Mexico?

In addition to the formalities involved in perfecting the security interests, foreign lenders should take into consideration the specifics for the application of the different withholding rates as described above, and the timing involved in enforcement, in order to choose the best alternative.

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Ana works for IC which continues to collaborate with CMGD in areas of her expertise such as with this publication. She specialises in foreign investment and incentive transactions, finance trusts and project finance from private and financial institutions and provides advice on the set up of operations including negotiation of incentives agreements with the local governments, acquisitions, financing and build out for such operations. Ana is a member of the Mexican Bar (*Barra Mexicana Colegio de Abogados*) and has a Foreign Consultant License from the State of Illinois.

Cornejo Méndez Gonzalez y Duarte S.C. (CMGD) is a multidisciplinary firm made up of highly skilled professionals who provide integral services for multinational clients. In all of our practice areas, we bring local expertise and know-how with an international focus and experience.

CMGD provides high value added and specialised advice to domestic and international clients and their business transactions in Mexico. CMGD works hand-in-hand with its clients in structuring and implementing solutions that meet their needs.

CMGD is a local firm with global reach. CMGD accomplishes this by having numerous unique assets including the language skills and cultural familiarity of its members, all of whom are fluent in both English and Spanish, and an extensive network of relationships with law firms, businesses, multinational institutions and other contacts in Mexico and abroad.

CMGD's success is directly related to our clients' satisfaction and our ability to achieve their objectives. Building prosperous and longstanding relationships while looking out for our clients' interests is what we strive for.

Morocco

Hajji & Associés

Amin Hajji

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Morocco?

The main trend in the lending markets in Morocco is rather positive. Indeed, the lending market in Morocco was active during the last two years. The increase and proliferation of infrastructure and development projects in Morocco has been positively reflected through a notable increase in financing activity.

1.2 What are some significant lending transactions that have taken place in Morocco in recent years?

The significant lending transactions that have taken place in Morocco relate mainly to the financing infrastructure projects, such as Tanger Med in Tangier and the solar power plant in Ouarzazate. Nevertheless, other areas such as tourism, new towns or sport centres have also benefitted from important financings in Morocco.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Subject to the answers below relating to (i) fraudulent transfer and financial assistance, and (ii) concerns arising from the absence of benefit for the guaranteeing company in question 2.2, there is no specific provision under Moroccan law that prohibits a company from guaranteeing borrowings of one or more members of its corporate group. Moreover, these types of guarantees are often used with respect to project financing, and are usually required by the financing entity.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Indeed, should the guarantee have no benefit for the company, this might be problematic to the extent that the directors who decide to give such guarantee are exposed to incur criminal liability, as far as Moroccan law provides that all directors who (i) have made use of the company's assets in a manner that is contrary to its economical interest, and/or (ii) in bad faith, have used their powers or voting rights, if any, in a manner contrary to the company's interest in order to favour their personal interests, incur criminal liability.

In this regard, the assessing of the social interest of the company may be problematic in case the agreed guarantee is given by a company to another company member of its corporate group.

It should be noted that Moroccan law does not recognise the concept of corporate groups as legal entities. Indeed, if this was the case, the assessing of the social interest of the company would not have been made regarding the company in isolation from the other members of its corporate group.

As a consequence, the assessing of the social interest in such cases, given the absence of legal recognition by the Moroccan legislation of corporate groups, will remain dependent on the sovereign appraisal of the courts.

In this context, we cautiously assume that said appraisal will take into account the interest of the corporate group considered as a whole, and not of the guaranteeing company in isolation.

2.3 Is lack of corporate power an issue?

Indeed, the lack of corporate power is an issue under Moroccan law. Any corporation entering into a financing contract must necessarily be validly incorporated, capable of subscribing to commitments, and the signing authority must have been duly authorised to commit the company.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

First of all, under Moroccan law, the contracting of a financing constitutes a normal management decision which is made by the managing body.

Besides, with respect to the granting of a security, there is indeed a formality which has to be respected before the granting of a security. The decision to grant a security has to be approved by the board of directors according to the terms and conditions of Moroccan law. The absence of the board of directors' prior approval results in the unenforceability *vis-à-vis* the company of such guarantees.

Besides, the decision making with respect to the granting of a security by the company must take into account the existence of the liabilities incurred by the directors of a company in case such security turns out to be contrary to the company's interests (see question 2.2 above).

Moreover, should there be a shareholders' agreement that provides for the prior authorisation of the minority shareholder for instance, such provision, if violated, shall not entail the nullity of the financing, but it may engage the civil responsibility of the shareholder who did not respect its commitments under the shareholders' agreement.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Subject to the response to question 2.4 above, under Moroccan law, there are no limitations imposed on the amount of guarantee. However, the board of directors may determine a threshold beyond which no security may be given unless the prior approval of the majority shareholders is obtained, for example.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Under Moroccan law, when there is an international financing transaction, such transaction is subject to a declaration to the Moroccan exchange office. Therefore, the financing documentation, including the attached securities, should be disclosed to the same exchange office. As such, the transfer of the principal or interest of the guarantee is freely transferable as per the applicable exchange control regulations.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Moroccan law offers a wide range of securities which may benefit lenders. Indeed, it provides for two types of collateral (i) real securities, which consist of an ancillary *in rem* right on property, whether tangible or intangible, movable or immovable, and (ii) personal securities, which are given by a person upon their entire or a specific part of their patrimony.

All these collaterals may be used in order to secure a lending obligation. The efficiency of these securities is different. As a consequence, it is often required of the borrower to furnish several securities in order to ensure the highest risk coverage.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Under Moroccan law, all the debtor's creditors have a general lien on all the properties contained in the debtor's patrimony. Thus, in order to benefit from preferential rights over the other creditors on specific property(ies), the conclusion of a specific contract for each form of security listing the related assets, which are the subject of the security given to the creditor, is required.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Indeed, collateral security may be taken over real property, plant, machinery and equipment. First of all, this collateral security does not result in a dispossession of the debtor from said land, plant, machinery and equipment. Furthermore, the validity of such collateral is subject to its publicity. Publicity of collateral taken over real property (land) is made by registration on the books of the land registry, while publicity of collateral given over plant, machinery and equipment is made before the secretariat office of the competent commercial court and by means of registration on the books of the trade registry.

However, should the land be of the public domain and/or the project construction and equipment are of public service, security cannot be taken over such assets and, if taken, it cannot exceed the life duration of the related public service project.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, receivables may be the subject of collateral security. The validity of such collateral is subject to (i) the submission of proof of the existence of the receivable to the pledgee, and (ii) the notification of the debtor of the existence of such collateral or the acceptance of the collateral by means of a deed bearing a certain date. This notification is to be made either by the original creditor or by the pledgee, should the latter receive special authorisation from the creditor.

Moreover, even though security may be taken over receivables, the beneficiary is absolutely not free to collect the receivables in the absence of an event of default. Hence, contractual clauses in the security instrument, which permit the beneficiary to sell the asset by private sale or to appropriate the asset for its own use, are null and void.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Collateral security may be taken over cash deposited in bank accounts. Under Moroccan law, cash deposited in bank accounts is considered as a receivable. As a consequence, the same procedure indicated above for receivables applies for cash deposited in bank accounts.

Should the account beneficiary be in default in reference to any of its obligations under any project related finance agreement, the finance party may judicially claim the seizure of any amounts entered with said local bank account, and afterward file under summary a judicial proceeding for the collection of the existing seized amount capped at the level of the secured cash deposit amount. In respect of foreign bank accounts, the finance party should comply with existing local judicial proceedings in order to collect the debt proceeds.

3.6 Can collateral security be taken over shares in companies incorporated in Morocco? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Collateral security may be taken over shares in companies incorporated in Morocco. The shares in Morocco are, by law, in dematerialised form. When a security is to be enforced before Moroccan jurisdictions, even though the documentation is subject to foreign law and/or jurisdiction, it would not be consistent to grant such security under foreign law.

The procedure for constitution of collateral security over shares consists of (i) an inscription that has to be made on the company's

registers, and (ii) the notification to the debtor about the existence of the collateral security over the shares.

The enforcement of the security should be preceded by a notice letter to the debtor in order for it to remedy its default under a seven-day grace period and, if unsuccessful, a judicial auction sale of the secured shares should be completed in order to repay the creditors.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, security may be taken over inventory upon dispossession of the debtor of said inventory and delivery to the creditor or to a third party as custodian.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Further to the response to question 2.4, and subject to the obtaining of the board of directors' prior approval, a company may grant security in order to secure its obligation, whether as a borrower under a credit facility or as a guarantor of the obligations of other borrowers, except for the members of its board of directors and auditors. In this last case, it is prohibited for the company to grant a security interest over an asset in order to secure the obligations of the aforementioned persons. This prohibition applies to the company together with its subsidiaries. Thus, such a guarantee shall be null and void.

However, the above guarantees might be authorised to the extent that the company operates as a financial establishment.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

All deeds are subject to (i) authentication of signature, which results in stamp duties for every page of the deed, and (ii) registration before the tax administration at a rate which depends on the purpose of the property of the security interest (land, machinery and equipment, receivable, etc.).

Moreover, except for mortgages (security over land) which have to be made by and before a notary, the other deeds may be concluded under private signature.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The filing, notification or registration requirements in relation to security over assets do not require a significant amount of time. These formalities may be fulfilled in a relatively short period of time. As regards the amount of fees related to such securities, except for the fees relating to authentication of signatures (stamp duties) which consist of a stamp on every page of the security deed, the registration fees are calculated using the amount of the transaction at a rate that depends on the nature of the property over which the security is constituted.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

In general, no regulatory or similar consents are required with respect to the creation of a security. However, such consents may be required in the hypothesis where the debtors have entered into an investment agreement with the government under which such consent is required prior to the granting of a security.

However, should the project plant to be established be in a public domain, there are legal provisions and even specific consents required from public authorities under determined agreements with respect to the creation of a security over public real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or over ground).

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Should the borrower to be secured be under a revolving credit facility, there are no special priorities or other concerns. The sole condition is to ensure that the security related to the revolving credit facility is duly continued and renewed, if any.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

As a matter of principle, there are no particular documentary or execution requirements, except for the legalisation of the signatures of the parties. This is a customary practice under Moroccan law.

However, it should be noted that some deeds, especially those in relation to a real estate, have to be done before a notary or an attorney at law accepted by the cassation court in Morocco.

Besides, when an agreement/deed is signed outside of Morocco, it is required to proceed with the notarisation (signature before a notary), consularisation (attestation by the Moroccan embassy that the notary who signed the document is duly incorporated in the country where the document has been signed) and legalisation of such documents (attestation by the Moroccan Ministry of Foreign Affairs that the consul who consularised the notary's signature was duly in place at the time of consularisation). Those two last formalities (consularisation and legalisation by the Ministry of Foreign Affairs in Morocco) may be avoided in case there is a treaty of judicial aid between Morocco and the country where the documents were signed.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Yes, under Moroccan law, and pursuant to the principle of the share capital intangibility, it is prohibited for a company to guarantee and/or give any security to support borrowings incurred to finance the direct acquisition of its shares. There are no exceptions to this prohibition.

(b) Shares of any company which directly or indirectly owns shares in the company

Under Moroccan law, such prohibition does not apply when the security is to support borrowings incurred to finance or refinance the acquisition of any company which directly or indirectly owns shares in the same company.

(c) Shares in a sister subsidiary

Under Moroccan law, such prohibition does not apply when the security is to support borrowings incurred to finance or refinance the acquisition of a sister subsidiary.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Morocco recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Under Moroccan law, an agent or trustee is allowed to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders.

Such action is possible as long as the agent benefits from a special mandate given to it by each lender with respect to the enforcement of the loan documentation and the collateral security.

However, it should be noted that the securities must be taken in the names of each of the creditors or in the name of a security agent who must in turn disclose the names of each of the secured creditors. Thus, the security agent has a valid mandate from each creditor and may enforce the security and apply the proceeds from the security to the claims of all the lenders.

5.2 If an agent or trustee is not recognised in Morocco, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Please see the response to question 5.1.

5.3 Assume a loan is made to a company organised under the laws of Morocco and guaranteed by a guarantor organised under the laws of Morocco. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The transfer of receivables is admitted under Moroccan law, subject to the notification of such transfer to the debtor by written notice bearing a certain date.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Under Moroccan law, tax treatment of interest payable on loans made to domestic or foreign lenders is mainly as follows:

- Corporate tax and income tax: Generally, a withholding taxation on loan interests is applicable under Moroccan law, except for some special operations. Indeed, companies which have their registered office outside the territory of Morocco are exempt from the payment of the withholding tax on (i) interest payable on loans made to the State, and (ii) on interests relating to loans in foreign currency for a 10-year period or more. All other cases are subject to said withholding tax.
- Value Added Tax: Bank and credit operations are submitted to a reduced rate of 10% (the normal rate of VAT is 20%). The VAT due on interests is paid by the withholding tax amount.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

In addition to our response to question 6.1, please note that offshore banks located in Morocco are exempt from VAT on interest.

In addition to those indicated in question 6.1 above, additional taxes which apply to foreign lenders are registration taxes, which are applicable for all transaction deeds.

6.3 Will any income of a foreign lender become taxable in Morocco solely because of a loan to or guarantee and/or grant of security from a company in Morocco?

Income of foreign lenders will, under Moroccan law, become taxable with respect to the loan interests. But a grant of security will not imply taxation, except for the registration of the constitutive deeds before the tax administration, which implies the payment of a percentage of the amount of the deed.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

The constitution of a security over a real estate property involves the establishment of a notarial deed and registration before the land registry. This involves payment of notarial fees which are approximately (1%) of the amount of the transaction, as well as payment of land registry fees.

In case of security over the goodwill or machinery and material, registration before the trade registry is necessary. This registration entails payment of judicial fees which depend on the nature of the security and which generally amount to 0.5% payable on first registration and each time the security is renewed. In any event, a tax registration at a rate *pro rata* the amount of the deed is necessary.

Indeed, the total costs of obtaining a mortgage over a real estate are relatively high as taxes and registration fees account for up to 2% of the secured amount. Recording a pledge over a going concern/goodwill with the Trade Registry will give rise to a registration fee of 0.5% of the secured amount, including upon each periodical deed renewal. In addition, the instrument creating the pledge must be registered with tax authorities before it can be registered with the Trade Registry.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Under Moroccan law, there are no adverse consequences to a

company if some or all of the lenders are organised under the laws of a jurisdiction other than Morocco. In any event, foreign lenders are expected to undertake due diligences over the borrower entity in order to ascertain the good financial and legal standing of the borrower.

7 Judicial Enforcement

7.1 Will the courts in Morocco recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Morocco enforce a contract that has a foreign governing law?

Yes indeed, Moroccan law recognises contracts governed by a foreign governing law. Courts in Morocco are able to enforce contracts that have a foreign governing law.

7.2 Will the courts in Morocco recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Moroccan courts do recognise and enforce judgments given by foreign jurisdictions. Said judgment may be enforced after an enforcement/*exequatur* of the foreign judgment or award. Such *exequatur* does not imply the re-examination of the merits of the case; the court will be limited to examining, mainly that the judgment (i) does not contain any provision that may be contrary to the Moroccan public order, (ii) is provided by a competent jurisdiction, and (iii) is final.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Morocco, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Morocco against the assets of the company?

a) As the enforcement/*exequatur* procedure is contradictory i.e. giving a right to the concerned parties to challenge during the successive jurisdiction's proceedings, said procedure could be as long as approximately two years. Indeed, once the suit is filed before Moroccan courts, the amount of time needed to obtain a judgment will depend on (i) the discussions and debates between the disputing parties, and (ii) the exercise of the multiple judicial and even abusive remedies available to the parties.

   Finally, when the creditor has obtained a favourable final judgment (and only then, as the enforcement is only possible after obtaining such judgment), the enforcement of the judgment against the company's assets will require the implementation of a judicial auction sale of said assets, which would require additional time.

b) Generally, the obtaining of an *exequatur* upon a foreign judgment does not require a significant amount of time. The judges will be limited to the verification of (i) the jurisdiction that rendered the aforementioned judgment as final, and (ii) the absence of any provisions that may be contrary to the Moroccan public order, and upon such verification, will recognise the judgment as enforceable on Moroccan territory.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

First of all, the enforcement of collateral security involves the prior notification of the debtor against which the judgment has been rendered according to the legal provisions in this matter. In this regard, the intervention of a judicial bailiff will be required in order to fulfil such notification.

Moreover, it should be noted that in case any obstruction of fact or law arises from the debtor, the court may decide the suspension of the judgment if it occurs to it that said obstruction is not a simple delaying tactic used by the debtor in order to escape the enforcement.

Besides, the enforcement against the company's assets will imply a judicial public auction. The public auction involves the publicity of such auction in order to allow any interested person to take part in it. The assets will be sold to the highest bidder. However, Moroccan law recognises the right of any interested person to place a new bid within ten days of the date of the first bid if this party deems that the price is inferior to the value of the concerned asset. As a consequence, the new bidder will have to propose a price at least superior by 1/6 of the price of the first auction amount. This additional procedure will necessarily slow down the closing of the auction procedure.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Morocco or (b) foreclosure on collateral security?

Under Moroccan law, no specific restrictions apply to foreign lenders in the event of filing suit against a company in Morocco or foreclosure on collateral security.

7.6 Do the bankruptcy, reorganisation or similar laws in Morocco provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Bankruptcy and reorganisation laws in Morocco do not provide for moratorium on enforcement of lender claims nor on enforcement of collateral security. Indeed, Moroccan legislation for bankruptcy and reorganisation favours the continuity of the company and its interest. Therefore, it gives the receiver the right to impose payment deadlines, after discussions with the company's creditors, in order to allow the company to face its debts and to continue its activity as possible.

7.7 Will the courts in Morocco recognise and enforce an arbitral award given against the company without re-examination of the merits?

The Moroccan courts will recognise an arbitral award without re-examination of the merits of the case upon simple verification that said award does not contain any provisions contrary to the Moroccan public order provisions. It should be noted that Morocco is a contracting party to the New York Convention of 1958.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

First of all, it should be noted that the opening judgment of an insolvency proceeding may not constitute, notwithstanding anything to the contrary, grounds for termination of any contract. Therefore, the lenders may not insert a clause in the finance documents providing for the termination of the contract if the company has to go through insolvency proceedings.

Moreover, the entry of a company into insolvency proceedings involves the company having to comply with a plan elaborated by the receiver. This plan may implement deadlines of payment to all or part of the creditors of the company.

However, the entry into insolvency does not prevent the lenders from pursuing the enforcement of their collateral security, provided of course that the debtor is in default regarding the finance documents and that the enforcement of such securities is allowed by the contract.

Finally, it should be noted that the debtor's entry into insolvency proceedings has the effect of freezing creditors' judicial actions against the insolvent person.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

There are preference periods during the insolvent person's reorganisation under a judicial receiver which can take as long as a eight months, but commonly take years; the court may use eighteen-month clawback rights. Moreover, some creditors are legally privileged even over creditors that benefit from a security over some of the debtor's properties. This is the case, for example, for tax debts and employees' salaries, legal costs, etc.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Bankruptcy proceedings are only applicable to merchants and artisans. Although this covers a large range of the active population, it should be noted that the bankruptcy proceedings do no apply to all other entities. As a consequence, in the case of bankruptcy of the other entities, their assets will be sold in order to ensure the payment of their creditors in accordance with the rank of each creditor, which is privileged creditors, secured creditors, and then unsecured creditors.

Moreover, should the bankrupt company be a financial institution, it is submitted to the specific law relating to credit institutions, notably with respect to more protective bankruptcy proceedings which include the direct intervention of the central bank during the reorganisation process.

Besides, public entities, except the ones organised as corporations, are excluded from bankruptcy proceedings and the applicable legislation is the public legislation.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Under Moroccan law, no other proceedings may be followed for the enforcement of a security, other than court proceedings.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Morocco?

Yes, a party's submission to a foreign jurisdiction is legally binding and enforceable under the laws of Morocco. It should be noted that public persons are allowed, by law, to provide for a waiver of enforcement and jurisdiction immunities for their private contracting parties.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Morocco?

Yes, the waiver of sovereign immunity is legally binding and enforceable under the laws of Morocco.

10 Other Matters

10.1 Are there any eligibility requirements in Morocco for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Morocco need to be licensed or authorised in Morocco or in their jurisdiction of incorporation?

Yes indeed, there are eligibility requirements for lenders in Morocco. There is a legal monopoly in favour of credit institutions. Credit institutions are the only entities allowed to provide credit. In order to establish a credit institution in Morocco, a licence delivered by the central bank/Bank Al Maghrib is required. Any breach of the banking monopoly exposes the violator to criminal penalties.

However, there are some exceptions to this monopoly. First of all, the credit institution monopoly only concerns the entities that provide credit as their common professional activity. Thus, entities which provide credit occasionally are not affected by the credit institutions monopoly.

Moreover, facilities encountered between companies from the same corporate group constitute a legal exclusion from the credit institutions monopoly.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Morocco?

Any financing transaction documentation, and specifically the local securities which will necessarily be submitted to Moroccan courts, should be clearly and simply drafted as said courts may require the translation into Arabic of related documentation. Indeed, translation of complex common law contracts could raise serious legal or contractual misunderstandings as judicial, on oath; translators do not often have a fair level of understanding of some common law concepts.

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HAJJI & Associés
Association d'avocats

Hajji & Associés was established in 1996 by Amin Hajji. It is composed of two partners and six associates. The firm is located in the business centre of the city of Casablanca. Nearly ninety per cent of its clients are international corporations, with Anglo-Saxon predominance.

The firm has since developed an activity oriented into international business and the legal counsel activity has been elaborated in some areas as project finance in energy, notably, aeronautic asset-based financing and leasing, mergers & acquisitions, telecommunication, distribution contracts, intellectual property, labour law, cyber law and competition issues.

Furthermore, the firm represents its clients before Moroccan courts in mainly commercial and civil litigations. International arbitration is also a new activity the firm is developing progressively.

Mozambique

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Mozambique?

Mozambique is facing a new era due to the large scale of natural resources (natural gas and coal) which have recently been discovered. Such resources are allowing new developments in strategic economic sectors. The banking and insurance sectors are now changing their view of the domestic market – which is essentially focused on mass consumption products – to accommodate these new developments and are also being inspired by developed markets in other countries.

1.2 What are some significant lending transactions that have taken place in Mozambique in recent years?

After a long negotiation process, the majority of the shares in the Cahora Bassa dam have been transferred from Portuguese control to the Mozambican Government. The media has reported that this was a USD 950 million transaction. The transaction was a share transfer but there was also a lending operation involved as the Mozambican Government did not have the resources to pay for such shares. We are not aware of any other lending operations that are related to private entities.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

The abovementioned rule is mandatory and therefore the provision of guarantees in breach of this rule will be considered null and void. However, as per the Commercial Code, the board shall be liable for any decisions taken against the articles of association or against the law.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

The abovementioned rule is mandatory and therefore such a transaction will be considered null and void. However, as per the commercial code, the board shall be liable for any decisions taken against the articles of association or against the law.

2.3 Is lack of corporate power an issue?

See questions 2.1 and 2.2.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Guarantees shall be provided in accordance with the articles of association of the company and must be approved pursuant to a board or shareholders' resolution.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No, they are not.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, there are not.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

As per the law currently in force in Mozambique, the land belongs to the Government – it is public property and cannot be sold or given as security. Notwithstanding, any infrastructures erected on the land can become private property and can be provided as security for lending transactions.

The following are types of collateral available to secure lending obligations:

(i) mortgage on real estate, aircrafts, vessels and other specific assets;

(ii) pledge over movable assets;

(iii) pledge over a business;

(iv) pledge of rights;

(v) financial pledge; and

(vi) escrow of incomings.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

In general, an agreement is required for the purpose of granting security over an asset. Depending on the type of asset, the execution of a public deed is required, without which the provision of security may be considered null and void.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Please refer to the answer to question 3.1 in terms of security over land.

For real estate, plant, machinery and equipment, refer to question 3.2.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, collateral security by means of a pledge over receivables may be taken. It will require an agreement as well as the notification to the debtor.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. The pledge over cash deposited in bank accounts can be made and it requires formal agreement and a notice to the bank where the cash is deposited.

3.6 Can collateral security be taken over shares in companies incorporated in Mozambique? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Collateral security over shares in companies incorporated in Mozambique can be made as a pledge of shares. The provision of security over shares will depend on the restrictions that may be imposed by the articles of association, in the absence of which shareholders may act freely.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, security can be taken over inventory and there is no special proceeding.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, please see the answer to question 2.1.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The costs are as follows:

(i) Notarial and registration fees will depend on the value of the assets.

(ii) Stamp duty:

(a) Surety, bail, bond and bank guarantee:

- 0.02% per month on the secured amount, in the case of security granted for a period of less than 1 year;
- 0.20% per month on the secured amount, in the case of security granted for a period 1 year and less than 5 years; and
- 0.30% per month on the secured amount, in the case of security granted for a period of 5 years or more;

(b) mortgage and pledge: 0.3% on the secured amount; and

(c) other types of security: 0.3% on the secured amount.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

In terms of timing, it depends on the complexity of the documentation required (refer to question 3.2).

In terms of expenses, a considerable amount might be involved in the event that stamp duty is due for the granting of guarantees or the creation of securities.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No, there are not.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

In order for a real estate property (excluding land) to be granted as security, a public deed for the transfer of the property and subsequent registration with the Land Registry is required.

Similarly, any powers of attorney issued for the purpose of the transfer of real estate property (excluding land) must be authenticated by a notary public. The PoA, in order to be validated in Mozambique, shall have to be certified in a local Mozambican Consulate/Embassy.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

There is no such prohibition in accordance with the Mozambican Commercial Code.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Mozambique recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes, it will.

5.2 If an agent or trustee is not recognised in Mozambique, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

5.3 Assume a loan is made to a company organised under the laws of Mozambique and guaranteed by a guarantor organised under the laws of Mozambique. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Yes, the debtor shall be notified of the assignment of the credit. It should also be noted that the assignment of the guarantee will only be possible in the event that it is not forbidden pursuant to the law or agreement between the parties and that the guarantee has not been provided *intuitu personae*.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Yes, all income derived from loans made by foreign lenders is subject to withholding tax at the rate of 20 per cent and is due at the time of payment of the interest.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Apart of withholding tax, the contract is subject to stamp duty and notarial costs. With regards to notarial costs, please refer to question 3.9.

6.3 Will any income of a foreign lender become taxable in Mozambique solely because of a loan to or guarantee and/or grant of security from a company in Mozambique?

Yes, all income of a foreign lender generated by a loan made to a Mozambique company is taxable in Mozambique.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Yes, please refer to the answer to question 6.2 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in Mozambique recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Mozambique enforce a contract that has a foreign governing law?

As per Mozambican Law, the parties are free to establish the terms and conditions of the agreements, as far as it is not against the law. The same principle applies in terms of settling conflicts.

7.2 Will the courts in Mozambique recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

As per the Mozambican Civil Procedure Code, decisions issued by foreign courts and arbitration tribunals can only be enforced in Mozambique after previous confirmation by the Supreme Court of Law, except if it is against an international convention or agreement.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Mozambique, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Mozambique against the assets of the company?

The Mozambican Procedure Law does not allow for a quick decision-making process by the courts of Mozambique. Notwithstanding, there has been a concerted effort to issue new laws and rules in order to reduce the excessive bureaucracy and speed up cases in court and ensure a justice is achieved more quickly. We may estimate that a court case might take between 1 and 3 years, in the absence of appeals.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

In case of fulfilling collateral security, the court may, at a later stage of the judicial process, address the property in a public auction and any interested entity may submit an offer as per the reference terms (prior conditions imposed by the court).

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Mozambique or (b) foreclosure on collateral security?

In general terms, there is no restriction. However, is very important to clarify that all immovable property that has been sold by the Mozambican Government cannot be sold to foreign entities.

A company will be considered a foreign entity if at least 51 per cent of the shares belong to a foreigner.

7.6 Do the bankruptcy, reorganisation or similar laws in Mozambique provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Article 1153(2) of the Civil Procedure Code allows for an arrangement of simple moratorium on non-preferential credits, which is established by agreement between the parties and must be approved by the judge of the case. The law allows an arrangement between creditors and the company in order to delay the enforcement of lender claims or both parties reaching different terms of payment (reduction of the credits).

7.7 Will the courts in Mozambique recognise and enforce an arbitral award given against the company without re-examination of the merits?

With regards to arbitration of a foreign decision, please refer to the answer to question 7.2 above.

It is important to clarify that a foreign decision of international arbitration may only be confirmed by the local competent court if:

(i) there is no doubt on the authenticity of the documents submitted (written decision);

(ii) it was not subject of an appeal;

(iii) it was issued by a competent court according to international rules; and

(iv) is not against the Mozambican Legal System.

Based on the above, the party may contest such decision.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In accordance with the Process Civil Code, a bankruptcy proceeding will suspend any judicial cases against the company, irrespective of whether such cases have been commenced by creditors with collateral security.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In accordance with the Civil Code and the Civil Procedure Code, there are privileged creditors, namely, government and workers.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The Mozambique Republic and certain public sector companies are excluded from bankruptcy proceedings.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

A court proceeding is always required in order to seize a company's assets.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Mozambique?

Yes, based on the principle of freedom of choice of law.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Mozambique?

The waiver of the sovereign immunity shall not be valid as per the Law currently in force in Mozambique.

10 Other Matters

10.1 Are there any eligibility requirements in Mozambique for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Mozambique need to be licensed or authorised in Mozambique or in their jurisdiction of incorporation?

The incorporation of lending companies is ruled by a specific Law which stipulates the prior conditions for the lending activity. As per such law, there are different types of lending entities and each of them must meet the prescribed requirements before being authorised to carry out financing transactions.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Mozambique?

No, there are not.

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Netherlands

Gianluca Kreuze

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Sietske van 't Hooft

1 Overview

1.1 What are the main trends/significant developments in the lending markets in the Netherlands?

We have seen improvement in the overall availability of funds in the traditional financing market, but particularly funding for small and midsize companies continues to be restrained. Large companies have easier access to funding sources. Banks, more than before, have been shifting their remaining liquidity from leveraged and ordinary corporate finance towards other types of financing. A strong increase has been seen in asset based lending.

On the demand side of the financial market, corporates are looking for other ways of financing themselves. Corporates tend to invest more time in spreading their liquidity sources making them less dependent on the whims of traditional banks. Financing is now also coming from non-traditional financiers such as private equity investors and insurance companies. We have seen a boom in the amount of bond issues. Participations by pension funds seem to fall behind the expectations of the market.

1.2 What are some significant lending transactions that have taken place in the Netherlands in recent years?

Most traditional banks have extended or refinanced existing current financing arrangements with the same lending group without materially changing the financed amounts. Most new money has come from alternative sources, mainly the bond market. The Dutch Central Bank reported last year that the Dutch corporate bond market has doubled in size since 2007. Non-financial corporations' recourse to the bond market has grown particularly sharply from 2009 onwards. In the first quarter of 2013 the market increased to a record level of EUR 105 billion. Most eye-catching were the bond issues by VimpelCom (USD 2 billion), InterXion (EUR 325 million) and KPN (EUR 2 billion).

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

A Dutch company may grant third party security or guarantees. A legal entity, or the bankruptcy trustee on its behalf, can contest the validity of a transaction if the company has acted beyond the scope of its corporate objects (i.e. its business purpose) and the counterparty was aware or should have been aware thereof (generally this concept is referred to as "corporate benefit" or "*ultra vires*").

In determining whether there is corporate benefit, all circumstances must be taken into account. The wording of the objects clause in the articles of association of the company is relevant but not decisive. In particular, it must be considered whether the interests of the company are served by the transaction and, on the downside, whether the existence of the company is jeopardised by the transaction. This is a factual test to be made by the management. The fact that the legal entity is part of a group can be taken into account (indirect benefit), particularly if the members of the group are economically and operationally intertwined. A downstream guarantee is generally considered to serve the corporate interest of the parent company as are reciprocal cross stream guarantees in a group financing arrangement that (directly or indirectly) benefit all group members.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

For corporate benefit issues, see question 2.1. Otherwise, concerns are fairly theoretical. A request for the performance by a party who knew that entering into a transaction would cause major damage to the company may be held contrary to reasonableness and fairness and therefore be unenforceable.

A director can be held liable for improper performance of duties only in the case of serious negligence, i.e. when a director acted in a way no (other) director under the same circumstances would reasonably have acted. Examples can be found in acting (or refraining from acting) in violation of statutory provisions, the articles of association (and any applicable internal regulations) or in a way which is obviously improper and against the interest of the company. The liability can be towards the company or towards a third party.

2.3 Is lack of corporate power an issue?

A legal entity which has acted within its corporate objects is generally considered to have the corporate power to enter into a transaction.

A rather specific rule applies to the board of managing directors of a foundation, which may only resolve to grant guarantees for third parties if this is explicitly provided for in the authority or

representation clause of the articles of association. Unless provided otherwise in the articles of association, this restriction affects the authority of the board to enter into the guarantee on behalf of the foundation.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental approval or other action is required in connection with the execution by a company of a guarantee.

Shareholder approval or approval of other corporate bodies is only required if the articles of association so provide. A defect in the decision making process could only affect the validity or enforceability of an agreement in particular circumstances where the counterparty is aware of the defect in the internal decision making and is considered to act in violation of the principles of reasonableness and fairness or in tort.

If a company has established a works council (a corporate body representing the employees), the works council will have advisory rights. Failure to enable the works council to properly exercise its rights does not normally affect the validity of the guarantee, but it is market practice to ensure the advisory rights have been exercised.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Dutch law does not impose any net worth, solvency or similar guarantee limitations on the amount of a guarantee granted by a Dutch company and no such limitations have been developed in practice. For financial assistance limitations, see question 4.1.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange controls (or similar obstacles) in force in the Netherlands.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

All relevant types of assets (both present and future) are available to serve as collateral. However, there are some restrictions:

- Assets which are acquired or come into existence after the grantor has been granted a suspension of payments or has been declared bankrupt can no longer be validly pledged by the grantor.
- Receivables may not be subject to a security interest if they are subject to anti-assignment restrictions that prohibit the assignment of the receivable or the imposition of liens.
- An undisclosed pledge can only be created over future receivables to the extent the receivables arise out of a legal relationship existing on the date of the creation of security.
- Real property, registered ships and registered aircraft cannot be made subject to a security right until acquired by the grantor.
- IP rights can only be made subject to a security right if the law provides this. As a result, it is questionable whether a security right can be created over international trade marks and models and designs (to the extent they are not registered in the Benelux region).
- Goodwill or knowhow cannot be made subject to a security right.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Dutch law does not know the concept of a general business charge or generic security. The formalities for creating security vary per type of asset and are often documented by separate agreement. However, since Dutch law allows for a generic description of assets by class (e.g. "all the company's receivables"), the security over different types of assets can, to a large extent, be combined in one agreement (commonly referred to as "security agreement" or "omnibus pledge"), which resembles a general security agreement.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

A distinction should be made between real property (and "fixtures" thereto) and plant, machinery and equipment that are not "fixtures" (movable assets).

Security over real property is taken by way of a mortgage (*hypotheek*). A mortgage is created by notarial deed, executed before a civil law notary, which is then registered with the Dutch Land Register. The mortgage can secure both present and future obligations but should state a maximum amount (normally, the principal amount increased by 40%-50% to cover interest and costs).

Security over movable assets is taken by way of pledge (*pandrecht*) and can take two forms:

- Possessory – whereby the secured party (or third party acting on its behalf) takes control over the assets.
- Non-possessory – created by a private deed which is registered with the Dutch tax authorities or a notarial deed (which is uncommon).

Given the practical difficulties of a secured party maintaining control over assets that are used by the grantor in the ordinary course of its business, a non-possessory pledge is typically created by lenders. The non-possessory pledge converts to a possessory pledge upon the occurrence of a specified trigger event, typically an event of default.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security over receivables is taken by way of pledge (*pandrecht*) and can take two forms:

- Disclosed – created by a private deed and notification to the debtor(s). Notification is a requirement; acknowledgment by the debtor is not.
- Undisclosed – created by a private deed which is registered with the Dutch tax authorities or a notarial deed (which is uncommon). Notification is not a requirement.

An undisclosed pledge can only be created over existing receivables and receivables arising from a legal relationship existing at the time of registration of the deed. This means there will be periodic updates by way of supplemental deeds. These can be executed by the grantor or, if there is a power of attorney in the original pledge, the secured party.

A disclosed pledge entitles the secured party to collect the receivables from day one. The secured party normally authorises the grantor to continue collecting the receivables until a certain trigger event occurs.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Cash deposited in bank accounts is considered to be the equivalent of a receivable (a claim of the account holder against the bank) and accordingly a pledge is therefore created in the same way as a pledge over receivables (see question 3.4). A disclosed pledge is the preferred option. It is normally agreed that the grantor may continue to operate and make withdrawals from the pledged account(s) until a certain trigger event occurs.

Under the Dutch general banking conditions, Dutch banks have a right of pledge and set-off over the balance standing to the credit of their customers' accounts. If a creditor requires a first ranking security right, a waiver should be obtained from the account bank. Account banks are often hesitant to waive their rights and at a minimum require they keep a pledge and set-off for costs related to the account. The waiver is usually not accepted for accounts included in a cash pooling or netting arrangement administered by the account bank.

Payments that are booked in a pledged account after the grantor has been granted a suspension of payments or has been declared bankrupt, will not become subject to the pledge and will be part of the bankruptcy estate.

3.6 Can collateral security be taken over shares in companies incorporated in the Netherlands? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

A distinction should be made between registered shares, bearer shares and book entry securities.

There are two basic types of shares in a Dutch private limited liability company (B.V.) or Dutch public limited liability company (N.V.):

- registered shares which are made out to the owner's name; and
- bearer shares, where the holder of the share in the company is unknown but can nevertheless enforce his rights as a shareholder. Owners of registered shares are entered in the share register of the company.

A security right over registered shares in a Dutch private limited liability company (*B.V.* or *besloten vennootschap met beperkte aansprakelijkheid*) or Dutch public limited liability company (N.V. or *naamloze vennootschap*) is created pursuant to a notarial deed of pledge executed before a civil law notary. The secured party is entitled to dividends and distributions. The voting rights may transfer to the secured party. Normally it is provided that the grantor remains entitled to collect dividends and exercise the voting rights until a certain trigger event. If the articles of association of the company prohibit or restrict the creation of security (or the transfer of voting rights), the articles should be amended. Shares are not certificated, but are registered in the shareholders' register (as is security over the shares in order that it becomes enforceable against good faith third parties). Security over registered shares cannot be created under a New York or English law governed document.

A security right over bearer shares located in the Netherlands is created in the same way as a pledge over equipment or inventory (see questions 3.3 and 3.7). If the bearer shares are located outside the Netherlands, a security right must be created in accordance with the law of the state where the shares are located. If located in New York or England, it follows that a security right can be granted under a New York law or English law governed document respectively.

A pledge over securities that are transferred by means of book entries in accordance with the Dutch Giro System Act (*Wet giraal effectenverkeer*) is created by means of the registration of the security right in the relevant book entry account. Dutch law provides that a security right over book-entry securities must be created in accordance with the law of the state where the securities account is administered. If such account is administered in New York or England, it follows that a security right can be granted under a New York law or English law governed document respectively.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

A security right over inventory is created in the same way as a pledge over equipment (see question 3.3).

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company may grant a security interest to secure its obligations as a borrower or a guarantor under a credit facility or, for that matter, the obligations of others (third party security).

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

A mortgage and a pledge over registered shares must be created by notarial deed. Notarial fees are not linked to property value or the secured obligations. Notarial fees are based on the amount of work involved and will, for a share pledge, be within a range of EUR 1,500-3,000. Notarial fees for a mortgage mainly depend on the number of properties and registration searches involved.

The Netherlands does not have a public security register. Security over real estate is, however, registered with the Dutch Land Register, which is searchable. Certain security agreements must be registered with the Dutch tax authorities, which, when so registered, are date stamped and evidence the date of creation of the security interest. The registry maintained by the Dutch tax authorities is not a searchable database and is therefore of no benefit to lenders trying to determine the existence of competing liens.

Costs for registration of a mortgage with the Land Register are minimal. Registration with the Dutch tax authorities is free.

No stamp duties are payable in the Netherlands.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

No significant amount of time or expense is involved for filing of Dutch law security.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No approval by any Dutch governmental body is required in connection with the creation of security. Exceptions may apply to Dutch (semi) public or regulated entities.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There are no priority or other concerns if borrowings are secured under a revolving credit facility (treated similar to a term loan).

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

A mortgage and pledge over registered shares must be executed before a civil law notary. In practice, each party grants a power of attorney to the notary. The signatures on such powers of attorney must be notarised (including a statement of authority) and furnished with an apostille. Such statement may take the form of a legal opinion, confirmation by a notary or, sometimes, an incumbency certificate.

A deed of mortgage must be executed in the Dutch language or, if in another language, come together with a certified translation. No language requirements apply for share pledges or private deeds.

Private deeds may be executed anywhere and in counterparts. No execution formalities (such as witnessing or initialling) apply.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

A distinction should be made between a Dutch private limited liability (B.V.) and a Dutch public limited liability company (N.V.).

The financial assistance prohibition for a Dutch B.V. has been abolished with retroactive effect as of 1 October 2012. Obviously, providing financial assistance is subject to the corporate benefit test (see question 2.1).

A Dutch N.V. is subject to financial assistance rules and may not guarantee, give security, or otherwise support borrowings incurred to (re)finance the acquisition of its shares or the shares.

If the target is an N.V. it is often decided to convert it into a B.V. at closing (by means of a fairly simple procedure). If conversion is not an option, the impact of the financial assistance prohibition can be mitigated in two ways. First, by way of a debt push down whereby the N.V. borrows funds from a bank up to the amount of its freely distributable reserves (for which it may validly provide security to the bank), which it on-lends to the purchaser for repayment of the acquisition debt. Certain formalities apply, such as shareholder approval and the N.V. should maintain a non-distributable reserve for the amount on-lent. The second solution is a merger between the target and the acquiring company whereby the target ceases to exist. The first option has been upheld by the Dutch Supreme Court. The second option has not been tested, but is often used in practice.

It is customary to include a guarantee limitation for financial assistance in each guarantee and security document.

(b) Shares of any company which directly or indirectly owns shares in the company

The financial assistance prohibition for a Dutch N.V. also applies to its subsidiaries.

The following distinction should be made:

- The (direct or indirect) parent is a Dutch N.V., in which case the Dutch financial assistance prohibition also applies to subsidiaries which are Dutch N.V.s. It is generally held that Dutch corporate law (including financial assistance) cannot be applied to subsidiaries that are not Dutch.
- The (direct or indirect) parent is a Dutch B.V. or an entity that is not Dutch, in which case it is generally held that the Dutch financial assistance prohibition does not apply to any subsidiaries which are Dutch N.V.s.

(c) Shares in a sister subsidiary

No specific prohibitions or restrictions apply to the ability of a company to guarantee borrowings or grant security for the (re)financing of the direct or indirect acquisition of shares in a sister company. For general limitations, see question 2.1.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will the Netherlands recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The Netherlands will recognise such role. Dutch law does not know the concept of a trust though. Trusts established under the laws of another jurisdiction may be recognised, but under Dutch law security can only be created in favour of the creditor of the claim (see question 5.2).

5.2 If an agent or trustee is not recognised in the Netherlands, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

To allow structures whereby a security trustee or agent is used, practice has developed the so-called parallel debt, a separate claim owed by the borrowers (and guarantors) to the security trustee or agent which equals the total amount owing to all the secured lenders. The parallel debt only becomes due when the amounts owing to the syndicated lenders are owing, and is likewise discharged when the syndicated debt is paid. It is this parallel debt that is the secured obligation under Dutch security documents. The parallel debt provision is preferably included in the loan agreement (or an intercreditor agreement).

5.3 Assume a loan is made to a company organised under the laws of the Netherlands and guaranteed by a guarantor organised under the laws of the Netherlands. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Under the Dutch conflict rules, claims under a loan agreement must

be transferred in accordance with the chosen law of, or the law otherwise applicable to, the agreement to transfer the loan.

If the chosen or applicable law is Dutch, the loan can be transferred in two ways. First, by way of assignment (*cessie*) whereby the claims under the loan agreement are assigned from Lender A to Lender B or, second, by way of a transfer of rights and obligations (*contractsoverneming*) whereby the entire contractual relationship of Lender A is transferred to Lender B. Both methods require a private deed between the assignor/transferor and assignee/transferee. Assignment can take place without the consent of the debtor, unless the loan agreement provides otherwise. However, the borrower can, and will only be obliged to, pay Lender B once notified of the assignment. A transfer requires the cooperation of the borrower (which is usually given in advance in the loan agreement).

If the loan agreement is governed by Dutch law and includes a restriction on assignment or transfer, it is the prevailing view that an assignment or transfer in violation of such restrictions is null and void.

As a general rule, in case of an assignment, guarantees and security granted by the borrower or a third party security provider guaranteeing or securing the assigned claim are considered accessory to such claims and will continue to guarantee and secure the claims following the assignment. This can be different for an independent guarantee, but independent guarantees are normally drafted in such a way that each existing and future lender is a beneficiary. In case of a transfer, security granted by a third party or guarantees will cease to exist if the third party security provider or guarantor has not given its prior consent for the transfer. Such consent is usually given in advance in the guarantee or security document.

In syndicated facilities, Dutch law security will normally be created in favour of an agent using the parallel debt (see question 5.2). If so, lenders can transfer or assign their stakes without affecting the Dutch law security rights.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

The Netherlands does not levy withholding taxes on interest payments on loans. However, interest payments on hybrid debt instruments (e.g. a loan which has no term or a term in excess of 50 years, which has a profit-contingent interest and which is subordinated to claims of other creditors) may become subject to a 15% withholding tax.

Proceeds of a claim under a guarantee or proceeds of enforcing security are not subject to withholding tax in the Netherlands.

Under the US Foreign Account Tax Compliance Act (FATCA), payments of interest and principal on loans may become subject to a 30% withholding tax to be paid to the United States. Such withholding tax may be avoided if the lender is FATCA compliant.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

No tax incentives are preferentially offered to foreign lenders. No specific taxes apply to loans, mortgages or other security documents governed by foreign law.

6.3 Will any income of a foreign lender become taxable in the Netherlands solely because of a loan to or guarantee and/or grant of security from a company in the Netherlands?

Income of a lender which has no (deemed) presence in the Netherlands does not become taxable in the Netherlands solely because such lender has granted a loan or is the beneficiary of a guarantee or security.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Generally, no significant costs are incurred. See question 3.9.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

The nationality of the lender and/or the jurisdiction in which the lender is based does not affect the Dutch tax treatment of the borrower (such as claiming interest deductions) nor the Dutch costs incurred upon granting security. The Dutch thin capitalisation rules were abolished as per 1 January 2013.

7 Judicial Enforcement

7.1 Will the courts in the Netherlands recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in the Netherlands enforce a contract that has a foreign governing law?

The choice of a foreign governing law is recognised in the Netherlands and the Dutch courts will apply the chosen law accordingly subject to the Rome I Regulation. Rome I provides that a Dutch court may apply provisions of law other than the law chosen by the parties (e.g. overriding provisions of Dutch law or of the laws of another jurisdiction) and may refuse to apply the chosen laws if such application would be manifestly incompatible with the public policy of the Netherlands.

Special rules apply with respect to the governing law of security documents. A security right must be created in accordance with, and will be subject to, the laws of the state:

- in which such property is located at the time of creation of the security in case of immovable property, movable assets and bearer shares;
- by which the company that issued the registered shares is governed in case of registered shares;
- in which the securities account is administered, in case of book-entry securities; and
- applicable to the undertaking to create a security right over that receivable in case of a receivable.

A security right validly created under and governed by a foreign law in accordance with these rules is recognised in the Netherlands. The security right can only be enforced in the same manner as, and will have the same ranking as, the Dutch security right which most closely resembles the foreign security right.

7.2 Will the courts in the Netherlands recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Recognition of foreign judgments are subject to the existence of treaties or EU law.

Judgments by an English court (or any other EU Member State court except Denmark) can be enforced in the Netherlands without any need for a re-trial or re-examination of the merits of the case.

In the absence of a treaty with the United States, a judgment by a New York court cannot be enforced in the Netherlands without re-litigation on the merits. A Dutch court will, under current practice, generally grant the same judgment without substantive re-examination of the merits if the judgment results from proceedings compatible with Dutch concepts of due process, the judgment does not contravene public policy of the Netherlands and the jurisdiction of the New York court is based on an internationally acceptable ground. A final judgment rendered by a court in New York will generally be upheld.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in the Netherlands, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in the Netherlands against the assets of the company?

Main proceedings before a Dutch court will take one to two years at a minimum and can take longer if specific defences are brought up or foreign law questions arise (particularly if such questions cannot be clarified by legal opinions). It is also possible to obtain judgment against a company in summary proceedings, which is much quicker than main proceedings.

Similarly, re-litigation of a judgment (if on the merits) rendered by a New York court can take a few years.

Pursuant to the EEX Regulation, a judgment rendered by an English court can be enforced in the Netherlands with leave from the Dutch court (an "*exequatur*"). Leave will in principle be granted if the judge is provided with a certified copy of the judgment and a certificate of the court that rendered the judgment. This procedure can take up to a few months. If the claim is undisputed, a creditor has two alternatives which may be quicker:

- Requesting the English court to certify its judgment as a "European enforcement order" which shall be honoured if certain procedural requirements set out in EU Regulation 805/2004 are met.
- Obtaining a European Payment Order by filing the form prescribed by EU Regulation 1896/2006 with the district court in The Hague and serving such form upon the debtor. If the debtor does not object within 30 days of notification, in principle a payment order will be granted by the court.

A prejudgment attachment can be levied quickly and easily (see question 8.4). In practice, the enforcement process can be fast-tracked by seizing the assets of the debtor. If the debtor has no legal defences to payment, it has no incentive to initiate or delay (costly) litigation.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

By default, a Dutch law security right is enforced by way of a public sale (which does not necessarily impact time or value). No court order or permission is required for such public sale.

A Dutch law security right may also be enforced by way of a private sale authorised by the competent Dutch court. In addition, a pledge may be enforced by way of a private sale agreed between the grantor and the secured party after a payment default has occurred. A pledge of receivables is usually enforced by collection of the receivables and application of the proceeds to the secured obligations. Self-help (appropriation) is not allowed, but credit bidding is.

Regulatory consents for enforcement are generally not necessary. As an exception, the approval of competition authorities may be required in case of the sale of shares in a Dutch entity.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in the Netherlands or (b) foreclosure on collateral security?

No restrictions apply to foreign lenders in particular. One specific restriction may apply if proceedings are initiated by a foreign plaintiff; the defendant may ask the court to order that the plaintiff provides security for damages (e.g. costs and interest) which the plaintiff might be liable to pay as a result of the judgment ("*cautio judicatum solvi*"). This rule does not apply to plaintiffs that are resident of an EU Member State or a State which has excluded the cautio in a treaty with the Netherlands. The Netherlands has entered into such treaties with many states including the US.

7.6 Do the bankruptcy, reorganisation or similar laws in the Netherlands provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

See question 8.1 below.

7.7 Will the courts in the Netherlands recognise and enforce an arbitral award given against the company without re-examination of the merits?

In general, arbitral awards are recognised and enforced in the Netherlands without re-examination on the merits, unless recognition or enforcement of the award (or the manner in which it was rendered) is contrary to the public policy of the Netherlands or principles of due process have not been complied with.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Under Dutch law, a secured party may enforce its security rights as if there were no bankruptcy or suspension of payments. In a bankruptcy/suspension of payments, the court may, for a maximum period of four months, order a general stay of all creditors' actions.

The bankruptcy trustee may also require the secured party to enforce its security within a reasonable period of time. If the secured party fails to do so, the bankruptcy trustee may sell the assets. The secured party will keep a statutory priority right on the proceeds, but will not be paid until the bankruptcy estate is distributed and will have to share in the bankruptcy costs.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

There are no general hardening periods in the Netherlands. In an indirect way, there is a hardening period of one year.

This works as follows. There is a general right of creditors and the bankruptcy trustee to challenge the validity of certain transactions entered into by a company which are prejudicial to creditors (fraudulent conveyance or "*Actio Pauliana*"). The challenge requires that both the company and (if the transaction was entered into for consideration) the counterparty, knew or should have known that the other creditors would be prejudiced. This is relevant because such knowledge is presumed for certain transactions, such as the creation of security, if the transaction took place less than one year prior to the bankruptcy or suspension of payments. This does not apply if there was an existing obligation to create the security (that predates the bankruptcy by more than one year), which is why often the credit agreement will contain a positive pledge.

The entitlement of the holder of security to the secured assets takes priority over the claims of almost all other creditors. The main exceptions are:

- Bankruptcy costs, but only if the bankruptcy trustee sells the secured assets (see question 8.1).
- Claims for enforcement costs.
- Claims for costs made with respect to the preservation of the assets.
- Claims of creditors which benefit from retention of title. If the grantor has not yet become the owner of an asset, it cannot validly create a right of pledge over such asset.
- With respect to certain movable assets only (usually referred to as "furnishings"): certain claims of the Dutch tax authorities (including wage taxes, VAT and dividend tax). The Dutch tax authorities have the right to take recourse on equipment which is used in the business of the debtor of the tax claim whether or not owned by the debtor, such as machinery, equipment and furniture (but not trading stock/inventory).
- With respect to receivables: debtors of the pledged receivables may have set-off rights.
- Claims of creditors with a possessory lien. A creditor, who has control over an asset of the debtor, may retain possession of the asset until its claim has been paid (e.g. a contractor with respect to real estate or owner of a warehouse with respect to inventory).
- Claims of creditors with a reclamation right. The seller of an asset may under certain conditions reclaim the asset if the purchase price has not been paid. This right can be invoked against the holder of a non-possessory right of pledge.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

It is uncertain under Dutch law whether certain public bodies (such as municipalities or provinces) may be declared bankrupt. Otherwise, no Dutch entities are excluded from bankruptcy proceedings.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Creditors who have title to enforcement (such as a judgment of a Dutch court or a notarial deed) can request a bailiff to seize the assets of the debtor without specific leave of the court once such title has been served upon the debtor.

A creditor without a title to enforcement yet may only levy a prejudgment attachment with leave of the court. Leave can be obtained rather easily within a couple of days of filing the petition. The creditor must demonstrate that he has a claim, the amount of the claim and (except in case of a third party attachment) the risk of embezzlement. The defendant will normally not be heard ("*ex parte*") and limited evidence is required. Leave is granted on the condition that main proceedings are instigated within a specific period of time (normally, fourteen days from the date of leave).

A secured creditor may bring the secured assets in its possession without court interference if the debtor is in default or there is a serious risk of default. This rule also applies to foreign law security (if recognised, see question 7.1). In case of real estate located in the Netherlands, the right to control the real estate with a view to enforcement must be provided for in the deed. If the debtor refuses to cooperate, the creditor has the option to request an order to surrender the assets in summary proceedings. Such order can be obtained in one to a few weeks. Pending the proceedings, the assets can be seized by way of prejudgment attachment (if necessary, with police assistance).

Assets that are specifically used for public service may not be seized.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of the Netherlands?

Dutch law allows parties to make a submission to the jurisdiction of the courts of the Netherlands or another jurisdiction if the transaction has an international element. Restrictions may apply with respect to certain areas of law such as bankruptcy law, employment law, consumer law and insurance law. Exclusive jurisdiction applies to certain proceedings, such as proceedings related to real estate and the governance of companies.

Notwithstanding a valid submission to a court outside the Netherlands, a Dutch competent court may assume jurisdiction in summary proceedings if provisional measures are required in view of the interest of the parties.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of the Netherlands?

As a general rule, no Dutch person has immunity from civil law proceedings. Foreign States, entities and private parties can validly waive immunity from proceedings by agreement.

10 Other Matters

10.1 Are there any eligibility requirements in the Netherlands for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in the Netherlands need to be licensed or authorised in the Netherlands or in their jurisdiction of incorporation?

Lending to businesses is not regulated in the Netherlands and it is not necessary that lenders to a company should be licensed, qualified or otherwise entitled to carry on business in the Netherlands by reason only of entering into a loan agreement or acting as agent or security agent and enforcing their rights thereunder.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in the Netherlands?

No, there are not.

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Nigeria

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Nigeria?

The monetary policy rate (which is the minimum approved rate for banks' lending, set by the Central Bank of Nigeria's Monetary Policy Committee) has consistently been retained at 12% since late 2011. However, the Central Bank of Nigeria (CBN) increased its minimum rediscount rate (which is the rate at which it lends to commercial banks) from 17% to 18%, giving rise to a consequent increase in banks' lending rates (now, between 21% and 29%). Given this very high cost of borrowing, some businesses source better priced offshore loans which nevertheless come with the additional cost of local bank guaranatee.

The Federal Government has also unveiled plans to establish a special finance institution that will attract funds into the economy at lower interest rates. When established, it is intended that the institution will lend funds to the Bank of Industry, Bank of Agriculture and commercial banks at such cost as would enable these banks to lend to businesses at lower interest rates.

Furthermore, the CBN has recently issued guidelines for the adoption of Basel II and III in Nigeria. It is hoped that with the implementation, banks will be stronger, more resilient and credible and eventually it will lead to a reduction in borrowing costs.

In February 2014, the CBN increased the cash reserve ratio on public sector deposits to 75%. While this was intended to reduce lending to the public sector and expand private sector lending, this measure rather had the immediate effect of reducing liquidity and increasing interest rates. The CBN policy nevertheless expects that the banks will eventually find ways to increase deposit mobilisation from the private sector and increase private sector lending.

1.2 What are some significant lending transactions that have taken place in Nigeria in recent years?

Notable recent significant lending transactions include: Zenith bank led syndicated financing of US$3 billion to MTN Nigeria for the expansion, modernisation and improvement of its network infrastructure; US$ 1.41 billion financing to Bonny Gas Transport for the acquisition of six new LNG vessels; US$ 815 million financing to Oando Plc for the acquisition of Nigerian assets of ConocoPhillips; a US$ 550 million facility used to acquire 45% interest from oil mining leases (OMLs) 4, 38, 41 from Shell and partners by Seplat.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, provided there is no restriction in this regard in its Memorandum of Association ("Memorandum").

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

No. The guaranteeing company need not show any benefit to itself. The consideration for the guarantee will be the grant of the loan by the lender. The security may be enforced against the guaranteeing company in accordance with the provisions of the guarantee agreement duly signed by the guaranteeing company.

2.3 Is lack of corporate power an issue?

From the date of incorporation, every company has the powers of a natural person, including the power to give guarantees (unless restricted by its Memorandum). It is, however, not lawful for a company to guarantee a loan taken by any director of the company (s. 270, Companies and Allied Matters Act (CAMA)), except where it is in the company's ordinary course of business to provide such guarantees, or the loan for which a guarantee is sought is for the purposes of the company. In the latter instance, approval of the company's shareholders must be sought and obtained.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No. There is no specific statutory or common law requirement for consents before issuing a guarantee, other than as stated in question 2.3 above. However, shareholders' approval is usually requested, particularly where the company's Articles of Association ("Articles") do not expressly permit the directors to give guarantees on behalf of the company for loans taken by other entities.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no such statutory limitations. However, lenders will

typically consider the solvency or financial worth of a company in ascertaining its capacity to guarantee a loan.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange control regulations or similar obstacles that prevent enforcement of a guarantee. But monies payable under a guarantee may not be remitted out of Nigeria if the loan funds were not imported into Nigeria through an authorised foreign exchange dealer, and a certificate of loan capital importation (CCI) issued by the authorised dealer/bank at the time the loan was made.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Any form of asset may be used to secure lending obligations – moveable and immoveable property, intangible property (such as shares), receivables, cash at bank, etc.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Yes. Asset security may be given by means of a general security agreement over all the assets of a company. This may be done with an "All Assets Debenture", which may create a fixed charge over specific, named assets of the borrower and/or a floating charge over all the assets of a company generally, or over a specific class of assets. A fixed charge restricts the right of the chargor to deal with the particular asset(s) without the consent of the holder of the charge. The restriction exists from the creation of the charge, and does not require default to crystallise. When the charge is general or floating, the borrower is at liberty to deal with the assets in the normal course of business until there is a default under the loan agreement, after which the borrower may not freely deal with the asset.

The creation of a security interest of certain classes of assets requires special formalities, for example: (a) a charge over shares, intellectual property rights and beneficial interests under a trust must be evidenced by a written document; (b) a charge on company shares or dividends or interest thereon may be notified to the company by serving on the company, a notice and affidavit of interest (s. 156, CAMA); (c) a charge over the assets of a company must be stamped at the stamp duties office and registered with the Corporate Affairs Commission (CAC); and (d) a charge or mortgage on real estate must be written, stamped at the stamp duties office and registered with the relevant Lands' Registry Office. However, a pledge of goods can be created by a mere oral contract, coupled with a deposit of the tangible moveable property or documents of title.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Generally, security can be taken over any class of assets, whether located underground or overground. The procedure for creating each type of security differs but, in general, would entail: (a) verification of title to the property; (b) preparation and execution of the appropriate agreement; (c) payment of stamp duties; and (d) registration of the security agreement with the CAC (if the chargor is a company).

In the case of real property, additional requirements are: (a) prior consent of the governor of the state in which the land is situated (or the Minister of Works and Housing, in the case of federal land) to the transaction (s. 22 Land Use Act); and (b) registration of the security agreement at the relevant lands registry.

Where the asset taken as security is an oil or gas pipeline, prior consent of the Minister of Petroleum is required to have been obtained (s.17(5)(e), Oil Pipelines Act). In addition, a mortgage of the assets of a licensee under the Electric Power Sector Reform (EPSR) Act requires the prior consent of the Nigerian Electricity Regulatory Commission (NERC) (s. 69(1), EPSR Act). Mortgages of shares of regulated assets will generally require the consent of the relevant regulatory agency.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. Security can be created over a company's receivables, either by way of a charge or by an assignment of such receivables. Where a floating charge is created, the chargor is permitted to continue its operations and collections of the receivables until: (a) the security becomes automatically enforceable and the chargee, under a power in the security agreement, appoints a manager or receiver of the assets; (b) the court appoints a receiver or manager of the assets on application of the charge; or (c) the company goes into liquidation (s.178, CAMA). Where any of the above happens, the charge crystallises and becomes a fixed equitable charge. This is, however, subordinate to a fixed charge on the receivables. In addition, the parties may agree to make the floating charge specific by notice either at will or after the occurrence of a specific event.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. Security can be created over cash in a bank account. Where the account is a fixed deposit account, the chargor may create a fixed charge on the account with the chargor giving clear and irrevocable instructions to the bank to pay the cash therein to the chargee in the event of default of the chargor. Where the cash in the bank account is part of a floating charge, the instructions will only crystallise upon default by the chargor. However, enforcement of such security typically requires a court order as banks are reluctant to hand over a customer's moneys without the express written instructions from the customer.

In certain instances, lenders may request to be added as co-signatories to the relevant accounts to ensure that the account remains funded and unauthorised disbursements are not made during the tenor of the facility.

Where the lender is the bank in which the borrower deposits his cash, the Court of Appeal has held that a bank may take the cash at the bank as security for any loan advanced and due from a customer (*FBN Nigeria Limited v Ogunsedo*). Cash held at a bank is considered as "unmentioned security".

3.6 Can collateral security be taken over shares in companies incorporated in Nigeria? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes. Shares may be used as security in Nigeria. Every company is

required to issue share certificates to holders of its shares (a shareholder may have his shares dematerialised and held in an electronic format by a certified depository). Where shares are used as security, upon executing the relevant share security agreement or other agreement and paying the relevant stamp duty thereon, the creditor should give notice of the security to the company (whose shares are being used as security). The notice should be accompanied by an affidavit of interest. The company should then: (a) enter the notice in its register of members; and (b) not register any transfer or make any payment or return contrary to the notice until the expiration of 42 days' notice to the creditor of the proposed transfer or payment. In addition, the creditor usually requires the share certificate to be deposited with it to prevent the debtor from trading the shares.

Parties may also decide to transfer the legal title of the shares to the lender with a condition that the shares are retransferred upon full satisfaction of the debt. In that case, the transfer will be registered with the CAC and the lender inserted in the company's register of members.

Where an individual intends to create a security interest over securities that are registered by the Securities and Exchange Commission (SEC) as collateral, the borrower is required to deposit the security document, as well as duly executed share transfer forms, and a letter to the registrar stating the securities and amount of the securities used as collateral and waiving any right to be notified of subsequent transfer by the registrar (Rule 379, SEC Consolidated Rules). In addition, where the shares are held by a certified depository, (currently the Central Depository Clearing System Plc), the rules of the certified depository in that regard should be followed.

Nigerian law recognises freedom of contract between the parties to an agreement; thus, such security document may be valid under an agreement governed by the law of a foreign country. It is to be noted, however, that common law conflict of law rules would subject the aspects of the transaction that relate to passage of title in the shares to the law of the country where the shares are domiciled.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, security can be granted over a company's inventory. This is typically by way of a floating charge. The chargor may continue to deal with the inventory until the charge crystallises. Upon agreement by the parties, stamp duty is required to be paid on the document creating the charge and the document is required to be registered with the CAC.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes to both (i) and (ii).

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Stamp duties and CAC registration fees are payable on security agreements. In addition, the governor's consent and registration fees are collected by the relevant state government for each particular real estate asset (see question 3.3 above). The charges or fees are *ad valorem* in some cases, and nominal in other cases. Notarisation is typically not required.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Yes. Registration fees and stamp duties payable depend on the nature or type of security asset.

Stamp duty ranging from 0.375% to 1.5% of the amount secured is payable on mortgages, bonds, debentures or covenants. Registration of charges for a private company at the CAC is approximately 1% of the amount secured. In respect of real estate assets, fees for the governor's consent (discussed in question 3.3 above) differ from state-to-state. In Lagos State, the commercial centre of Nigeria, the consent fee for mortgages is 2% of the facility amount, and an additional 3% of the secured amount is payable to register the mortgage at the Lagos State Lands' Registry.

Timelines vary from 5-10 days for both stamp duties and CAC registrations, to 30 days or (much) longer for the governor's consent (efficiency varies from state to state).

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Regulatory or similar consents required depend on the nature of the security asset. For instance, consent of the governor of the relevant state in which the land is located is required where the asset security is a real estate asset. Consent requirements also exist in certain regulated industries/sectors, especially where government licensing is required for the business in question. Generally, no consent is required for plant, machinery and equipment except as may be provided for by specific statute (e.g. EPSR Act or Oil Pipelines Act).

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Under Nigerian law, subject to statutory preferential debts (see question 8.2 below), the priority of security interests is generally determined by the order of their creation (or registration in the case security interests that require registration), as well as by the nature of these interests – i.e. whether legal or equitable. In relation to revolving credit facilities, the priority rules will operate, although these rights can be varied, subordinated or waived by agreement. (Please see question 8.1 below for the priority rules that will apply to secured creditors.)

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Generally there are none, except where the security is a real estate asset, in which case a security agreement created by deed is required. The land instruments registration law in force in some states in Nigeria requires attestation of the execution of a registrable instrument by a notary public or relevant Nigerian diplomat in the foreign country where the instrument is executed.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Yes. The CAMA prohibits a company or any of its subsidiaries from providing financial assistance (which may be in the form of a gift, guarantee, security, indemnity or loan) to someone who is acquiring or proposing to acquire the shares of such company, directly or indirectly. The exceptions to this rule are: (i) where money lending is in the ordinary course of business of the company; (ii) where the lending is in favour of trustees who have been appointed to hold shares for the employees of the company; (iii) lending to employees (other than directors) to encourage them to be beneficial owners of the shares of the company or its holding company; or (iv) where the law otherwise so authorises.

(b) Shares of any company which directly or indirectly owns shares in the company

The above restriction will apply where such shareholder holds more than half the shares of the company or controls the composition of the board of directors of the company and is thus considered its holding company.

(c) Shares in a sister subsidiary

There is no such restriction.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Nigeria recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The concept of a security trustee is well established in Nigeria. In transactions where there are several lenders, the security interests are often granted to a trustee and registered in its name, on behalf of the lenders. The trustee can therefore enforce the security on behalf of the lenders. The document appointing the trustee is, however, required to be stamped and then registered at the CAC, and additionally at the relevant state lands registry where the security or part thereof consists of a real estate asset.

5.2 If an agent or trustee is not recognised in Nigeria, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

5.3 Assume a loan is made to a company organised under the laws of Nigeria and guaranteed by a guarantor organised under the laws of Nigeria. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The Judicature Act of 1875 (which is a statute of general application and valid law in Nigeria) as well as the Property and Conveyancing Act (which is applicable in many states in Nigeria) permit an absolute assignment of a debt or other legal thing in action (including a guarantee). An assignment of a chose in action will, however, only be effective if: (a) the assignment is in writing, signed by the assignor ('Lender A'); (b) the assignment is absolute; and (c) written notice has been given to the person from whom the assignor would have been entitled to receive or claim such chose in action.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Local companies are required to withhold, as tax, 10% of the interest or dividend income paid to any company (foreign or local). The applicable rate is 7.5% for a foreign company from a country that has a double taxation relief arrangement with Nigeria. Although a borrower may be required to gross up the payments made to a lender to cover any taxes that the lender ought to pay on income arising from the transaction, such taxes paid by the borrower on behalf of the lender do not constitute an allowable expense for tax purposes.

Tax should not be withheld on the proceeds of a claim under a guarantee or the proceeds of enforcing security unless the proceeds of the enforcement include interest income which, conceptually, should attract deduction of withholding tax.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

CITA provides the following tax rebates for interest on foreign loans of qualifying tenor:

Repayment period including moratorium	Grace period	Tax exemption
Above 7 years	Not less than 2 years	100%
5-7 years	Not less than 18 months	70%
2-4 years	Not less than 12 months	40%
Below 2 years	None	None

In addition, Nigeria has entered into double taxation treaties with various countries, pursuant to which the taxes payable by foreign entities in Nigeria is reduced.

6.3 Will any income of a foreign lender become taxable in Nigeria solely because of a loan to or guarantee and/or grant of security from a company in Nigeria?

The general principle is that income of a foreign company will be

liable to tax in Nigeria if such income is deemed to have derived from Nigeria. The interest element of a loan to a Nigerian company is taxable in Nigeria. However, interest income on the loan will not be taxable in Nigeria for the simple reason that the loan is guaranteed by a company, or secured with assets, in Nigeria, where the loan is granted to a non-Nigerian entity. But it would seem that income on the loan will be taxable in Nigeria where, upon the enforcement of the guarantee or the realisation of the security, funds are paid out of Nigeria to satisfy the debt.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Other than the costs associated with stamping and registration requirements (see question 3.9 above), there are no other significant costs incurred by a foreign lender in granting the loan/guarantee/security.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

There is no adverse consequence to a Nigerian borrower where some or all the lenders are foreign companies. Also, there are no thin capitalisation rules in Nigeria.

7 Judicial Enforcement

7.1 Will the courts in Nigeria recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Nigeria enforce a contract that has a foreign governing law?

Yes, subject to certain restrictions. Nigerian law permits the parties to choose the governing law of their contract. Where all the parties are private entities and there is significant foreign interest, it is not unusual for foreign law to be stipulated.

Where the contract is governed by foreign law, the court will still apply domestic law on: (a) regulatory issues relating to the contract; (b) matters that are subject to mandatory rules of domestic law and public policy; and (c) issues relating to the transfer of property rights where the property is located in Nigeria.

7.2 Will the courts in Nigeria recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes. The Reciprocal Enforcement of Judgment Act of 1958 and the Foreign Judgment (Reciprocal Enforcements) Act of 1990 provide for the enforcement of foreign judgments in Nigeria. A Nigerian court would, however, not enforce a foreign judgment which: (a) is contrary to public policy; (b) does not relate to a definite amount; (c) is made by a court which does not have jurisdiction over the matter; or (d) arises from proceedings in respect of which the defendant was not given the opportunity to present his case.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Nigeria, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Nigeria against the assets of the company?

(a) Where the defendant has no defence to an action, the suit may be brought under summary judgment procedure as applicable in nearly all the high courts in Nigeria. The timing for such procedure varies but is usually shorter than a full trial. Timing may range from 6 months to 3 years.

(b) Where the foreign judgment is not challenged by the borrower, enforcement proceedings may be concluded in 1 to 3 months.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There is no requirement for public auctions. There are, however, court blocking procedures as the debtor or other creditors may approach the court seeking an injunction restraining the creditor from enforcing the security, particularly where the debt sought to be enforced is subordinate to other debts.

Except with regard to regulated assets and land, there are no regulatory consents required generally. In the case of a real estate asset, prior consent of the governor must be obtained. In practice, however, consent is sought after the sale and is usually granted upon payment of relevant fees. Specific legislation may impose consent requirements prior to a sale on certain assets. For instance, the Merchant Shipping Act requires the consent of the Minister of Transportation (in practice, the Nigerian Maritime Administration and Safety Agency) to the sale of a Nigerian vessel.

In the event of winding up of the borrower company, certain claims rank in preference to others.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Nigeria or (b) foreclosure on collateral security?

No, there are no restrictions against foreign lenders in Nigeria in the enforcement of securities.

7.6 Do the bankruptcy, reorganisation or similar laws in Nigeria provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

There are no laws on the postponement of obligations of companies from satisfying their debt obligations. This is usually governed by the parties' agreement. However, when a liquidation or bankruptcy order is issued or a temporary liquidator appointed, no proceedings against the company (including proceedings to enforce security interests) can be commenced or continued without the permission of the court, and once commenced, will be subject to conditions set by the court.

A receiver, for a limited time, could also be authorised to operate the company's business and to try to reach arrangements with its creditors, under the court's supervision. At the end of the rescue proceedings, the company either returns to solvency, or moves to liquidation proceedings in which its assets are realised and the proceeds distributed among the creditors in order of priority.

7.7 Will the courts in Nigeria recognise and enforce an arbitral award given against the company without re-examination of the merits?

Nigerian courts will generally recognise arbitral awards without re-examining the merits. However, in very limited circumstances (for example, where one party is deemed to lack capacity or where the arbitral tribunal exercised jurisdiction different from what was agreed by the parties), the courts may set aside or refuse to enforce an arbitral award.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

When a liquidation or bankruptcy order is issued or a temporary liquidator is appointed, no proceedings against the company (including proceedings to enforce security interests) can be commenced or continued without the permission of the court, and, once commenced, will be subject to conditions set by the court.

The rights of a secured creditor are subject to the priority rules (see question 3.12 above), set out below:

(a) If more than one creditor is granted the same (type of) security interest over the same asset, the respective security interests will rank in the order of their creation.

(b) A creditor with a legal interest acquired for value and without notice of a prior equitable interest will rank ahead of the holder of the equitable interest.

(c) A later fixed charge (whether legal or equitable) will have priority over an earlier floating charge, provided the floating charge did not prohibit the company from creating the fixed charge in question, and provided the holder of the later fixed charge did not have notice of the prohibition. (Although Section 179 of CAMA prescribes actual notice, Nigerian common law and equity also accept constructive notice.)

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes. Section 494 of CAMA provides that in the event of insolvency, local rates, charges and taxes due from the company, statutory deductions for the benefit of staff, wages salaries and holiday remuneration due to any clerks or servants, workman or labourer, will be paid with priority over all other debts.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Certain corporations created by statute are exempt from general insolvency proceedings. For instance, the Nigeria Deposit Insurance Corporation Act generally exempts the corporation from liquidation.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes. Terms of the agreement executed by parties may permit the creditor to enforce his security without recourse to court. Furthermore, in certain instances the creditors may be able to appoint a receiver without recourse to court. In some states in Nigeria, the creditor, where the security is a real estate asset, is entitled to exercise a power of sale or take possession of the property without recourse to court. In practice, however, many receivers/managers will seek the assistance of the court in taking control of the secured assets. This is in order to ensure that there is no interference by the debtor with the duties of the receiver/manager.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Nigeria?

Generally, yes. However, the enforcement of a foreign jurisdiction clause is largely a matter of discretion for the courts. Thus, where a matter has been instituted in a Nigerian court in breach of a foreign jurisdiction clause and the defendant has applied for a stay of proceedings pending determination of the suit by the foreign court as specified by the agreement, the court has discretion as to whether or not to grant the stay. The Supreme Court (in *Nika Fishing Company Limited v Lavina Corp.*) held that the law requires such discretion to be exercised by granting a stay, unless strong cause for not doing so is shown.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Nigeria?

Yes, a waiver of immunity clause (that is deemed validly made) will be enforced by the courts without further inquiry.

10 Other Matters

10.1 Are there any eligibility requirements in Nigeria for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Nigeria need to be licensed or authorised in Nigeria or in their jurisdiction of incorporation?

There are no such eligibility requirements in Nigeria. Licensing is only required (pursuant to the Money Lenders' Laws of the various states) by any lender that carries on the normal business of money lending. Subject to the laws of the relevant jurisdiction of incorporation, a foreign company does not require any licensing or authorisation in order to lend to a Nigerian company.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Nigeria?

Yes. Foreign exchange regulations in Nigeria requires a foreign bank, through which funds comprised in a foreign loan are imported into Nigeria, to issue a CCI at the time the funds are imported into Nigeria. Without the CCI, the borrower would be unable to obtain foreign exchange with which to repay the loan.

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IKEYI & ARIFAYAN

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Peru

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Peru?

The Peruvian economy has grown significantly in the last ten years and so financing needs have grown exponentially. Peruvian companies can obtain bank financing on a cross-border basis without restriction so the market has seen a great deal of competition between domestic banks and foreign banks. Banks have been active in trade finance, acquisition finance and project finance, participating individually and in syndicates.

1.2 What are some significant lending transactions that have taken place in Peru in recent years?

The largest bank financing ever to take place in Peru was the USD 2.3 billion syndicated loan for the construction of the Peru LNG project, which included a 400km natural gas pipeline, a liquefaction plan and a seaport. The whole project required an investment of more than USD 4 billion. Peru LNG is a limited liability company indirectly owned by Hunt Oil, SK, Repsol and Marubeni. The bank syndicate was led by Societé Generale and included K-Exim, SACE, US-Exim, the IDB, among others. The deal was completed by June 2008. Other important project financings were the financing granted by Bancolombia, Export Development Canada and HSBC Bank USA to Fenix Power (Ashmore) for the development of a combined cycle generating plant of 512MW for an amount of USD 225 million and the financing granted by the International Finance Corporation, and European banks DnBNOR, Nordea, WestLB and Societe Generale to SN Power for the construction of the 168 MW Cheves hydropower plant owned by Norway's SN Power, a joint venture between Statkraft and Norfund for an amount of USD 250 million.

Last year we worked on two important acquisition financings. Bank of America and Citigroup granted a USD 200 million bridge loan to Intergroup for the acquisition of a PET bottler, and Bank of America, BBVA and Goldman Sachs arranged a USD 350 million loan for Hochschild mining for the acquisition of International Minerals Corporation, which owned the remaining 40% of Hochschild's subsidiary, Minera Suyamarca. In both cases, the loans were repaid with proceeds from a securities offering.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Under Peruvian law, there are certain circumstances that restrict the ability of a company to guarantee borrowings of one or more other members of its corporate group. Article 106 of the Peruvian Corporate Act (*Ley General de Sociedades*) prohibits Peruvian corporations from making loans, granting guarantees or creating security interests on their assets to back the acquisition of their own shares (please refer to our answer to question 4.1 below regarding financial assistance). In this regard, a Peruvian company is prohibited from granting any guarantee in connection with the acquisition of its own shares.

There are no restrictions in other scenarios. However, the granting of a guarantee to secure obligations of a related company could be declared void by a court if is not within the corporate purpose of the company (i.e. as an "*ultra vires*" act) or has no economic benefit for the company.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

There are no enforceability concerns if a disproportionately small (or no) benefit to the guaranteeing/securing company is shown. On the other hand, director or officer liability claims could be initiated only in the event their actions in connection with the granting of the guarantee have been made exceeding their faculties, with malicious intent (*dolo*) or gross negligence (*negligencia grave*). Liability claims could be initiated by (a) minority shareholders, or (b) creditors. Creditors will only have a valid action against directors or officers who entered into a certain transaction if the following requirements are met: (i) the claim is intended to reconstitute the company's equity; (ii) the claim has not been filed by the company or its shareholders; and (iii) the collection risk is substantially increased. The statute of limitations to file claims against directors and officers is two (2) years as from the date of execution of the relevant guarantee.

2.3 Is lack of corporate power an issue?

Yes. In accordance with article 13 of the Peruvian Corporate Act, in order for a guarantee to be binding and enforceable against a company, the officers executing such guarantee must be duly authorised to do so.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No. Generally, having a guarantee executed in writing by duly authorised representatives of the company with sufficient powers is enough for the guarantee to be valid and enforceable. Specific consents could apply when dealing with certain types of counterparties such as banks, insurance companies, pension funds and governmental agencies (which should be answered on a case-by-case basis). Shareholder approval will not be necessary unless the company bylaws expressly require such approval for the granting of a guarantee or it is outside of the corporate purpose of the company.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no provisions under Peruvian law that limit the amount of a guarantee over the basis of net worth or solvency because, in any event, the guarantor company shall only respond up to the amount of its equity. However, in the case of bonds (*fianza*) the Peruvian Civil Code (*Código Civil*) establishes that the guarantee may not exceed the amount of the secured obligation after including all applicable interest, expenses, fees and enforcement costs. Hence, the guarantee may not exceed the amount finally owed by the debtor.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, there is no foreign exchange control applicable in Peru.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Under Peruvian law, in addition to personal guarantees (*fianzas* or *avales*) the following types of collateral may be mainly used to secure lending obligations:

(i) Pledges: over moveable property such as inventories, vehicles, ships, shares, credits, accounts, rights and, generally, all moveable assets (except for specific exceptions).

(ii) Mortgages: over immoveable property such as real estate, as well as exploitation concessions (mining, transportation, electric and public utility concessions).

(iii) Guaranty Trust: through which assets and rights are transferred to a trust, *in dominio fiduciario*, which creates an autonomous and independent patrimony that is managed by a trustee (*fiduciario*) for the benefit of creditors in the terms and conditions established in the corresponding trust agreement.

Additionally, warrants are available to creditors and, in the financial sector, guarantees such as stand-by letters of credit and credit derivatives are also acknowledged by the local regulation.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Yes, as long as the security agreement complies with all of the formalities required for granting a security for each type of asset as described in our answer to question 3.1 above. Also, in Peru we have several alternatives when it comes to determining the composition of a security package. In the case of assets comprising a production unit, the obligor may grant a special type of mortgage known as "production unit mortgage", which enables the grantor to include under a single mortgage (and through the execution of a single mortgage agreement), a group of assets of different nature, both movable property and real estate property (i.e. buildings, *in rem* rights, equipment, machinery) as long as they are all pertaining to a single production unit. In case a collateral package is structured to include a production unit mortgage, the parties can still agree to have separate security documents (i.e. pledges and mortgages) over all the assets that, for some reason, were not comprised under the relevant production unit. Please refer to our answer to question 3.3 below with regards to the applicable procedure.

Likewise, a single guaranty trust agreement may be executed in order to create a guarantee trust that includes all types of the relevant assets and rights of the borrower, to the extent permitted by law (i.e. real property, accounts, moveable assets, contracts, concessions, shares, etc.). This mechanism could be combined with the execution, in parallel, of independent security agreements over other assets not comprised in the trust, taking into account each asset's nature. All assets and rights subject to security would be part of the trust and administered by a designated trustee on behalf and for the benefit of the secured creditors.

A guaranty trust is created through the execution of a trust agreement (*contrato de fideicomiso*) between the guarantor (*fideicomitente*), the relevant creditor (*fideicomisario*) and the trustee (*fiduciario*). Please note that, in accordance with the General Banking Law (*Ley General del Sistema Financiero*), only entities that are duly authorised to act as trustees by the Superintendence of Banking and Insurance (SBS) may act as such (in addition to authorised trustee entities, banks may also perform such function). Although the guaranty trust will be created upon the execution of the trust agreement, in order to obtain enforceability against third parties the agreement must be executed as a public deed and registered in the Contracts Public Registry (*Registro Mobiliario de Contratos*) and, in case the assets comprised in the trust are registered assets (i.e. real estate and certain movable assets such as vehicles, aircraft, etc.), it must also be registered in the relevant registry (please refer to our answers below for detail regarding the relevant registries).

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. Mortgages are created by means of the execution of a private document and a public deed between the Obligor and the Lender (or the corresponding security agent or trustee, as applicable) and will be valid and perfected once registered before the public registries (please note that, as opposed to pledges where registration is only needed for perfection/enforceability as explained below, in the case of mortgages registration is required for validity). Security interests over land and buildings must be registered in the file of the relevant asset in the Immovable Property Registry (*Registro de Propiedad Inmueble*). Security interests over concessions must be registered

in the Public Registry of Concessions for the Exploitation of Public Services (*Registro de Concesiones para la Explotación de los Servicios Públicos*), in the case of mining concessions, in the Mining Rights Registry (*Registro de Derechos Mineros*).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. The Peruvian Pledge Law (*Ley de Garantía Mobiliaria*) expressly allows for pledges to be created over receivables. A pledge is created by means of the execution of a private agreement between the Obligor and the Lender (or the corresponding security agent). However, in order to file the agreement for registration before the public registries, a public deed must previously be granted before a Notary Public. The perfection of the pledge (to achieve enforceability against third parties) and a stronger level of publicity against third parties will be obtained by registering the pledge in the Contracts Public Registry (*Registro Mobiliario de Contratos*).

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. The Peruvian Pledge Law expressly allows for pledges to be created over cash deposited in bank accounts. Please refer to our answer to question 3.4 above for the applicable procedure.

3.6 Can collateral security be taken over shares in companies incorporated in Peru? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes. Peruvian Pledge Law does not require the shares subject to pledge to be issued by a company incorporated in a particular country. A share pledge is created by means of the execution of a private agreement between the Obligor and the Lender (or the corresponding security agent). However, in order to file the agreement for registration before the public registries, a public deed must previously be granted before a Notary Public. The perfection of the pledge (to achieve enforceability against third parties) is obtained once the security interest is registered in the relevant stock ledger of the respective Obligor. In order to give the security a stronger level of publicity against third parties, share pledges are usually registered in the Contracts Public Registry (*Registro Mobiliario de Contratos*) as well. Share of companies in Peru may be in certificated form or in account entry form, in accordance with the Peruvian Corporate Act.

Peruvian law allows contracting parties to freely choose the governing law, dispute resolution venue and language used in all private agreements, including security documents. In that regard, a share pledge agreement may be granted under New York or English Law and the validity and enforceability of such agreement will be determined by such foreign law and not by Peruvian law. Thus, to the extent that the share pledge agreement is valid and enforceable under New York or English law, Peruvian law and courts will recognise such share pledge agreement. However, please note that, in case such agreements need to be filed as evidence or otherwise before Peruvian courts, they need to be officially translated into Spanish by a translator registered in Peru. When filed before government agencies (i.e. insolvency authority), translations do not need to be official.

The shares can also be transferred *in dominio fiduciario* to a guarantee trust. Please see responses above regarding procedure for establishment of the trust, validity and enforceability.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes. The Peruvian Pledge Law expressly allows for pledges to be created over inventory. Please refer to our answer to question 3.4 above for the applicable procedure. In case the assets comprising the inventory are assets registered in the Public Registry, the pledge must also be registered in the Movable Assets Registry (*Registro Juridico de Bienes Muebles*) in connection with such assets.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

To the extent that the financial assistance restrictions (as explained in our answer to question 4.1 below) are not violated, a company may validly grant a security interest in order to secure its obligations both as a borrower under a credit facility and as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

(i) Mortgages (immovable assets):

The costs involved in the registration of mortgages comprise notary fees (required for execution of agreement as a public deed), which will vary depending on the designated Notary Public and are customarily calculated taking into consideration the secured amount (ranging between USD 500 and USD 5,000), and public registry fees. As of the date of writing this chapter, registry fees are set at 0.75/1000 over the total secured amount (when less or equal to approximately USD 13,000) or 1.5/1000 if the secured amount exceeds such amount, with a limit of one Referential Tax Unit ("UIT") (currently S/. 3,800.00 which is equivalent to approximately USD 1,355), with an additional S/. 31 (equivalent to USD 11) qualification fee.

(ii) Pledges (movable assets and rights):

The costs involved in the registration of pledges are comprised of notary fees (required for execution of an agreement as a public deed), which will vary depending on the designated Notary Public and are customarily calculated taking into consideration the secured amount (in a range between USD 500 and USD 5,000), and public registry fees. The costs of registering a pledge over movable assets in the public registries depend on the secured amount (*monto del gravamen*). As of the date of writing this chapter, registry fees are set at 1.5/1000 of the total secured amount (expressed in *Nuevos Soles*) with a limit of one UIT, and an additional S/. 10.00 (equivalent to USD 3.6) qualification fee.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Please refer to our answer to question 3.9 above regarding the applicable expense. Regarding the duration of the applicable

procedures, general timing for registration of pledges and/or mortgages in the relevant public registries is sixty (60) business days. Please bear in mind that, as mentioned above, in the case of mortgages registration is necessary for the creation of the security interest, while in the case of pledges registration is advisable in order to obtain publicity and enforceability of the security interest against third parties.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Not generally (except, as mentioned, in the case of mortgages, for which registration is required for creation of the security interest). Specific consents could apply when dealing with certain types of counterparties such as banks, insurance companies, pension funds, governmental agencies and concessionaires of infrastructure concessions (which should be answered on a case-by-case basis).

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There are no special priority or specific concerns associated with granting security for borrowings under a revolving credit facility. In such case, priority shall be governed by the terms and conditions of the relevant facility agreement. However, please bear in mind that in case the borrower is subject to an insolvency procedure under the Peruvian Insolvency Act (*Ley General del Sistema Concursal*), the priority rights of secured creditors shall be subordinated to the rights of workers (in connection with their compensation and benefits) and the payment of contributions to social security programmes.

Nevertheless, secured creditors have priority over (a) tax claims (including fines, interest and penalty fees owed to the Peruvian State), and (b) unsecured creditors.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

As mentioned above, security documents must be executed as public deeds (through a notary) in order for them to be registered in the relevant Public Registry. Execution under power of attorney shall be necessary in case a special power is required to be granted by the company in favour of the person who shall execute the documents (i.e., in case such person is not a representative or officer of the company already duly authorised to execute the documents on its behalf, in accordance with the company's powers and faculties regime or the applicable Shareholders' Meeting resolution, as the case may be).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

As mentioned, article 106 of the Peruvian Corporate Act prohibits Peruvian corporations from making loans, granting guarantees or creating security interests on their assets to back the acquisition of their own shares. In this regard, a company is prohibited from guaranteeing or giving security in order to secure borrowings incurred to finance or refinance the direct or indirect acquisition of its shares. The granting of security in breach of this prohibition would be susceptible of being declared null and void (for which any interested party, including the grantor, may file a judicial claim), and the directors approving the transaction would be subject to liability. However, there is no case law on this matter, and there is uncertainty as to how a Peruvian court would rule on such claim.

(b) Shares of any company which directly or indirectly owns shares in the company

In our view, the financial assistance limitation applies only to direct acquisitions (i.e., acquisition of shares of the target company which are financed, guaranteed or secured by the target company), and that, therefore, indirect upstream and/or cross-stream acquisitions are outside the scope of the financial assistance prohibition. In that regard, a company could provide security in order to back borrowings incurred to finance the acquisition of shares of the company that owns its shares (upstream), or those of a sister subsidiary (cross-stream). The reasoning behind this interpretation lies in the fact that, under Peruvian law, prohibitions and provisions that restrict rights in general may not be applied by analogy or by extension, they must be expressly established. However, it is important to note that there are no regulations or case law interpreting the scope of the financial assistance prohibition. Hence, this conclusion represents only our legal judgment based on the laws of Peru and, while we believe that in a properly presented case before a Peruvian court such court would rule in accordance with our position, it is possible that such court could reach an adverse decision.

(c) Shares in a sister subsidiary

Please refer to our answer to question 4.1(b) above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Peru recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes, it will.

5.2 If an agent or trustee is not recognised in Peru, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Agents and trustees may enforce claims on behalf of lenders in Peru, without the need to have each lender participating individually on the enforcement actions.

5.3 Assume a loan is made to a company organised under the laws of Peru and guaranteed by a guarantor organised under the laws of Peru. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Generally, and notwithstanding any requirements and limitations under the assignment and participation provisions in the relevant

loan documentation, the assignment of credits shall be communicated to the borrower and guarantor in order to be enforceable against them.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest payments on domestic loans are not subject to withholding tax, while interest payments on cross-border loans are subject to a withholding income tax. The amount being withheld by the Peruvian borrower is a deductible expense for calculating its taxable income.

In addition, tax treatment of interest payments to a foreign lender is more favourable when the foreign lender is a bank or financial institution compared to that when the lender is a regular corporation.

The following is a description of the tax treatment applicable to a cross-border lending transaction.

1. Income tax

Interest paid to a foreign lender is subject to Peruvian Income Tax, whenever the loan proceeds are placed or economically used in Peru or if the payer of such interest is domiciled in Peru.

Peruvian source income from foreign financial transactions, such as cross-border lending activities, granted by a non-domiciled individual or entity, is subject to a withholding tax of 4.99%, if certain conditions are met; otherwise a withholding tax of 30% will apply.

In order to qualify for the 4.99% withholding rate, the following requirements must be met: (i) funds disbursed must have entered into Peru (deposited in a bank account in Peru); (ii) the proceeds of the loan must be used in activities in the ordinary course of business of the borrower, or to refinance existing loans; (iii) the credit does not accrue an annual interest rate exceeding LIBOR + 7%, provided, further, that any excess thereof will be subject to the 30% income tax withholding; and (iv) the lender and the borrower are not deemed to be related parties.

If the foreign lender is domiciled in a jurisdiction that is deemed to be a tax haven, then the borrower will be required for tax purposes to prepare a transfer pricing analysis on the terms and conditions of the loan.

2. Value Added Tax (VAT)

Interest paid to the lender will be exempted from VAT, provided that the lender of the loan is a financial institution (local or foreign bank).

3. Financial transaction tax

Additionally, it is important to mention that in Peru there is a Financial Transactions Tax ("FTT") with a 0.005% rate on debits from and credits to a bank account, either in national or foreign currency. If the loan is disbursed and deposited in a Peruvian Financial System bank account, such credit will also be levied at the corresponding FTT rate. The taxpayer of the FTT is the holder of the Peruvian bank account.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no incentives. Please refer to our answer to question 6.1.

6.3 Will any income of a foreign lender become taxable in Peru solely because of a loan to or guarantee and/or grant of security from a company in Peru?

Please refer to our answer to question 6.1 above.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Notarial and registration fees may be incurred for executing security agreements and for perfection of a security interest. Please refer to our answer in question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are no adverse consequences in that case. However, terms and conditions of a cross-border loan will be subject to transfer pricing rules whenever the lender is domiciled in a tax haven jurisdiction.

7 Judicial Enforcement

7.1 Will the courts in Peru recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Peru enforce a contract that has a foreign governing law?

Yes, they will.

7.2 Will the courts in Peru recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes. The recognition procedure takes place before the Superior Court. A final, non-appealable foreign judgment against the borrower would be recognised, conclusively, and enforceable in the competent courts of Peru without reconsideration of the merits; provided that: (i) there is in effect a treaty between Peru and the relevant country regarding the recognition and enforcement of foreign judgments; or (ii) in the absence of such treaty, the following conditions and requirements are met:

(a) such judgment does not resolve matters under the exclusive jurisdiction of Peruvian courts;

(b) such court has jurisdiction under its own private international law rules and under international rules on jurisdiction;

(c) the defendant was served in accordance with the laws of the place where such court sits, was granted a reasonable opportunity to appear before such foreign court and was guaranteed due process rights;

(d) the judgment has the status of *res judicata* in the jurisdiction of the court rendering such judgment;

(e) there is no pending litigation in Peru between the same parties for the same dispute, which shall have been initiated before the commencement of the proceeding that concluded with the foreign judgment;

(f) such judgment is not incompatible with another enforceable judgment in Peru, unless such foreign judgment was rendered first;

(g) the foreign judgment is not contrary to public order or good morals;

(h) the foreign judgment was not rendered by a court in a country which denies enforcement of Peruvian judgments or engages in a review of their merits;

(i) the foreign judgment is (i) officially translated into Spanish by a translator registered in Peru, and (ii) certified with an "*Apostille (Convention de La Haye du 5 octobre 1961)*" pursuant to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, or if it is not party to such Convention, certified by the Peruvian consulate; and

(j) applicable court filing fees are paid.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Peru, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Peru against the assets of the company?

It could take between two and four years in each case. Even though a borrower could have no legal basis for opposing enforcement, still it could delay enforcement just by challenging on appeal a decision from the first instance court.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Court proceedings do require a public auction. Even for private foreclosures, we always recommend that the process includes certain minimum protections in favour of the owner of the assets, such as an obligation to obtain an independent appraisal, publicity and minimum bids.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Peru or (b) foreclosure on collateral security?

No, they do not.

7.6 Do the bankruptcy, reorganisation or similar laws in Peru provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes. As of the date of the release of the publication with the debtor's insolvency declaration in the Official Gazette (the "Bar Date"), all obligations of the debtor originated before the Bar Date ("pre-publication claims"), including obligations owed to secured creditors, become temporarily unenforceable. The automatic stay suspends enforcement of any pre-publication claim against the debtor's estate until a reorganisation plan or liquidation plan is approved and new conditions are established. In addition, from the Bar Date, all execution proceedings for collection and injunctions against the debtor's estate are stayed. The automatic stay will suspend the enforcement of any credits against the borrower. It will also suspend the accrual of interest and late charges.

7.7 Will the courts in Peru recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. Peru is a member of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

A claim seeking recognition of the foreign award will need to be filed before a competent Superior Court in Peru.

As a general rule, foreign arbitration awards are recognised unless:

(a) the parties to the agreement under the laws applicable to them were under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of the country where the award was granted;

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In liquidation scenarios, secured credits shall be paid with the proceeds of the foreclosure of their respective collateral, unless such collateral has been sold and the proceeds have been used to pay labour or alimony claims (if the insolvency is of an individual). In those cases, all the creditors that hold collateral participate *pari passu* in relation to their contribution for payment of the credits ranked above them. If there should be any unpaid remnant, such amount is paid *pro rata* with non-secured claims. In a reorganisation/restructuring process, although priority is preserved, payments will be realised according to the reorganisation plan provisions (i.e. the priority will not apply). If fixed assets are sold during reorganisation, the priority rules for distribution will apply.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Under the Peruvian Insolvency Law, once the debtor files for its insolvency, or is given notice of an involuntary filing, all actions by management (a) during the prior year ("Suspect Period"), and (b) from that date on and until the date the creditors ratify or replace management ("Avoidance Period"), are put under scrutiny with two different tests. These tests may result in such actions being declared void.

The first test covers all actions or transactions, whether for consideration or not, performed during the Suspect Period. These will be declared void if they have a negative impact on the net worth of the company and are not related to the normal activities of the debtor (both requirements shall be met).

The second test covers the following actions by management if they happen during the Avoidance Period: (i) payment of unmature obligations; (ii) payment of mature obligations not made according to their terms; (iii) contracts for consideration that are not in the ordinary course of business; (iv) compensations (set-offs) among mutual obligations with creditors; (v) liens over, or transfers of, property; (vi) liens created in security of obligations incurred prior to insolvency; (vii) foreclosure on liens and attachments; and (viii) mergers, spin-offs if they have a negative impact on the net worth of the insolvent.

The priority ranking applicable in Peru is: (i) labour claims (included pension claims); (ii) alimony claims (applicable only when the insolvent is an individual); (iii) secured claims, including attachments and seizures; (iv) tax claims; and (v) non-secured claims.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Banks and insurance companies are subject to a different insolvency regime. Pursuant to the Peruvian Banking Law, the banking regulator ("SBS" for its acronyms in Spanish) has the power to interrupt the operations of a bank in order to prevent it from, or to control and reduce the effects of, a bank failure. Either of these actions, depending on the event, must be taken upon the occurrence of certain events, including: (a) suspension of payments; (b) repeated failure to comply with instructions from the SBS or the Central Bank; (c) repeated violation of the Peruvian Banking Law or the bank's by-laws; (d) unauthorised or unsound management; or (e) deficit of regulatory capital (to the extent that if it is in excess of 50%, then an Intervention is mandatory). Less drastic measures, such as (i) placing additional requirements, (ii) ordering a capital increase or an asset divesture, or (iii) imposing a financial restructuring plan, may be adopted by the SBS when the situation allows for them.

An Intervention may halt a bank's operations up to 45 days, which may be extended for a second period of up to 45 additional days, during which time the SBS may institute measures such as: (a) cancelling losses by reducing reserves, capital and subordinated debt; and (b) segregating certain assets and liabilities for transfer to another financial institution. After an Intervention, the SBS will proceed to dissolve and liquidate the bank unless the bank merges with another acquiring institution or another recovery measure is adopted.

Beginning on the date on which a resolution of the SBS subjecting a bank to an Intervention regime is issued, and continuing until such Intervention is concluded (which period ends when the liquidation process begins), the Peruvian Banking Law prevents any creditor of the bank from: (a) initiating any judicial or administrative procedure for the collection of any amount owed by the bank; (b) enforcing any judicial decision rendered against the bank to secure payment of any of its obligations; (c) constituting a lien or attachment over any of the assets of the bank to secure payment of any of its obligations; or (d) making any payment, advance or netting payment obligations or assuming any obligation on behalf of the bank, with the funds or assets that may belong to it and are held by third parties, except for: (i) the netting of payment obligations that are made between regulated entities of the Peruvian financial system and insurance systems; and (ii) under certain circumstances, the netting of payment obligations arising from repurchase agreements and derivatives transactions entered into with local or foreign financial and insurance institutions.

During liquidation, claims of bank creditors rank as follows:

First order – Labour claims:

1st. Employee remunerations.

2nd. Social benefits, contributions to the private and public pension system and other labour claims against the bank accrued until the date when the dissolution is declared, retirement pensions or the capital required to redeem those pensions or to secure them by purchasing annuities.

Second order:

Claims for bank deposits and other types of saving instruments provided under the Peruvian Banking Law, in the portion not covered by the Deposit Insurance Fund.

Third order – Taxes:

1st. Claims by the Peruvian social security administration (*EsSalud*) related to health care benefits for which the bank is responsible as employer.

2nd. Taxes.

Fourth order – Unsecured and non privileged credits:

1st. All unsecured and non privileged credits against the bank, ranked on the basis of (i) the date they were assumed or incurred by the bank whereby obligations assumed or incurred on an earlier date shall rank senior in right of payment to obligations assumed or incurred by the bank at a later date, and (ii) obligations assumed or incurred by the bank on a date that cannot be determined shall rank junior in right of payment to all the obligations comprised in (i) above and *pari passu* among themselves.

2nd. The legal interests on the bank's obligations that may accrue during the liquidation.

3rd. Subordinated debt.

Except for unsecured and non privileged credits, all claims within an order will be ranked *pari passu* among themselves. Each category of creditors will collect in the order indicated above, whereby distributions in one order will be subject to completing full distribution in the prior order.

Any security interest created before the issuance of the resolution declaring the bank's dissolution and the initiation of the liquidation process shall subsist in order to guarantee the obligations it secures. The secured creditors shall retain the right to collect from the proceeds of the sale of the collateral, on a preferred basis (except with respect to labour claims and savings, which are privileged claims), subject to certain rules established under Article 119 of the Peruvian Banking Law.

Peruvian banks are not subject to the regime of insolvency and bankruptcy otherwise applicable to Peruvian corporations in general.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Different types of securities would be subject to different regimes. Mortgages, for securing real estate assets only, shall always be enforced through court proceedings while pledges (for securing movable assets) may contain an agreement between the pledger and beneficiary to have an out-of-court foreclosure process. Usually, an out-of-court foreclosure would be much faster than a court proceeding.

Another mechanism for securing assets under Peruvian law is the guaranty trust. Trusts are bankruptcy remote vehicles and can hold different types of assets such as any kind of movable assets, including flow of funds and bank accounts, and real estate assets as well. A trustee must be responsible for holding and administering the assets in accordance to a trust agreement, which makes this structure more expensive.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Peru?

Submission to a foreign court is valid and enforceable under the laws of Peru. In this respect, article 2060 of CC provides that the election of a foreign tribunal under an agreement with respect to patrimonial (monetary) or economic actions will be valid and enforceable under Peruvian law as long as such actions are not referred to matters in which Peruvian Courts have exclusive jurisdiction (i.e. when the dispute refers to real property rights or civil actions resulting from crimes or misdemeanours executed in Peru, or with effects produced in Peruvian territory).

There is no specific prohibition to non-exclusive jurisdiction agreements in Peruvian law. Considering that it is valid to agree an applicable jurisdiction different than the courts of Peru, we understood that parties could agree that jurisdiction (local or foreign) could be defined by the plaintiff. The only limit applicable to this kind of agreement will be the exclusive jurisdiction matters mentioned in the precedent paragraph. However, note that, although there is some experience in the drafting of commercial agreements in this sense, there is no experience regarding the enforceability of that kind of agreement.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Peru?

There is no sovereign immunity in Peru.

10 Other Matters

10.1 Are there any eligibility requirements in Peru for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Peru need to be licensed or authorised in Peru or in their jurisdiction of incorporation?

In Peru it is not necessary to obtain an authorisation from the SBS or from any governmental entity, in order to provide credit in favour of Peruvian citizens or residents, individuals or companies. According to article 11 of the Peruvian Banking Law, any person willing to enter into the business of banking in Peru shall hold an authorisation from the SBS; however, the business of banking has been defined as financial intermediation, meaning the activity of receiving funds from the public (i.e. taking deposits) AND granting loans with such funds. Therefore, any entity, such as foreign bank or foreign non-banking entity, may grant loans to Peruvian residents without restriction whatsoever.

Nevertheless, from a tax perspective, tax treatment of interest payments to a foreign lender is more favourable when the foreign lender is a bank or financial institution compared to when the lender is a regular corporation.

The following is a description of the tax treatment applicable to a cross-border lending transaction.

1. Income tax

Interest paid to a foreign lender is subject to Peruvian Income Tax, whenever the loan proceeds are placed or economically used in Peru or if the payer of such interest is domiciled in Peru.

Peruvian source income from foreign financial transactions, such as cross-border lending activities, granted by a non-domiciled individual or entity, is subject to a withholding tax of 4.99%, if certain conditions are met; otherwise a withholding tax of 30% will apply.

In order to qualify for the 4.99% withholding rate, the following requirements must be met: (i) funds disbursed must have entered into Peru (deposited in a bank account in Peru); (ii) the proceeds of the loan must be used in activities in the ordinary course of business of the borrower, or to refinance existing loans; (iii) the credit does not accrue an annual interest rate exceeding LIBOR + 7%, provided, further, that any excess thereof will be subject to the 30% income tax withholding; and (iv) the lender and the borrower are not deemed to be related parties.

If the foreign lender is domiciled in a jurisdiction that is deemed to be a tax heaven, then the borrower will be required for tax purposes to prepare a transfer pricing analysis on the terms and conditions of the loan.

2. Value Added Tax (VAT)

Interest paid to the lender will be exempted from VAT provided that the lender of the loan is a financial institution (local or foreign bank).

3. Financial transaction tax

Additionally, it is important to mention that in Peru there is a Financial Transactions Tax ("FTT") with a 0.005% rate on debits from and credits to a bank account, either in national or foreign currency. If the loan is disbursed and deposited in a Peruvian Financial System bank account, such credit will also be levied at the corresponding FTT rate. The taxpayer of the FTT is the holder of the Peruvian bank account.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Peru?

There is nothing that comes to our mind that has not already been covered in this chapter.

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Miranda & Amado is a full-service Peruvian law firm with an international outlook. A market leader across a range of practice areas, the firm is renowned for its expert handling of highly sophisticated transactions and cross-border deals for a predominantly multinational clientele.

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The firm takes pride in having the right balance of experience and youth. A high proportion of the firm's talented lawyers studied at US and UK law schools and have worked at some of the best law firms in New York, Chicago, Washington D.C. and London.

Chapter 52

Portugal

William Smithson

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Portugal?

Given the liquidity issues of Portuguese banks, we have seen recently a significant increase in the lending activity of emerging markets financial institutions, namely from China and Brazil. Towards the last quarter of 2013, we saw Portuguese banks returning to the market as the sovereign debt crisis eased.

1.2 What are some significant lending transactions that have taken place in Portugal in recent years?

The landmark transactions in Portugal over last year have been: (i) the EUR 1.6bn loan facility to utility company EDP by a syndicate of 16 banks; (ii) the EUR 150m loan facility by ICBC to Galp; and (iii) loans by the China Development Bank and ICBC to REN.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

As a general rule, the corporate powers of a company are restricted to those rights and obligations which are necessary or convenient for accomplishing the purpose of the company (which, generally, is to make a profit).

In accordance with Article 6(3) of the Portuguese Companies Code there is a legal presumption that the granting of guarantees in respect of obligations of other entities is contrary to the purpose of companies, unless there is a justifiable own interest of the company in providing the guarantee or the company in question is in a group or dominion relationship with such entity.

Please note that the legal concept of group relationship is a restricted one, as enshrined in the Portuguese Companies Code.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

In such situations, it is likely that there is no justifiable interest of the company in providing the guarantee and unless the company is in a group or dominion relationship with the entity whose obligations it guarantees, the provision of the guarantee may be considered to be null and void.

2.3 Is lack of corporate power an issue?

Yes. Please see question 2.1 above.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Except for certain state-owned and other public sector companies, unless there is a restriction contained in the articles of association of the company, in principle, no governmental approvals, consents, filings or other formalities are required by law for a guarantee provided by a Portuguese company to be enforceable.

However, it is common practice for there to be a requirement for either shareholder approval or board approval for the granting of the guarantee. Usually, such approval will contain an express reference to the benefit to the company from the provision of the guarantee (even if such benefit is an indirect one) or to the dominion or group relationship (if any) with the entity benefiting from the provision of the guarantee.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No, they are not.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, there are not.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

There are various types of collateral available to secure lending obligations, such as:

(i) mortgage over real estate property, aircrafts, vessels, cars and industrial units (e.g. factories);

(ii) pledge over movable assets not referred to in (i) above;

(iii) pledge over a business (including inventory) – only possible if pledgee is a credit institution;

(iv) pledge of rights (including credits and receivables);

(v) financial pledge – a pledge of cash or securities in favour of a credit institution; and

(vi) escrow of income deriving from real estate, aircrafts, vessels or cars.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

In accordance with Portuguese law, the provision of generic security (i.e. over the assets of a given entity generically) is considered null and void because of a lack of determination of the specific assets that become subject to the security.

It is therefore necessary that a security agreement identifies, to the greatest extent possible, the assets which are subject to the security created by such agreement. At least, the security agreement must contain certain criteria which would allow the identification of the secured assets at a given time.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, collateral security may be taken over such assets by means of a deed of mortgage.

A mortgage over a plant will include the real estate property and all the machinery and equipment thereof, which is identified in a schedule to the deed.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, collateral security by means of a pledge over receivables may be taken. An agreement is required, as well as notification of the creation of the pledge to the debtors, so that the pledge may be enforced against such persons.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. There are two types of pledge that can be taken over cash deposited in bank accounts: a pledge created under the Portuguese Civil Code; and a financial pledge.

A Portuguese Civil Code pledge is the most common form of pledge. The financial pledge, which may be created if the pledgee is a bank, provides more flexibility to the pledgor upon enforcement.

In any event, formalities include the execution of an agreement and notice to the bank where the cash is deposited (if the custody bank is not the pledgee). The acknowledgment of the pledge by the bank is not required, but is useful in order to ensure swift enforcement.

3.6 Can collateral security be taken over shares in companies incorporated in Portugal? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, collateral security may be taken over shares in companies incorporated in Portugal as a pledge of shares.

Shares may be either in certificated form or in book-entry form.

Yes, provided that any formalities required under Portuguese law for the validity and effectiveness of the pledge are complied with.

The procedure will depend on the type of company in question.

If the company is a private limited liability company (*sociedade por quotas*), registration of the pledge over the shares at the Commercial Registry is required.

If the company is a public limited liability company (*sociedade anónima*) the necessary formalities will depend on whether the shares are in certificated form of book-entry form. A pledge of shares in certificate form requires the delivery of the shares to the pledgee, in the case of bearer shares, or annotation of the creation of the pledge on the share certificate and registration of the pledge in the books of the issuer, in the case of registered shares.

The creation of the pledge over book-entry shares is made by annotation of the creation of the pledge in the securities account in which the shares are deposited.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over inventory is possible if such security is granted in favour of a credit institution. The procedure includes the execution of a written agreement. Upon default or the occurrence of other circumstances as set out in the pledge agreement, it is customary for the pledgee or security agent to give an enforcement notice to the pledgor crystallising the stock.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, but please see the restrictions on the provision of guarantees in question 2.1 above, which are also applicable in relation to the provision of security interest by companies.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The costs for the creation of security are, generically, as follows:

(i) notarial fees (only applicable where the execution of a public deed is required): approximately EUR 280 per deed;

(ii) registration fees: EUR 225 per property asset, if registration is requested by the notary;

(iii) stamp duty (please see below on the applicability of stamp duty):

  (a) 0.04 per cent per month over the secured amount, in the case of security granted for a period of less than one year;

  (b) 0.5 per cent over the secured amount for security granted for a period of more than one year but less than five years; and

  (c) 0.6 per cent over the secured amount for security granted for a period of five years or more.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

In principle there should be no timing issues.

As regards expenses, these can be a considerable amount in the event that stamp duty is due on the granting of guarantees or the creation of security.

3.11 Are any regulatory or similar consent required with respect to the creation of security?

No, it is not.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Yes, the creation of security over real estate requires the execution of a deed, usually made before a notary. In such case, the powers of attorney, if any, must also be granted before a public notary (and bear the apostille of The Hague Convention, if executed outside of Portugal).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

(a) Shares of the company

Yes, this is expressly forbidden in accordance with Article 322 of the Portuguese Companies Code. Few exceptions are available.

(b) Shares of any company which directly or indirectly owns shares in the company

No express prohibition exists, but please note that the corporate powers of the company may be restricted in respect of granting of guarantees or security – please see question 2.1 above.

(c) Shares in a sister subsidiary

No express prohibition exists, but please note that the corporate powers of the company may be restricted in respect of the granting of guarantees or security – please see question 2.1 above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Portugal recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes it will.

5.2 If an agent or trustee is not recognised in Portugal, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

5.3 Assume a loan is made to a company organised under the laws of Portugal and guaranteed by a guarantor organised under the laws of Portugal. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Yes, notice to the borrower and guarantor of the assignment is required.

However, please note that there might be situations in which the guarantee may not be assigned. For example, if the parties have restricted the ability of the guarantor to assign, or if the guarantee has been provided *intuitu personae* (i.e. the nature of the guarantee is not separable from the person of the borrower).

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Payments of interest by a Portuguese corporate to a foreign lender will be subject to withholding tax, currently at a rate of 25%, or such other reduced withholding tax rate as determined in the applicable Double Tax Treaty. The proceeds of a claim under a guarantee or the proceeds of enforcing security are not subject to withholding tax.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders?

In general, there are no tax incentives to foreign lenders in the context of bank lending transactions, in contrast to the general tax exemption applicable to foreign bondholders.

However, the following specific tax incentives may apply:

(i) full or partial tax exemption in respect of interest paid by public sector entities to foreign lenders (for instance, *Schudschein* loans); and

(ii) full tax exemption on interest paid by entities operating in the Madeira International Business Centre to foreign entities.

A loan to a Portuguese entity or a guarantee provided by a Portuguese entity will, in principle, attract stamp duty at the rates specified in question 3.9 above. However, please note that non-payment of stamp duty will not have an impact of the effectiveness of the loan or security or the valid registration of security.

6.3 Will any income of a foreign lender become taxable in Portugal solely because of a loan to or guarantee and/or grant of security from a company in Portugal?

The income of a foreign lender deriving from payments of interest will become taxable in Portugal by virtue of the borrower being considered a tax resident in Portugal. Please note that, as mentioned

in question 6.1 above, there will be withholding tax on the payments of interest in such situation.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are other costs, such as notarial fees and land registry fees, for the registration of a mortgage over real estate. These will not be significant unless the security is granted over several properties. The cost of registration of a mortgage is EUR 225 per property, if the registration is submitted by a notary.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in Portugal recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Portugal enforce a contract that has a foreign governing law?

In accordance with the general principle set out in the Portuguese Civil Code, the parties to an agreement may elect the law governing the agreement, provided that such election corresponds to a serious interest of the parties or is the law of a jurisdiction which has a connection with the agreement and is legitimate in the context of the principles of private international law.

In addition, it should be noted that Portugal is a party to the Rome Convention, pursuant to which the parties may not elect the laws of a given jurisdiction as the governing law of the agreement in the event that all elements of the contractual relationship are connected with a different jurisdiction.

7.2 Will the courts in Portugal recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Any final judgment obtained in a competent jurisdiction in respect of any sums payable in connection with the Agreements would be enforced by the courts of Portugal under the conditions set out in Council Regulation (EC) 44/2001 of 22 December 2000 or the Lugano Convention of 16 September 1988 or, if and when such conventions are not applicable, would be enforced by the courts of Portugal without re-examination of the merits of the case provided that:

(a) there are no doubts about the authenticity or substance of the document in which the judgment is given, and the judgment is final and conclusive;

(b) any conditions imposed by the law of the country in which it was given, which are conditions to its enforcement in the Portuguese courts, have been complied with;

(c) it was issued by a foreign court the jurisdiction of which had not been claimed fraudulently and does not pertain to matters subject to the exclusive competence of the Portuguese courts;

(d) it would not be adjudged *res judicata* by the Portuguese courts;

(e) the defendant was duly served for the action in accordance with the law of the country in which the judgment was issued and that the principles of the right to a fair trial (*principio do contraditório*) and equal treatment of the parties have been complied with; and

(f) it does not contravene the principles of Portuguese public order.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Portugal, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Portugal against the assets of the company?

In general, filing a suit in Portugal, obtaining a judgment and enforcing it could take between 9 and 24 months. Enforcing a foreign judgment in Portugal against the assets of the company could take between 6 and 12 months. In both (a) and (b) scenarios, the timeframe for enforcement of the court decision will depend on how long it takes to identify the assets to be seized.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Yes, timing of the enforcement may be affected in the event that there is a public auction of the assets or in the event that such auctions are not successful, if, for instance, no offers higher than the reserve amount are received.

Regulatory consents may also impose a significant delay in the conclusion of the enforcement in the event that the sale of the enforced assets to the acquirer is subject to obtaining regulatory consents, in the context of competition laws or sectorial regulation (sale of qualified shareholdings in financial institutions, defence industries, public services concessionaires).

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Portugal or (b) foreclosure on collateral security?

No, in principle, no such restrictions will apply.

7.6 Do the bankruptcy, reorganisation or similar laws in Portugal provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, in accordance with the Portuguese Insolvency Code the commencement of insolvency proceedings or a *procedimento de revitalização* (similar to a Chapter 11 procedure) will imply a moratorium on the enforcement of collateral security against the insolvent or quasi insolvent borrower or guarantor.

7.7 Will the courts in Portugal recognise and enforce an arbitral award given against the company without re-examination of the merits?

The Portuguese Republic is a party to the New York Arbitration Convention and therefore any arbitral awards given in another

contracting state will be recognised without re-examination of the merits of the claim.

In relation to arbitral awards given in a state which is not a party to the New York Arbitration Convention, or any other convention to which the Portuguese state is a party, the enforcement of an arbitral ward in Portugal is subject to the recognition of such award by a court of competent jurisdiction in Portugal, irrespective of the nationality of the parties.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In accordance with the Portuguese Insolvency Code, the commencement of insolvency proceedings or *procedimento de revitalização* (similar to a Chapter 11 procedure) will suspend all enforcement proceedings against the company.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Under the Portuguese Insolvency Code there is there is a 2-year suspect period during which any acts that are "prejudicial" to the insolvent entity and are carried out in bad faith will be set aside.

In addition, the Portuguese Insolvency Code sets out the specific situations in which certain acts may be set aside, including, *inter alia*:

(i) any acts carried out within 2 years prior to the commencement of the insolvency proceedings without there having been consideration thereof;

(ii) the provision of security for existing obligations by the insolvent entity within 6 months prior to the commencement of the insolvency proceedings;

(iii) the provision of guarantees by the insolvent entity in respect of debts of third parties within 6 months prior to the commencement of the insolvency proceedings where there is no benefit (vested interest) to the insolvent entity; and

(iv) the provision of security by the insolvent entity in respect of new transactions within 60 days prior to the commencement of the insolvency proceedings.

Under the Portuguese Civil Code there is also a concept of *impugnação pauliana* pursuant to which an action could be brought by a creditor to set aside a transaction that results in the decrease of the bankrupt companies' assets, and in circumstances in which there was no consideration given, certain requirements are met.

Preferential creditor's rights exist in Portuguese law, such as court fees, tax debts and employees' claims.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Yes, the Portuguese Republic and certain public sector entities are excluded from Portuguese insolvency laws and there is no applicable legislation governing the insolvency of such entities.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

In accordance with (i) the Portuguese Civil Code, (ii) the regime of the financial pledge, or (iii) the regime of the banking pledge, it is possible that the enforcement of a pledge is conducted in an out-of-court proceeding.

In the case of a pledge created under the rules of the Portuguese Civil Code, the parties may agree to an out-of-court sale of the pledged assets. Please note, however, that in this situation, the pledged assets will, in principle, be in the possession of the pledgee or a custodian appointed by the parties.

In the case of a financial pledge or a banking pledge, the assets may not be in the possession of the pledgee.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Portugal?

Provided that the choice of law is valid (please see question 7.1 above) such choice is legally binding and enforceable under the laws of Portugal.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Portugal?

In the event that an entity benefits from sovereign immunity, the waiver of the benefit of such immunity will not be valid in accordance with Portuguese law.

10 Other Matters

10.1 Are there any eligibility requirements in Portugal for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Portugal need to be licensed or authorised in Portugal or in their jurisdiction of incorporation?

No elegibility requirements are applicable in Portugal. Licensing or authorisation in Portugal is required in the event that the lender frequently engages in lending activity in Portugal.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Portugal?

No there are not.

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Recent transactions include advising Oversea Chinese Banking Corporation on a EUR 40 million refinancing of the Orient Express Hotels Group, Mizuho on the USD 550 million Senior Secured Loan Facility to Grupo R and Goldman Sachs on the €260 million refinancing of the Wireco Group (leading cables and wires industry).

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Gonçalo advises a varied number of domestic (Portuguese banks and corporates) and international clients (mostly international investment banks and hedge funds) in the capital markets, financial services and banking areas. In 2004 he joined SRS Advogados, qualified as a lawyer in 2005 with the Portuguese Bar Association and in 2008 as solicitor with the Law Society of England and Wales. He spent a year in the Capital Markets group at Simmons & Simmons and six months on secondment at the Legal Department of Morgan Stanley (Fixed Income Division) in London. Gonçalo is recommended by Legal 500 for its banking & finance, capital markets and regulatory work. Named as an "Associate to watch" by Chambers & Partners he is described by clients as a "solid lawyer" and a "strategist for transactions".
He has recently advised Galp in its EUR 650 million Export Credit Loan Facility and its 200 million loan agreement with ICBC, Itaú BBA on the EUR 102.5 million loan to Cimpor and Mizuho on the USD 550 million Senior Secured Loan Facility to Grupo R.

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The Financial Markets Department comprises a team of lawyers specialised in all areas of finance, corporate finance and ancillary areas. The team draws upon its extensive know-how and experience to provide first-rate service in every aspect of the financial and capital markets.

Our understanding of the Financial Sector is further enhanced by the fact that many of our lawyers have worked in the financial sector either in the City of London or New York, including long-term positions or secondments with entities such as Citibank, Goldman Sachs, Lehman Brothers and Morgan Stanley.

Russia

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Russia?

Project finance has remained one of the main focuses of the Russian lending market, with a number of billion-dollar financings currently on-going and the continued development of PPP projects. The market is also marked by a number of commodity based export financings and potential return of LBOs. There has been an increase in domestic deals and along with that, more rouble based transactions.

Legislation also continues to develop, with the lawmakers striving to resolve concerns raised by the banking community and improve the overall lending environment. In particular, the Russian Civil Code has been undergoing a comprehensive reform, and the rules regarding pledges have been recently amended to introduce a number of new instruments (e.g. pledge manager, pledge register, pledge of rights to bank accounts) and refine existing ones. Most of these changes should enter into force on 1 July 2014.

1.2 What are some significant lending transactions that have taken place in Russia in recent years?

One of the most significant transactions is the more than US$3 billion project financing to a Russian oil and gas company SeverEnergia from three leading Russian banks. Another major deal was the large-scale refinancing of Chelyabinsk Pipe-Rolling Plant's existing portfolio of loans valued at nearly US$3 billion. There also was one of the largest acquisition financings in recent history, with a US$800 million senior loan from a syndicate of foreign and Russian banks, whereby a Russian investment and trading company Summa acquired a 49% stake in Far Eastern Shipping Company. We would also mention a US$2 billion financing for the US$4 billion acquisition of a group of companies involved in coal-mining and the coal processing business structured on a leveraged buyout basis. There was also a US$675 million project financing to Rosneftbunker in connection with the construction and development of an oil product terminal, which is expected to become one of the world's largest oil product terminals that transports cargo by rail.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, guarantees by some of the members of a corporate group for other members are used in transaction structures in Russia. Proper corporate approvals (including where relevant of "interested party" transactions) may need to be obtained from the parties. The issue of financial assistance relevant in some other jurisdictions is not present in Russia.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Generally, a director of a Russian company is required to act in the interests of the company reasonably and in good faith. Otherwise, the company's shareholders may sue the director for losses caused to the company.

Further, the issue of whether there was a commercial interest in providing a guarantee/security may be taken into account if a guarantee/security is challenged in case of bankruptcy of the guarantor.

In addition, if a guarantor/security grantor is found bankrupt due to the actions (inaction) of its controlling persons (including, *inter alia*, its director) such persons may be held liable for the guarantor's debts on a subsidiary (secondary) basis.

It should also be noted that the guarantor obtains recourse against the original debtor in case the guarantee is called upon.

2.3 Is lack of corporate power an issue?

Generally Russian companies can enter into any lawful transactions, unless their charter specifically limits that ability. The exception relates to a limited number of entities, for example, the so-called unitary enterprises which are not allowed to enter into transactions which are not in line with the types and purposes of activities reflected in their charter.

For certain transactions special corporate approvals are needed (e.g. an approval by the shareholders' meeting or a board of directors, as applicable), failure to obtain which may lead to a challenge of the relevant transaction.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental consent is required. A guarantee generally requires a corporate approval of the relevant governing bodies of the guarantor if it qualifies (i) as an "interested party" transaction (i.e. a transaction with or for the benefit of the guarantor's affiliates), and/or (ii) as a "major" transaction (i.e. a transaction which amounts to 25% or more of the total value of the guarantor's assets).

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no specific limitations on the amount of a guarantee. However, the issues of solvency and net worth of the guarantor as compared to the guaranteed amount may be taken into account if a guarantee is challenged in the case of bankruptcy of the guarantor. Considerations mentioned in question 2.2 may also apply.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no specific obstacles for enforcing a guarantee (though its enforceability may be limited by bankruptcy and similar laws affecting creditors' rights generally). A Russian guarantor will need to comply with certain currency control formalities to make payments to a foreign creditor.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Under Russian law various types of collateral are available, including movable and immovable assets, shares/participation interests and rights under contracts. It is expected that by mid-2014 a new framework for security over bank accounts should also become available.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Security is taken by way of a Russian law pledge. Where immovable property is subject to security, the term "mortgage" is often used. Separate agreements are required with respect to different types of assets as their pledge is subject to different perfection requirements.

At the moment, there are limited options for taking a "floating charge" or similar type of general security over "any and all" assets under Russian law. Typically, each pledged item should be specifically described in the pledge agreement, except for the so-called pledge of goods in circulation (which can cover, for example, raw materials of particular general characteristics while they are in a particular location).

It is expected that a new regime will enter into force in 2015. Such regime will allow the pledged assets to be described in a more general way in a pledge agreement.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Security over immovable property (such as land, buildings, etc.) can be taken by way of a mortgage. Mortgage of land lease rights may require the consent of, or notifying of, the lessor, as applicable. Mortgages are subject to state registration in a unified state register of rights to immovable property.

Security over machinery and equipment (to the extent they do not qualify as immovable objects) can be taken by way of a pledge. It is expected that a register of notices of pledges of movable property should also come into operation in 2014.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security over receivables can be taken by way of a pledge of rights under contracts. A debtor is to be notified of the pledge. A prior debtor's consent for the pledge may be also required in accordance with the terms of the underlying contract.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Currently it is not possible to take robust security over Russian bank accounts. Instead of a pledge of bank accounts, which is at the moment not recognised by Russian law, an agreement granting a creditor direct debiting rights is usually used in practice. Such agreement usually takes the form of a tripartite agreement between the debtor, the creditor and the debtor's bank (this instrument is not intended to create priority in case of bankruptcy of the debtor).

According to the recent changes to the Civil Code, as of 1 July 2014 it should be possible to create security over bank accounts by way of a pledge of rights under a bank account agreement.

3.6 Can collateral security be taken over shares in companies incorporated in Russia? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Russian law differentiates between shares in joint stock companies and participation interests in limited liability companies. Both shares and participation interests are in non-documentary form.

Security over shares can by created by way of a pledge of shares. The pledge is subject to reflection in the relevant shareholders' register or, if the shares are held by a depositary, with the depositary.

Security over participation interests can be taken by way of a pledge of participation interest. The consent of the other participants of the company must be given for the pledge. A participation interest pledge agreement must be notarised and the pledge must be recorded in a unified state register of legal entities. In addition, the company must be notified of the pledge.

It is an established market practice that security over shares (and participation interests) in Russian companies is taken by way of a

Russian law governed pledge to facilitate its enforceability in Russia.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over inventory and other generically similar assets can be created by way of a pledge of goods in circulation. The pledge agreement would describe the generic characteristics of the goods that shall be deemed pledged, as well as the locations at which they are deemed pledged.

The pledgor has the right to change actual composition of the pledged goods subject to maintaining a minimal value of the goods.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, this is generally possible, subject to obtaining relevant corporate approvals.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The current prevailing practice is that pledges (mortgages) must be notarised if the parties would like to include out-of-court enforcement procedures (save for participation interest pledges, which must be notarised in all instances).

Although the procedure for calculating the notary fees is not always certain, normally the notarial fee is calculated as a percentage of the value of the pledged (mortgaged) asset, which means that the aggregate fee can be significant.

Mortgages over immovable assets are also subject to state registration. The registration fee is RUB 4,000 (around US$130).

Pledges of shares in joint stock companies are subject to registration in a shareholders' register or with a depositary, as applicable. The registration fees are charged by the relevant registrars/depositary, and typically are nominal.

Other fees may apply depending on the type of the pledged assets (e.g. IP, ships, aircraft).

There are no Russian stamp duties, i.e. those that can be due solely due to the fact of keeping an original of a pledge or mortgage agreement in Russia.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

In terms of expense, as noted in question 3.9, the notary fees can be substantial in certain cases.

If a creditor is a foreign entity, the timing for registrations and notarisation is affected by the need for providing its corporate documents and authorisations to a registrar/notary in an apostilled form with notarised translations into Russian. Assembly of a complete package in practice may take extra time, and it is prudent to arrange this process to begin well in advance of the proposed closing of a deal.

Upon submission to the registrar, together with all the required documents, a mortgage agreement should, as a matter of statutory procedure, be registered within 15 business days and, if a mortgage agreement is notarised, within 5 business days. However, in practice the registration may take longer if the registrar requests additional documents or has comments on the mortgage agreement.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No regulatory consents are generally required for the creation of the security, except for certain specific cases. For example, consent of the lessor of a land plot to the creation of a mortgage over lease rights, as mentioned in question 3.3.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

At the moment, such security requires careful drafting and consideration in each particular case (as some theoretical reservations remain with respect to the secured obligations that may be reduced to zero at times). However, this concern should hopefully be removed by mid-2014 with the entry into force of the latest set of the legislative changes which should provide for greater flexibility with respect to possible ways of describing the secured obligations.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Please refer to previous sections describing the instances when notarisation of a pledge or mortgage agreement may be required. As notarisation means the actual signing of the agreement in front of a notary, in such case both parties need to be present and execute the same agreements.

Although the Russian Civil Code permits in some cases execution of an agreement by means of electronic communications (allowing the sender to be determined), the more typical practice would be to execute the agreement in the presence of both parties.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

At the moment, there is no concept of financial assistance in Russia in the way it exists in many other jurisdictions and there is no prohibition on the above instances of granting security/guarantee. However, a specific corporate approval may be required for a Russian company to the extent the relevant transaction qualifies as an interested party transaction (i.e. a transaction with, or for the benefit of, its affiliate). The approval is to be granted by disinterested (independent) board members or shareholders depending on the size of the transaction. There may be a specific regime of acquiring shares in certain types of regulated legal entities.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Russia recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The trustee/agency structures, in the way they are commonly used in certain other jurisdictions, are currently not recognised by Russian law.

The law as it stands now can be interpreted to deem that Russian law pledges and mortgages must be granted in favour of the respective creditor(s). There are also reservations as to whether one pledge can simultaneously secure claims of several creditors.

The changes to the Civil Code currently expected to enter into force mid-2014 introduce the structure of a "pledge manager" acting as a pledgeholder on behalf and in the interests of many creditors (i.e. similar to the role played by a "security trustee"). At this stage, as the amendments have not yet entered into force or been tested, obviously a lot of parameters of using this new structure still need to be clarified and developed (including with respect to the types of security and transactions for which it could be used).

5.2 If an agent or trustee is not recognised in Russia, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Several structures are currently used (although they have not been tested in courts and are not free from legal concerns) for transactions. The type of structure depends on the number of lenders, whether the facility may be syndicated and other parameters. Among others are the following:

(i) a joint and several structure, whereby security is granted to secure the borrower's payment obligations to the party (and only to the party) who is a joint and several creditor with the other lenders for the payment obligations of the borrower;

(ii) a fronting entity structure, whereby security is granted to secure the borrower's payment obligations to a fronting entity which on-lends the loan proceeds received from the lenders;

(iii) subsequent layers of security, in which one layer secures claims under one facility only; and

(iv) a single unranked instrument (co-pledge holders), whereby security is granted to the secured creditors in a single instrument.

In view of the anticipated changes to the Russian Civil Code it could be expected that structuring options may be subject to adjustments.

5.3 Assume a loan is made to a company organised under the laws of Russia and guaranteed by a guarantor organised under the laws of Russia. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Firstly, the requirements of the laws governing the loan and guarantee agreements must be complied with (this may include consent, notification and/or confirmation requirements post-transfer).

A Russian borrower and a Russian guarantor may need to comply with certain currency control formalities (filings) to make payments to a new foreign creditor.

In order to ensure it remains in effect, the form of transfer (e.g. assignment or novation) should be considered from the perspective of the security package for the loan.

The need for corporate approval by a Russian debtor or a Russian guarantor should be also considered.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest paid to a Russian lender (either a Russian incorporated company or a bank or a Russian permanent establishment of a foreign lender) is subject to taxation through self-assessment by the lender; no withholding at source is required. Interest income is included into the lender's taxable income and is subjected to a 20% Russian profit tax (after available cost deductions and any loss carried forward).

Interest paid to a foreign lender is taxed at source by imposing a Russian withholding income tax at a rate of 20%.

Tax is to be withheld by Russian-based borrowers including Russian incorporated companies or Russian branches (permanent establishments of non-Russian companies). Depending on their tax residence, foreign lenders may seek tax relief in the form of a reduced withholding tax rate or an exemption. Tax relief is possible either in advance of interest payment or by means of the refund procedure (by filing a refund application with the Russian tax authority. This is usually a cumbersome and lengthy procedure). In order to invoke the advance tax relief, the foreign lender shall submit to the borrower a tax residence certificate properly issued by a competent tax authority of the tax residence state. If lending to a Russian bank, the bank is allowed to apply the tax treaty relief based on the information about tax residence from publicly available sources.

Payments under guarantee are not specifically regulated in the Tax Code; as a matter of practice, their taxation at source follows the tax treatment applicable to the underlying obligation. Payment related to the principal amount should not be subject to Russian withholding tax; payment related to the interest amount due and any associated penalties would be subject to withholding tax unless a tax relief treaty was available to the lender.

With effect from 1 July 2012 and retroactive application from 1 January 2007, Russian borrowers have been exempt from the obligation to withhold a 20% Russian withholding tax when paying interest on loans received from a foreign lender in connection with the lender's issuance of publicly traded notes (so-called "Eurobonds") provided that the relevant foreign lender is a tax resident in a jurisdiction which has a tax treaty with Russia (confirmed with a properly issued tax residence certificate). The recognition of notes as "publicly traded" implies that the notes are admitted to listing and/or trading on an authorised foreign exchange and/or rights to the notes are recorded by an authorised foreign depositary-clearing organisation. "Connection" between the loan and the issuance of notes has to be proven either by reference to documentation (e.g., loan agreement, prospectus) or by actual cash flow. The same tax treatment applies to payment under surety,

guarantee or any other security instrument related to the loan which is connected to the issuance of publicly traded notes.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives for foreign lenders other than those discussed in question 6.1 above. Please refer to question 3.9 for a description of various fees and duties that may be applicable in connection with perfecting a Russian security.

6.3 Will any income of a foreign lender become taxable in Russia solely because of a loan to or guarantee and/or grant of security from a company in Russia?

A foreign bank or company is not subject to Russian income tax unless withholding tax applies (as explained in question 6.1 above) or such foreign bank or company creates a permanent establishment status in Russia.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Please refer to question 3.9 for a description of various fees and duties that may be payable in connection with perfecting Russian security.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Transfer pricing rules (which require notification to the tax authority and preparation of transfer pricing documentation) apply to borrowings from foreign affiliated lenders as well as if a certain threshold is exceeded (currently annual income from transactions between the relevant parties is over RUB 60 million), to borrowings from foreign lenders from so-called "black-listed" countries ("offshore zones"). Exemption from these rules applies to loans obtained before 1 January 2012 and to inter-banking loans and deposits for a term of up to 7 days.

As of 1 January 2015 these rules will be lifted for borrowings from foreign banks; interest on such borrowings will have to comply with certain thresholds linked to EURIBOR, LIBOR, and SHIBOR.

7 Judicial Enforcement

7.1 Will the courts in Russia recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Russia enforce a contract that has a foreign governing law?

Russian courts should generally recognise and enforce a foreign governing law chosen by the parties, provided an agreement involves a "foreign element" (e.g. a foreign party).

In some cases the choice of foreign law is not allowed (e.g. contracts with respect to immovable assets located in Russia are to be governed by Russian law). Certain mandatory rules of Russian law would apply irrespective of choice of foreign law.

7.2 Will the courts in Russia recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Judgments of foreign courts are generally enforceable in Russia on the basis of an international treaty providing for enforcement. There is no such agreement between Russia and the United Kingdom or the Unites States.

It should be noted that there have been some cases where Russian courts have interpreted treaties that provide for rights of foreigners to access courts as providing grounds for recognition and enforcement of foreign court judgments. The courts have also sometimes referred to international principles of comity and reciprocity as an alternative basis for enforcement. On this basis, there have been some instances in which English court judgments have been recognised and enforced in Russia. As for New York judgments, no view has been expressed by Russian courts as to whether there is such a treaty-basis for enforcement or whether the principles of comity and reciprocity are applicable to them. We are not aware of any New York court judgment having been enforced as of yet.

Russian courts do not generally re-examine the foreign judgments on the merits, except for cases where a public policy objection is raised.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Russia, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Russia against the assets of the company?

Generally, a creditor should be able to obtain a final and binding Russian court judgment confirming the debt within approximately four months from the moment of filing of the claim if the debtor does not file an appeal, and within approximately six months if an appeal is filed. Timing of enforcement of a judgment by bailiffs depends on the assets being enforced.

In relation to enforcement of a foreign court judgment (and subject to the reservations set out in the preceding section) the statutory period for a court to consider an application for enforcement of a foreign court judgment is three months.

The time periods may be much longer if service of notice on foreign parties is required, or complicated issues of law or fact are involved, or if the debtor attempts to resist enforcement.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Generally, there are several enforcement options available to secured creditors: (i) court enforcement, whereby the pledged (mortgaged) property will be sold at a public auction; (ii) out-of-court enforcement (if agreed by the parties), whereby the pledged property may be realised via public or private sale or taken by the creditor (private sale option is not available for mortgaged immovable property); and (iii) a combined option, whereby the pledged (mortgaged) property may be realised as agreed by the

parties but based on a court decision. In certain cases listed in the law pledges (mortgages) may be enforced only through the court.

Currently the prevailing approach on the market is that out-of-court enforcement requires a notary's executive endorsement to be obtained. This may be granted only with respect to undisputable secured claims, which may become problematic if the debtor disputes the claim. Therefore, in practice, if the debtor does not cooperate, the pledge will most likely have to be enforced by the courts.

The buyer or the creditor appropriating the pledged assets may need to comply with certain regulatory filing/consent requirements when acquiring particular assets (such as shares in strategic enterprises, etc.).

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Russia or (b) foreclosure on collateral security?

Foreign lenders generally have the same procedural rights as Russian parties, and there are no special restrictions. Foreign language documents presented to a Russian court must be accompanied by a properly certified translation and must be apostilled/legalised, as applicable.

7.6 Do the bankruptcy, reorganisation or similar laws in Russia provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Russian insolvency law provides for a moratorium on enforcement of lender claims and pledges (mortgages) of the insolvent debtor's assets from the moment the supervision stage of insolvency is introduced. In certain cases enforcement of a lender's claims made before this date may be challenged in the course of the insolvency proceedings.

Although in theory a secured creditor can enforce at the stage of *financial rehabilitation* or *external management*, in practice the secured property would generally be sold during the final bankruptcy stage (*receivership*).

7.7 Will the courts in Russia recognise and enforce an arbitral award given against the company without re-examination of the merits?

Awards issued by international arbitration tribunals are generally enforceable in Russia without re-examination on the merits based on the New York Convention on the recognition and enforcement of foreign arbitral awards to which Russia is a party, subject to the general exceptions set out in the Convention.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

As mentioned in question 7.6, the collateral security provided by an insolvent debtor should be enforced in the course of the insolvency proceedings, and, generally, such enforcement takes place at the last stage of the insolvency proceedings (receivership).

The creditors whose claims are secured by pledges receive at least 70% of proceeds of sale of the pledged assets (or 80% if a "credit agreement" is secured).

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Preferential unsecured creditors are entitled to a maximum of 20% of the proceeds of the sale of the pledged assets (or 15% if a "credit agreement" is secured).

Security agreements and the discharge of the creditor's claims with secured property can be potentially challenged in the course of the insolvency proceedings as (i) "suspicious" transactions (in particular, transactions which intentionally impaired creditors' interests, if concluded after the insolvency petition has been filed or up to three years prior to that), or (ii) transactions that resulted in the preferential treatment of some creditors over others (concluded after the petition has been filed or up to six months prior to that).

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

According to the Civil Code, some entities are not subject to bankruptcy, e.g. this relates to some state corporations. Those entities are normally subject to separate federal laws.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

In the course of bankruptcy proceedings no processes other than court proceedings are available to creditors, and security should also be enforced through court proceedings.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Russia?

The parties may generally submit their disputes to a foreign jurisdiction if one of them is a non-Russian entity. A Russian court should enforce such submission agreement if it finds that such agreement is valid, enforceable and does not violate exclusive jurisdiction of the Russian courts. If a matter covered by a submission agreement is presented for consideration by a Russian court, it should discontinue the proceedings, if it finds that the submission agreement is valid and enforceable, and the dispute does not fall within exclusive jurisdiction of the Russian courts.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Russia?

The concept of sovereign immunity and its waiver is not fully developed under Russian law. There is a view that a waiver of sovereign immunity can be made only by an authorised representative of the state.

10 Other Matters

10.1 Are there any eligibility requirements in Russia for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Russia need to be licensed or authorised in Russia or in their jurisdiction of incorporation?

Foreign financial institutions are involved in numerous loan

transactions with Russian borrowers. While conduct of general banking operations in Russia is subject to proper licensing by the Central Bank of Russia, this requirement has not been interpreted to apply to granting individual loans.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Russia?

Typically, when a Russian law security package is included into the documentation, it will have an impact on the overall structuring of the financing documents, in particular when multiple creditors are involved.

In advance of the closing of a transaction it is usually recommended that the scope of perfection requirements relating to the documentation is identified, so that the parties could commence the assembly, translation and apostille of any relevant documents to be submitted for the purposes of such perfection.

The need for corporate approvals by Russian companies also needs to be observed in advance as obtaining them may require time. Additional requirements may also apply to lending transactions involving state companies and unitary enterprises (e.g. with respect to special corporate approval and tendering procedures that should be followed by such entities).

Other areas of consideration would typically include currency control analysis of the cash flows that are envisaged as part of the transaction. Russian currency laws may apply irrespective of the governing law of the agreements, and may be relevant, for example to determine into which accounts a loan must be disbursed and in which cases assignments of export receivables of a Russian exporter may be permitted to secure the loan.

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Chapter 54

Singapore

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Singapore?

The year 2013 saw a period of steady loan growth, with housing loans continuing to form the largest bulk of loans disbursed by the major local banks, followed by loans to the building and construction and general commerce sectors. In the face of continued rising property prices, the Monetary Authority of Singapore ("MAS") – the central bank of Singapore and key policy-maker overseeing the financial sectors – introduced a second slew of measures to stabilise and curb speculation in the residential property market, as well as to prevent the accumulation of excessive debt among borrowers. These wide ranging measures have generally not been extended to apply to loans to corporate entities.

The sustained period of low interest rates has also been conducive to the growth and strong performance of Real Estate Investment Trusts (REITs) in Singapore. Many REITs in Singapore, exercising prudence, have chosen to refinance their existing debts over a longer term or extend the maturities of their existing debts while interest rates were still low in 2013.

The highly-anticipated review of the Singapore Companies Act (Cap. 50, 2006 Rev. Ed.) ("CA") which commenced in the preceding year is still ongoing, with public consultation on the draft bill concluded recently. The proposed amendments include updating of provisions relating to financial assistance, registration of charges, and the prohibition of providing guarantees or securities to secure loans to companies related to directors. The Accounting and Corporate Regulatory Authority ("ACRA") Act has likewise recently been reviewed to enhance the regulatory regime governing corporate service providers.

1.2 What are some significant lending transactions that have taken place in Singapore in recent years?

The takeover battle for Fraser & Neave Ltd. (the largest in history in Singapore and Southeast Asia), between competing bidders TCC Asset Ltd ("TCCA") and Overseas Union Enterprise ("OUE") continued to dominate headlines as the eventual winner, TCCA, completed its takeover bid in early 2013. This transaction involved financing estimated to be around S$13.8 billion, funded by, among others, DBS Bank and United Overseas Bank.

Other large transactions in 2013 include the S$2.6 billion syndicated loan facility granted to Senoko Energy – Singapore's largest energy supplier – to refinance its existing debts, in which DBS Bank was coordinating mandated lead arranger; as well as the S$1.2 billion leveraged loan granted to Universal Group Holdings. Also noteworthy are the loans undertaken by Real Estate Investment Trusts ("REITs"), such as the JPY7 billion and S$100 million three-year unsecured loan facilities and S$500 million five-year unsecured revolving credit facilities obtained by Starhill Global REIT from a club of 8 banks (with HSBC Institutional Trust Services (Singapore) Limited as trustee) for the purpose of refinancing existing debts, and the S$975 million secured term loan facility granted to SPH REIT to part-finance its acquisition of properties.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, subject to there being sufficient corporate benefit and no contravention of specific rules under the CA, for example, relating to guarantee of loans to companies related to directors and provision of financial assistance.

S157 of the CA provides that a director of a company "*shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office*". This statutory statement is in addition to the directors' duty under general law to exercise their discretion *bona fide* in what they consider is in the best interest of the company. The directors of a company have to ensure there is sufficient corporate benefit in giving any guarantee, including a guarantee for the borrowings of one or more members of its group.

A commonly asked question is whether directors can, in giving a guarantee, consider the interests of the corporate group. The theoretical rule is that companies within a group are separate legal entities. However, in practice, companies are often part of larger groups and it is generally accepted that there is corporate benefit on the face of a transaction involving a holding company guaranteeing the obligations of its subsidiary. It would be harder, however, to show corporate benefit in a subsidiary guaranteeing the debts of its holding or sister companies and in such situations, it would be prudent to have the shareholders of the company sanction the giving of the guarantee.

In addition, companies have to be mindful of the prohibition under s163 of the CA relating to the guarantee of loans to companies related to directors. There are exceptions to this prohibition, including where the companies involved are in a subsidiary/holding company relationship or are subsidiaries of the same holding

company in the legal sense. Members of a corporate group in the legal sense are therefore generally exempted. They are, however, not excepted if they are non-subsidiary affiliates, and directors have to be careful then to conduct the necessary enquiry to ensure there is no contravention of the section.

Regard also has to be given to the prohibition against giving of financial assistance and other considerations where a company is insolvent, as set out in sections 4 and 8 below.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

See question 2.1 above. In giving a guarantee, the directors of the company have to ensure there is sufficient corporate benefit. If the corporate benefit to the guaranteeing company is disproportionately small or there is no corporate benefit, then there may be an issue as to whether the directors in giving the guarantee are in breach of their fiduciary duties.

Where directors have given a guarantee in breach of their fiduciary duties, the guarantee may be set aside if the lender had knowledge of the impropriety and the offending directors may be both civilly and criminally liable for their breach.

Other considerations where a company is insolvent are set out in section 8 below.

2.3 Is lack of corporate power an issue?

Unless otherwise limited or restricted by the provisions of its own constitutive documents (i.e. Memorandum and Articles of Association), a company has full capacity to do any act, including enter into guarantees. Caution should be taken as there are, however, companies with old forms of Memorandums of Association that still contain restrictions and limits on the grant of guarantees and if so, such restrictions will continue to apply.

The effect of the lack of corporate power in the grant of a guarantee, whilst it does not invalidate the guarantee *per se*, may be asserted or relied upon in, amongst others, proceedings against the company by any member of the company or, where the company has issued debentures secured by a floating charge over all or any of the company's property, by the holder of any of those debentures to restrain the doing of any act or transfer of any property by the company. The court may, in such a situation, exercise discretion to set aside and restrain the performance of the guarantee but allow for compensation for loss or damage sustained.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental consents or filings are generally required.

A guarantee will be required to be lodged with the companies' registry in Singapore, the ACRA, *only* if by its terms it also seeks to create a charge or agreement to charge within the meaning of s131 of the CA.

In terms of formalities, a contract of guarantee has to be in writing and signed by the person sought to be rendered liable under the guarantee. Board resolutions approving the terms, execution and performance of the guarantee should be passed. Shareholders' approval should also be obtained if there is any potential issue of lack of corporate benefit and breach of directors' duties, or where it is otherwise required by statute (for example, to whitewash the transaction) or the constitutive documents of the company.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No, unless otherwise restricted by the constitutive documents of the company.

If, however, the amount guaranteed is clearly disproportionate to the corporate benefit received, the issues discussed in question 2.2 above would arise.

Other considerations where a company is insolvent are set out in section 8 below.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange controls in Singapore which would act as an obstacle to the enforcement of a guarantee.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Under Singapore law, all types of collateral may potentially be available to secure lending obligations, provided the grant thereof is not against public policy.

Common types of collateral that can be used include real property (land and buildings), personal chattels, debts and other receivables, stocks and shares and other choses in action.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is possible to give asset security by means of a general security agreement, for example, by way of a debenture seeking to take security over different classes of assets, save to the extent that a statutorily prescribed form is required (e.g. to effect a legal mortgage over land under the Singapore Land Titles Act (Cap. 157, 2004 Ed.) ("LTA") or take a legal assignment over book-entry securities).

The main types of security interests that can be created under Singapore law are mortgages, charges, liens and possessory pledges, and the question of which is the appropriate method of taking security would depend on the nature of the asset over which the security is to be taken and the extent of security required.

Different classes of assets will also be subject to different procedures and perfection requirements.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Land

Yes, a legal or equitable mortgage/charge or assignment of sale and purchase/lease/building agreement with mortgage-in-escrow is commonly granted over real property (land and to the extent immovable, plant and buildings thereon). The type of security will

depend on, amongst other factors, whether title over the land has been issued, the land type and the type of holding.

There are two types of land in Singapore – common law titled land and land under the LTA. Virtually all land in Singapore has been brought under the LTA. A legal mortgage for land under the LTA has to be in a statutorily prescribed form and registered with the Singapore Land Authority ("SLA"). Where title has not been issued for land under the LTA, a lender would take an equitable mortgage over the sale and purchase agreement, lease or building agreement in relation to the land, with an accompanying mortgage-in-escrow for perfection upon issue of title.

Commonly, an appropriate caveat may also be lodged with the SLA against the land to protect the lender's interest during the time between the acceptance of the facility and the registration and perfection of the security.

Related security like an assignment over insurances, rental and sale proceeds and agreements and in the case of land under construction, assignment over construction contracts and performance bonds are usually also taken.

Procedure and perfection steps briefly include taking of relevant title documents, registration with the SLA (or Registry of Deeds, if applicable), registration of the charge with ACRA under s131 of the CA, stamping, consents from lessor of the land or other third parties (if applicable), corporate authorisations, whitewash/shareholders' approval (if applicable), etc. In practice, some banks require shareholders' approval where the assets to be mortgaged/charged constitute *the whole or substantially the whole of the company's undertaking or property*.

Machinery and equipment

A fixed charge granted by way of a debenture or charge is commonly taken over machinery and equipment.

Registration with ACRA will be required under s131 of the CA. Other perfection steps are (to the extent applicable) discussed above.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, security over receivables (being choses in action) can be taken by way of an assignment or charge (fixed or floating) through a deed of assignment/charge or a debenture, depending on the entire security package to be taken. Generally, lenders may also, for control purposes, obtain a charge (fixed or floating) over the accounts into which the receivables are paid (see question 3.5 below).

In order to take a legal assignment over receivables, express notice in writing has to be given to the debtor of the receivables. The giving of notice also enables the lender to secure priority.

A charge to be taken over receivables can be fixed or floating. Where the lender is able to control the receivables and they are not subject to withdrawals without consent, a legal assignment or fixed charge may be created over the subject receivables. Often, however, the receivables are part of the ongoing business of the security provider and the lender does not seek to take control over the same. In such a situation, only a floating charge may be created in substance, regardless of how the charge is termed or labelled in the documentation.

Registration with ACRA will be required if the charge is floating or the receivables fall under one of the prescribed categories of s131 of the CA. Other perfection steps are, to the extent applicable, discussed in question 3.3 above.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, security over cash deposited in bank accounts (being choses in action) can be taken in the same way as receivables and the principles and requirements in question 3.4 apply.

In practice, it may be difficult to obtain a legal assignment or fixed charge over cash deposited in a bank account unless the bank account is opened with and controlled by the lender. Where that is not practicable and/or it is necessary to enable the chargor to make withdrawals from the bank account freely, the lender may be left with taking only a floating charge over the account.

Registration with ACRA will be required if the charge is floating or if it falls under one of the prescribed categories of s131 of the CA. Other perfection steps are as discussed in question 3.3 above.

3.6 Can collateral security be taken over shares in companies incorporated in Singapore? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares in Singapore may be in certificated/scrip or scrip-less form.

Where shares are certificated, a legal or equitable mortgage may be taken over the shares. A legal mortgage may be granted by way of a share mortgage, accompanied by a transfer and registration of the shares and delivery of share certificates in the mortgagee's name. The procedures and restrictions for the transfer will be set out in the company's constitutive documents and the CA. An equitable mortgage/charge may be granted by way of a share mortgage/charge and deposit of share certificates together with a blank transfer executed by the mortgagor/chargor on the agreement that the mortgagee/chargee may complete the transfer forms upon occurrence of a default event under the facility or by notice.

Where shares are in scrip-less form (i.e. book-entry securities, being essentially listed shares of companies on the Singapore stock exchange – Singapore Exchange Limited), by statute, a different regime will apply. Security may be taken over such shares by way of a statutory assignment or statutory charge in prescribed form registered with the Central Depository (Pte) Limited in Singapore or by common law subject to certain requirements prescribed.

There is no specific restriction to prohibit the general terms of security over shares to be governed by New York or English law, but the creation and grant of security over shares should be governed by Singapore law as the shares of Singapore companies (and exercise of certain enforcement rights) are regulated by the CA and local property rules.

Registration with ACRA will be required if the charge is floating or the shares fall under one of the prescribed categories of s131 of the CA. Other perfection steps are as discussed in question 3.3 above.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, a floating charge is most commonly created over inventory as it is ambulatory in nature. The chargor in this instance will generally be permitted to deal with the inventory in the ordinary course of its business until the occurrence of a default event under the facility or notice from the lender.

Registration with ACRA is required under s131 of the CA. Other perfection steps are as discussed in question 3.3 above.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes for both cases, subject to considerations like the existence of corporate power and corporate benefit, s162/163 of the CA (prohibition on loans to directors and related companies) and financial assistance, etc., as set out in this chapter.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The fee for the registration of a charge/security instrument with ACRA in accordance with s131 of the CA is currently S$60 per charge.

In addition, security interest over certain assets (e.g. aircraft, ships, intellectual property rights and land) will need to be registered at specialist registries and additional fees will be payable. For example, the fee payable for the registration of a mortgage over land with SLA is currently S$68.30 per mortgage.

Stamp duty is payable on a mortgage, equitable mortgage or debenture of any immovable property and stock or shares. A legal mortgage is subject to *ad valorem* duty at the rate of 0.4% of the amount of facilities granted on the mortgage of immovable property or stocks and shares, subject to a maximum of S$500. An equitable mortgage and a debenture is subject to *ad valorem* duty at the rate of 0.2% of the amount of facilities granted on the mortgage of immovable property, subject to a maximum of S$500.

Notarisation is not required for security documents which are executed and to be used in Singapore.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The charge/security instrument to be lodged with ACRA under s131 CA must be lodged within 30 calendar days after the creation of the charge where the document creating the charge is executed in Singapore (or within 37 calendar days if executed outside Singapore). The filing (once filing forms are completed) is instantaneous and confirmation of registration from ACRA will normally take 2-3 business days.

Registration at specialist registries will each have its own time frame. For example, the registration of a mortgage with SLA may take several weeks if complex and involving multiple units. In the interim, a lender may protect its interest by the lodgement of a caveat with the SLA.

Fees payable for such registrations are as discussed in question 3.9 above.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Regulatory consents may be required in certain circumstances. For example, where the subject land is state land leased from the Government or Government statutory boards like the SLA and Urban Redevelopment Authority.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Under Clayton's rule, security taken over a revolving loan may be 'reducing' as the loan 'revolves' as a result of the 'first in first out' rule. In the absence of contrary indication, a secured revolving facility may technically lose the security once an amount equal to the original loan and any associated charges and interest has been paid into the account, even though sums have been paid out in the meantime. In practice, this is however rarely an issue as finance documents will be drafted to provide for inverse order of payment and/or for security to be continuing notwithstanding any intermediate payments made as long as there is anything outstanding under the loan.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Execution requirements are predominantly set out in the company's constitutive documents and the CA. In addition, certain instruments are also statutorily required to be in writing or executed by deed. For example, a legal mortgage over land must be by deed. Certain statutory remedies (e.g. power to sell the mortgaged property, to insure the property, to appoint a receiver, etc.) given to mortgagees will also not be available unless the mortgage is by deed. Commonly, it is prudent in any event for securities to be executed by deed so that there is no issue of past consideration.

Where it is envisaged that the execution of the security instrument be completed by virtual means or using pre-signed signature pages, it is also good practice for it to be done in line with the principles set out in English case *R (on the application of Mercury Tax Group and another) v HMRC*.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

S76 of the CA provides *inter alia* that a company shall not, whether directly or indirectly, give any financial assistance for the purpose of, or in connection with the acquisition by any person (whether before or at the same time as the giving of financial assistance) or proposed acquisition by any person, of shares in the company or in a holding company of the company. The prohibition does not extend to sister subsidiary companies. The CA further provides that financial assistance for the acquisition of shares may be provided by means of a loan, *the giving of a guarantee, the provision of security*, the release of an obligation or the release of a debt or otherwise.

These provisions may therefore be triggered in the event of the giving of guarantees/securities or other accommodation which may directly or indirectly provide 'financial assistance' within the meaning of the CA. There are, however, whitewash provisions available under our laws, including short form whitewash procedures that would enable the company to effect a whitewash through *inter alia* the passing of shareholders' and directors' resolutions and lodgement of solvency statements and papers with ACRA without the need for public notification and objection period

or court order. Where the company is unable to effect a short form whitewash, parties have to bear in mind that the need for public notification and objection period for a long form whitewash will mean that a timeframe of 6 to 8 weeks (assuming no objections) may be required.

It should be noted that it has been recommended and accepted by the Singapore Ministry of Finance ("MOF") in the recent review of the CA for provisions relating to financial assistance to be abolished for private companies but continue to apply to public companies and their subsidiary companies. It is expected that the changes to the CA will be implemented in 2014.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Singapore recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes, Singapore recognises the role of an agent and trustee and these roles are normally taken up by the lead bank to whom the borrower has granted the mandate to arrange the syndicated loan. An express trust will be created to ensure the desired consequences.

The creation of the trust must comply with the relevant formalities. For example, s7 of the Singapore Civil Law Act (Cap.43, 1999 Rev. Ed.) requires a trust in respect of immovable property to be manifested and proved in writing, signed by the person who is able to declare such trust. In addition, a validly constituted express trust has to be certain as to intention of the settlor to create the trust, identity of the subject matter and identity of the beneficiaries. Provided the relevant mechanics are set out in the finance documents and the trust is properly constituted, the security trustee will be able to hold the security on trust for the syndicated lenders and will have the right to enforce the finance documents and collateral security, including applying the proceeds from the collateral to the claims of the syndicated lenders in accordance with the finance documents.

5.2 If an agent or trustee is not recognised in Singapore, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable. Please refer to question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of Singapore and guaranteed by a guarantor organised under the laws of Singapore. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The right of Lender B to enforce the loan and guarantee exists provided the procedure for assignment or novation of Lender A's rights and obligations, as set out in the finance documents, are complied with (e.g. consent of borrower and guarantor if required) and the continuity of the guarantee is provided for expressly and preserved under the documents.

Where there are no proper procedures or transfer/preservation provisions within the finance documents or the security agency/trust is not properly constituted, an assignment or novation of the underlying loan may result in an assigned or new debt which is not covered by the guarantee. A transfer in such a situation may fail and the guarantee rendered unenforceable over the assigned or new debt. In such an instance, a fresh guarantee will be required for Lender B to be guaranteed. In practice, confirmation by the guarantor is often sought even if the documents provide expressly for preservation without consent.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Withholding tax is applicable by virtue of s12(6) read with s45 or 45A of the Singapore Income Tax Act (Cap. 134, 2008 Rev. Ed.) ("ITA") where a person is liable to pay another person not known to him to be resident in Singapore any interest, commission, fee or any other payment in connection with any loan or indebtedness or with any arrangement, management, guarantee, or service relating to any loan or indebtedness if such payments are borne, directly or indirectly, by a person resident in Singapore or a Singapore permanent establishment or is deductible against any income accruing in or derived from Singapore. Interest and agency fee payments are generally subject to this withholding tax unless otherwise exempted.

Assuming that such income is not derived by the non-resident person from any trade, business, profession or vocation carried on or exercised by him in Singapore and is not effectively connected with any permanent establishment in Singapore of the non-resident person, the current withholding tax rate is 15% of the gross payment.

There are, however, various exceptions to this. For example, payments made from 21 February 2014 onwards to Singapore branches of non-resident companies, including non-resident banks, are not subject to withholding tax. In addition, if the non-resident bank is a resident of a tax treaty country, the Avoidance of Double Taxation Agreement may provide for a different/reduced tax rate.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Singapore has various governmental agencies to assist foreign investors and creditors. The Economic Development Board is the lead governmental agency responsible for planning and executing strategies to attract foreign businesses and investments. International Enterprise Singapore works to position Singapore as a base for foreign businesses to expand into the region, in partnership with Singapore-based companies.

Although incentives are generally industry-specific, and not affected by the residency of the investors or creditors, there are selected schemes directed to attract foreign investors and creditors. For example, Singapore allows for reduced withholding tax rate on interest payments on loans taken to purchase productive equipment for the purposes of trade or business.

Save for withholding taxes as discussed in question 6.1, no taxes specific to loans, mortgages or other security documents, either for the purposes of effectiveness or registration, are applicable. Stamp duty as discussed in question 3.9 will be applicable.

6.3 Will any income of a foreign lender become taxable in Singapore solely because of a loan to or guarantee and/or grant of security from a company in Singapore?

Where the bank is not a tax resident in Singapore, withholding tax as discussed in question 6.1 may apply.

Where the bank is a tax resident in Singapore or has a branch in Singapore, any interest, commission, fee or any other payment in connection with any loan or indebtedness or with any arrangement, management, guarantee, or service relating to any loan or indebtedness if such types of income are borne, directly or indirectly, by a person resident in Singapore or a Singapore permanent establishment, or is deductible against any income accruing in or derived from Singapore that accrues to or is derived by the bank or its Singapore branch, will be deemed to be sourced in Singapore and subject to income tax in Singapore by virtue of s12(6) read with s10(1) of the ITA.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Apart from fees and tax payable as discussed above (i.e. questions 3.9 and 6.1), the provision of certain services, for example the provision of guarantee services, may be subject to goods and services tax ("GST") in Singapore if the provider of the service is registered for GST purposes pursuant to the Singapore Goods and Services Tax Act (Cap. 117A, 2005 Rev. Ed.) unless the service qualifies as an international service or is an exempt supply on which no GST is chargeable. The rate at which GST is chargeable on standard-rated supplies of goods and services is presently 7%.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Thin capitalisation principles are not applicable in Singapore. However, it should be noted that should the banks be organised under the laws of a foreign jurisdiction, and no express choice of law is made in the finance documents, the applicable law for the finance documents may be that of the foreign jurisdiction. In such a situation, the borrower may not be able to enjoy the rights and remedies available to a borrower in Singapore, but not in that foreign jurisdiction.

7 Judicial Enforcement

7.1 Will the courts in Singapore recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Singapore enforce a contract that has a foreign governing law?

Provided that it is *bona fide* and legal and there is no reason for avoiding the choice on the grounds of public policy, the express choice of the laws made by the parties to a contract will be upheld as valid and binding in any action in the courts of Singapore and the courts will enforce a contract that has a foreign governing law.

7.2 Will the courts in Singapore recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

A final judgment for a sum of money obtained against a company in Singapore (which is not a judgment for the payment of a fine, penalty or tax, or anything of that nature) in a superior court in England will be enforceable against the company in Singapore subject to the provisions of the Singapore Reciprocal Enforcement of Commonwealth Judgments Act (Cap. 264, 1985 Rev. Ed.) ("RECJA").

Judgments of a similar nature issued by New York courts will be enforced in Singapore in accordance with the common law. This is because there is no reciprocal agreement or convention between Singapore and the United States of America in respect of the enforcement of court judgments. Under the common law, a money judgment may be enforced, provided it is final and conclusive. It will then be for the defendant to prove that the New York courts had no jurisdiction over the matter, or that the judgment was obtained by fraud, or that there were any major procedural irregularities in arriving at the judgment or that enforcement would be contrary to the public policy of Singapore. The Singapore court will not re-examine the merits of the case.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Singapore, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Singapore against the assets of the company?

The timeline for each case would depend on its own facts. Generally, if the claim is against a defendant in Singapore and based on a straightforward loan agreement or guarantee, it is possible to obtain default or summary judgment within 3 to 6 months of filing the claim (assuming there is no appeal).

There are generally four main methods of enforcement, namely, a writ of seizure and sale, garnishee proceedings, examination of judgment debtor and bankruptcy proceedings. Depending on which method of enforcement is selected and whether any challenge is mounted by the debtor, the process could take 2 to 6 months or longer.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There is no specific requirement for a public auction. Secured creditors typically have wide powers under the terms of the security document to take possession, dispose or otherwise deal with the secured assets, or appoint a receiver in respect of the secured assets, to satisfy the secured debts. There may be requirements for regulatory consent in respect of certain types of borrower (for example, where it is a regulated entity).

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Singapore or (b) foreclosure on collateral security?

There are no specific restrictions on foreign lenders filing a suit or

foreclosing on collateral security so long as the Singapore courts have jurisdiction over the matter.

7.6 Do the bankruptcy, reorganisation or similar laws in Singapore provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

The legislation provides for an automatic moratorium where a provisional liquidation, liquidation or judicial management (or administration) order is made. Notwithstanding the moratorium, secured creditors may enforce their security in a provisional liquidation or liquidation. However, where a judicial management order has been made, a creditor may not enforce any security over the company's assets without permission from the court.

The court may also grant an order for a temporary stay of proceedings if requested by an applicant proposing a scheme of arrangement. Generally, a temporary stay of proceedings does not restrict the enforcement of collateral security unless the terms of the scheme of arrangement being proposed apply to secured creditors.

7.7 Will the courts in Singapore recognise and enforce an arbitral award given against the company without re-examination of the merits?

Arbitral awards may be recognised and enforced in Singapore in accordance with the New York Convention or under the Singapore Arbitration Act (Cap. 10, 2002 Rev. Ed.) without having its merits re-examined. However, the courts may refuse to enforce such awards on the following grounds: incapacity of a party; failure to give proper notice to a party or the inability of a party to present his/her case; issues with the selection of the arbitrators; the award falling outside of the scope of the arbitration agreement; invalidity of the arbitration agreement; the award having been set aside; and/or the enforcement of the award being contrary to the public policy of Singapore.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Bankruptcy proceedings in respect of a company include receivership, winding up, schemes of arrangement and judicial management. The right to appoint a receiver over a company can arise statutorily, contractually in accordance with the terms of the security document such as a debenture or by an exercise by the court of its power to appoint a receiver on the application of the secured creditor. In such a case, the receiver would act in furtherance of the interests of the secured creditor that appointed the receiver to realise the collateral security. The right of secured creditors to enforce their rights over the collateral security are not affected in a winding up. However, once a judicial management order is made, secured creditors may not enforce their rights over the collateral security without permission from the court.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes. Liquidators and judicial managers, but not receivers, can apply to set aside or claw back certain transactions entered into before commencement of winding up. Such transactions include transactions at an undervalue, preferences, avoidance of floating charges and unregistered charges and transactions defrauding creditors. The clawback period ranges from five years (transactions at an undervalue) to six months (preference) from the commencement of winding up. Generally, floating charges created within six months of the commencement of winding up are void unless there is proof that the company was solvent at the time the floating charge was created.

The CA also contains provisions against fraudulent trading i.e. where the business of a company has been carried on with the intent to defraud creditors or for any fraudulent purpose. A liquidator can in such an instance apply for a declaration for the person/director to be personally responsible for the debts/liabilities of the company.

The tax authorities and employees who are owed wages (up to a certain limit) are preferential creditors and are paid ahead of unsecured creditors but behind secured creditors.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Entities incorporated in Singapore are generally not excluded from bankruptcy proceedings in Singapore.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

See question 8.1 above. In addition, creditors may apply for a writ of seizure or to garnish the assets of the debtor.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Singapore?

Yes, a party's submission to a foreign jurisdiction may be legally binding and enforceable, provided the conditions for recognition are satisfied. Money judgments from certain Commonwealth countries may be registered for purposes of enforcement under the RECJA. In addition, the Singapore Reciprocal Enforcement of Foreign Judgments Act (Cap. 265, 2001 Rev. Ed.) allows judgments from a list of prescribed countries to be enforced in Singapore. Currently, only the Hong Kong Special Administrative Region is on the list of prescribed countries. Judgments from all other countries will usually be enforced through new Singapore proceedings under the common law.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Singapore?

A party's waiver of sovereign immunity may be legally binding and enforceable provided it satisfies the conditions as set out in the Singapore State Immunity Act (Cap. 313, 1985 Rev. Ed.).

10 Other Matters

10.1 Are there any eligibility requirements in Singapore for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Singapore need to be licensed or authorised in Singapore or in their jurisdiction of incorporation?

Under Singapore law, unless exempted or excluded, a person may

not carry on the *business of a moneylender* without holding the requisite moneylenders' licence. The relevant legislation, the Singapore Moneylenders Act (Cap. 188, 2010 Rev. Ed.), also provides that any person who lends a sum of money in consideration of a larger sum being repaid (i.e. charge interest), shall be presumed until the contrary is proved to be a moneylender. This has in the past been an issue with overseas funders not being licensed financial institutions here (which are exempted) lending into Singapore. With effect though from 1 March 2009, an amended Moneylenders Act came into force in Singapore pursuant to which 'any person who lends money solely to corporations' would be an 'excluded moneylender'. Accordingly, a lender can be an 'excluded moneylender' *provided* on the facts it lends money solely to corporations.

The granting of loans to corporations *per se* is not otherwise regulated in Singapore. There are no eligibility requirements in Singapore for a lender lending to a company and, subject to the above, it need not be licensed or authorised if no other regulated activities (e.g. banking, securities or financial advisory activities) are being conducted.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Singapore?

The principal Singapore law considerations for lenders when participating in financings in Singapore have been covered by the above questions and answers.

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South Africa

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in South Africa?

In the last couple of years, South Africans have seen more stringent bank lending criteria. This is due to, amongst other things, regulatory changes following international bank trends as well as stricter credit control via the imposed **National Credit Act** and other regulations implemented in South Africa. Also, the South African market has been quiet over the last few years mainly due to the uncertainty around debt that is pushed down into a capital structure.

A significant development has also been the limitation by South African Revenue Services for tax deduction purposes of interest based on a percentage of EBITDA which has significantly reduced the likelihood of new high yield bonds being raised in the European high yield market.

1.2 What are some significant lending transactions that have taken place in South Africa in recent years?

Whilst the traditional major banking institutions and a number of hedge funds have made relatively significant funds available, the Industrial Development Corporation of South Africa ("*IDC*") (*www.idc.co.za*) and the Development Bank of South Africa ("*DBSA*") (*www.dbsa.org*) have also become significant participants in making funds available for various transactions. In particular, the **IDC** provides finance for industrial development projects both within and outside of South Africa, promoting regional economic growth. The **DBSA** on the other hand focusses on infrastructure development finance, providing long term debt solutions for infrastructure projects. It also provides financing support to intermediary, public and private sector organisations offering lending products including a range of financial instruments and financial products to private and public sector organisations.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, subject to (1) full disclosures being provided to all interested parties, and (2) satisfying statutory and regulatory requirements, in particular the relevant provisions of the Companies Act 71 of 2008 ("*the Companies Act*").

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

In principle, yes, relating to reckless and perhaps even negligent trading, but the test that would be applied will be measured against the prevailing circumstances at the time the transaction was concluded (*and what the director knew or ought to have known*) and not the ultimate outcome with the wisdom of hindsight.

2.3 Is lack of corporate power an issue?

Yes, it can be an issue. For a corporate to bind itself (*whether it is guaranteeing an obligation or is the beneficiary of a guarantee in its favour*), the persons representing it must be properly empowered to conclude the necessary legal instruments.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

There are certain formalities required, for example shareholder approval, satisfying solvency tests and other statutory or regulatory requirements, all of which depend on the nature of the transaction. In dealing with organs of state, the state itself must satisfy its own protocols and any statutory provisions which are applicable to that particular transaction or organ of state.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

The answer is generally no, however, if a corporate (*as opposed to an individual*) were to assume a contingent liability (*by way of some or other intercession in which it assumes a co-principal or ancillary obligation*) which has an impact on its solvency, such act of intercession may in certain circumstances be attacked.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange control requirements although, if the funds are paid by a South African entity and are to be repatriated outside of South Africa, there are a number of exchange control

requirements that need to be met. If, however, the creditor/lender introduced the funds into South Africa by way of a loan to a local corporate, the repatriation of the funds would be a formality.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

The types of collateral available in South Africa to secure lending obligations are the following:

- registering first and second mortgages over immovable property;
- registering notarial bonds (*either general or specific*);
- suretyships;
- guarantees;
- debentures;
- pledges or hypothecation;
- liens;
- assignment of rights; and
- preference shares.

A number of securities can be taken per financial exposure and a lender is not limited to one security.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Generally, a covering security or mortgage bond over all assets can be procured ("**a Notarial General Bond ("*NGB*")**) but in certain circumstances very specific assets need to be identified for a particular type of collateral security. The procedure requires the completion of written and signed agreements (*which usually capture the commercial agreement between the lender and borrower*), the subsequent preparation of a mortgage or **NGB** (*although the pre-existing commercial agreement need not be signed as a matter of law unless it relates to an interest in immovable property or there are very peculiar requirements that dictate same*) and for the mortgage or **NGB** to then be registered in the various Deeds Offices which have jurisdiction over the asset and/or the debtor in question.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, collateral security over real property (*known also as immovable property*) requires the registration of a mortgage bond. Collateral security over plant, machinery or equipment (*movables*) requires the registration of an **NGB**. In the latter instance, the security becomes effective six months after registration in respect of debts incurred prior to the registration of the **NGB** but immediately effective in respect of debts incurred subsequent to the registration of the **NGB**.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, the collateral security over receivables is almost always evidenced by a cession of debtors *in securitatem debiti* in terms of which ownership often remains vested in the original creditor but the right to recover payment from the debtor vests in the security holder. An **NGB** (*see the answer to question 3.3*) can be registered over receivables as well. Debtors need not be notified of the security for such security to be effective but if a debtor pays its creditor (*as opposed to the security holder*) without knowledge of the security over the receivable in question, the debtor thereby discharges the debt. The onus is invariably on the security holder to give notice of its interest in the receivable to the debtor to ensure that the debtor pays it and not the giver of the security.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, this takes the form of a pledge and is evidenced by a written agreement of pledge. The bank in question is to be notified thereof in order to protect the security holder's position.

3.6 Can collateral security be taken over shares in companies incorporated in South Africa? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Under South African Law, collateral security can be taken over shares by way of: (1) a pledge i.e. delivery of the actual shares certificate evidencing the shareholder's economic interest in the company in question; and (2) a cession of the shareholder's rights, title and interest thereto. The share certificate (*a hard document or in some instances in electronic format*) is simply evidence of an economic interest in a company and does not constitute the interest itself.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, by and large inventory is dealt with in the same way as movables such as plant, equipment and machinery (*see the answer to question 3.3 above*).

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company can grant a security interest over its assets to secure its own obligations under: (1) a credit facility; or (2) a guarantee. A company can indemnify another company (the guarantor) against any claim being made by a creditor against the guarantor under its guarantee. The company provides security to the guarantor for its obligations under such indemnity.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The recommended fee for the registration of bonds over immovable property and movables are determined according to a sliding scale in accordance with the amount that the bond is securing, starting from R3,000.00 to R6,480.00 for the first R500,000.00 plus

R960.00 per R100,000.00 or part thereof thereafter up to and including R1,000,000.00, whereafter the recommended fee is R528.00 per R100,000.00 up to and including R5,000,000.00, whereafter the recommended fee is R264.00 per R100,000.00 thereafter. It is to be noted that often the fee for the registration of bonds is a negotiated fee in which the recommended fee is used as a guideline only. VAT may or may not be applicable depending on whether the creditor (*in whose favour the security is to be registered*) is offshore or not. There is no stamp duty payable.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The amount of time is not significant when one has regard to the benefit that will be achieved. The expense is a function of the amount to be secured and therefore varies.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

There are a number of statutes/laws that provide for and create an environment in which certain securities are registered, such as the Deeds Registries Act 47 of 1937 (as amended) ("*the Deeds Act*"). Such regulatory or similar concepts are, where required, invariably obtained in the ordinary course and without difficulty. Where the security stands second or later in line (*such as for example a second mortgage bond over real/immovable property*) the consent of the first mortgage bond holder is usually required – depending on the terms of the first mortgage bond.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

The security of the sort referred to herein is usually evidenced by a written credit facility agreement and the special priority or other concern (*to use the terminology used*) is that the security document itself must be correctly worded in a way that affords the credit provider (*and creditor*) the requisite security. In addition, a credit facility agreement in South Africa will typically deal with the terms and conditions relating to the facility and like any other agreement must be sufficiently expansive and worded so that the party assuming the major risk has the necessary checks and balances in order to protect its position.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

The security documentation that is registered in the Deeds Office follows a format provided for in the **Deeds Act** and other statutory provisions. It is a formal document, registered and lodged in the Deeds Office and available for inspection by the public. The execution requirements are usually stringent and a conveyancer or Notary Public is the person who is tasked with the responsibility of procuring the registration. In South Africa, registrations in Deeds Offices are highly regulated, visible and transparent.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Yes, there are restrictions and the company must satisfy the solvency and liquidity test requirements set out in the **Companies Act**.

(b),(c) Similarly, when any financial assistance is given to a related or inter-related company, it can only be given once the lending company has satisfied the solvency and liquidity requirements set out in the **Companies Act**.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will South Africa recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

South Africa recognises the law of principal and agent and an agent (*properly mandated*) will be entitled to act for and on behalf of his/her/its principal in, for example, the enforcement of loan documentation and collateral security. Whilst in principle South Africa recognises the grouping of a number of persons with identical rights this is not a common practice. The use of a "trustee" is not typical in South Africa other than (1) in an insolvency environment where a trustee is appointed by the Master of the High Court to act *inter alia* on behalf of creditors, and (2) in respect of a registered trust. Those are very specific roles and are not comparable to the role of a "trustee" in other countries in the circumstances referred to above.

5.2 If an agent or trustee is not recognised in South Africa, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

There are a number of mechanisms and processes that will allow one party to enforce the rights of a number of persons simultaneously and even in one court proceeding. South African law and procedure recognises the existence of a joinder by various parties and conversely a misjoinder by parties who do not have a legal interest in the proceedings in question.

5.3 Assume a loan is made to a company organised under the laws of South Africa and guaranteed by a guarantor organised under the laws of South Africa. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

There are "special requirements" necessary to enable Lender B (*who effectively steps into the shoes of Lender A*) to enforce the loan save that Lender B would have to establish precisely what rights he

has acquired from Lender A that vest it with the entitlement/right to claim a repayment of the loan. Typically, in South Africa a written and signed agreement between Lender A and Lender B is concluded in which the full scope of the commercial/contractual transaction is recorded. There are a number of rights and entitlements that can be disposed of by Lender A and the extent of those rights and entitlements – whether for example it is an out and out transfer of ownership or any lesser right – is recorded.

Where, however, the terms of the loan agreement between Lender A and the Borrower (*i.e. the debtor*) exclude Lender A's entitlement to deal with the loan, Lender A cannot then transfer any or all of its rights to Lender "B". Under South African law, absent an agreement from the debtor a loan owed to one creditor (*for example Lender A*) cannot be fragmented so that the debtor is then faced with 2 or more creditors in respect of the same underlying debt.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

As of 1 April 2012, a dividend withholding tax regime was introduced into South African law. The withholding tax is imposed at shareholder level in respect of any dividend paid by the company on or after the 1st of April 2012 and is levied at the rate of 15% which, in the case of a non-resident shareholder, may be reduced in terms of any relevant double tax agreement.

It is therefore not a requirement to deduct or withhold tax earned on interest payable on loans or the proceeds of a claim recovered under a guarantee or proceeds from enforcing security.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Incentive investment programmes typically focus around employment opportunities through offshore activities where incentives/cash grants are offered for offshore jobs created. There are also manufacturing incentive programmes which encourage local and foreign capital investment.

So, for a foreign lender to obtain benefits, almost invariably the loan transaction needs to be part of a larger transaction involving an existing investment programme. The lender may also fulfil the role of an investor in which, for example, a manufacturing facility is established which creates jobs. In those circumstances, the fact that a lender/investor is creating opportunities compatible with the incentive programme will allow the lender to explore the benefits to their full extent.

6.3 Will any income of a foreign lender become taxable in South Africa solely because of a loan to or guarantee and/or grant of security from a company in South Africa?

Generally, no.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are no material or appreciable additional costs that will be incurred by a foreign lender as opposed to a local South African lender. However, in order for the funds from the foreign lender to become available in South Africa, South African Reserve Bank approval is required and such approval – whilst not necessarily onerous – has a cost profile attached to it. However, in the scheme of things it is not significant/material.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

A South African borrower will be required to obtain exchange control approval in order to obtain funding from a foreign lender. The capital adequacy requirements of a lender may vary depending on its jurisdiction of incorporation. This may affect the costs payable by the borrower. In addition, it must be legal in both the jurisdiction of the lender and the jurisdiction of the borrower under the facility.

7 Judicial Enforcement

7.1 Will the courts in South Africa recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in South Africa enforce a contract that has a foreign governing law?

Yes they will.

7.2 Will the courts in South Africa recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Generally, the South African courts recognise the integrity of a foreign judgment.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in South Africa, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in South Africa against the assets of the company?

Based on the assumptions referred to, there are various processes that can be followed including: (1) a provisional sentence in respect of a liquid document; and (2) a High Court motion proceeding (*application*). The preparation of the court papers, once full instructions are received, will in the case of a provisional sentence summons be a few days and in the case of an application approximately 7/10 days. Once the court process is served on the defendant/debtor, a judgment can follow (*absent any opposition*) within a few weeks and thereafter a warrant of execution can be issued.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

The enforcing of collateral security is in almost all instances (*following the security being perfected and a judgment against the debtor obtained*) a function of the rights afforded to the security holder in the relevant debt instrument, such as the mortgage bond or the **NGB**.

On occasions the collated security document allows the security holder to dispose of the secured asset by way of private sale but mostly by way of public auction. There are instances where the security holder has discretion but at all times the debtor (i.e. *the giver of the security*) has, at the very least, contingent rights to ensure that he/she is treated reasonably and fairly and that the asset is not disposed of fraudulently. Very rarely are regulatory consents required.

Very often assets are disposed of by way of public auction – sometimes via the offices of the Sheriff of the High Court and in other instances (*depending on the terms of the collateral security*) by a private auction house – in all instances following appropriate advertisements being placed advertising the sale.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in South Africa or (b) foreclosure on collateral security?

Foreign lenders are by and large treated the same as local South African lenders. There are no additional or onerous requirements to be addressed by a foreign lender prior to exercising its legal remedies.

7.6 Do the bankruptcy, reorganisation or similar laws in South Africa provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Business rescue provisions in the **Companies Act** have the effect of creating a moratorium. The business rescue process is akin – at least in principle – to the Chapter 11 provisions in the United States which involve *inter alia* a re-organisation of the debtor company's, shareholding and/or debt structure.

7.7 Will the courts in South Africa recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes, as in the case discussed in question 7.1 above.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Bankruptcy proceedings effectively stay any court proceedings that are pending against the debtor entity but liquidators, once appointed, accept proof of claim forms from all creditors (*including secured creditors*) and the secured creditor's rights are dealt with in terms of the **Insolvency Act** and certain sections of the 1972 **Companies Act**. The rights of a secured creditor are recognised in a bankruptcy environment.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Generally no, the only charges against the proceeds of any realised security are the liquidator's charges which are governed by regulation although it is always open to a secured creditor to approach the Master of the High Court and request that the statutory charges raised by a liquidator (*almost always expressed as a percentage of proceeds realised in respect of the secured asset*) be reduced in appropriate circumstances.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Generally there are no entities that are excluded from bankruptcy proceedings although when dealing with state-owned companies there may be provisions affecting such companies in the relevant legislation.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

The only circumstances where assets can be recovered in the sense of taking physical possession thereof without a court order by the security holder is with the consent of the debtor. Where consent is absent, a secured creditor applies to the court for relief such as perfecting the security or repossessing the asset in question. Self-help is not permitted under South African law. A voluntary surrender process is, however, available by agreement between the affected parties.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of South Africa?

Yes, it is subject only to the requirement that the court actually has an objective ground of jurisdiction to hear the matter.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of South Africa?

Yes, provided the waiver of sovereign immunity (*where applicable*) is validly given. The validity or not of a waiver of sovereign immunity is a factual and legal enquiry but in principle where there is a valid/authorised/legitimate waiver of sovereign immunity, it is legally binding. Where there may be certain regulatory requirements and protocols/treaties to be satisfied, those will need to be satisfied before the validity of the waiver of sovereign immunity can be enforced.

10 Other Matters

10.1 Are there any eligibility requirements in South Africa for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in South Africa need to be licensed or authorised in South Africa or in their jurisdiction of incorporation?

The South African lending industry – more particularly in terms of

its banking industry – is well regulated and highly sophisticated. Banks need to be licensed and authorised to conduct lending transactions. Credit givers are regulated and required to be registered in terms of a minimum threshold stipulated in the **National Credit Act** 34 of 2005.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in South Africa?

Save for recognising and satisfying statutory and regulatory requirements where applicable, there are no other material considerations that need to be taken into account in South Africa that would not typically apply in any other Commonwealth, European or first world country.

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Brian has arbitrated and litigated locally and internationally and been involved in large and small commercial transactions. He acts for listed entities, large private companies, family conglomerates, entrepreneurs and individuals. He has established firm collegial and professional relationships with colleagues throughout the world; many of whom refer matters to him on behalf of their offshore clients where he has acted either alone or as co-counsel. He has, on behalf of clients and colleagues, travelled over the years to: Abu Dhabi, Argentina, Austria, Australia, Botswana, Canada, Dubai, England, Finland, France, Germany, Holland, Hong Kong, Ireland, Iraq, Jordan, Kenya, Kazakhstan, Lesotho, Namibia, Poland, Russia, Scotland, Singapore, USA and Zambia.

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Michelle Steffenini is a senior associate in the Commercial Department. She has over 10 years' experience in commercial transactions and in drafting lending and security documentation as well as giving advice in structuring such transactions.

Brian Kahn, the managing partner of Brian Kahn Inc. ("BKI"), commenced practice in 1969, and when the law relating to the incorporation of professional practices changed, he established an incorporated company. BKI is a boutique-style firm and is considered medium size by South African standards. We employ 28 professional and support staff, a mirror of the rainbow nation.

In 1997, BKI developed its own office building which it named "Umlilo House". The source of and inspiration for the name (which means "fire" in Zulu), emerges from the vision and culture of the firm, which is dynamic, progressive and effective in achieving success for its clients.

BKI has an excellent reputation for being dynamic, passionate and successful. We specialise in commercial law, labour law, commercial litigation and dispute resolution, including media law. Our Litigation and Dispute Resolution department specialises in complex litigation and arbitration, including multi-jurisdictional litigation, and covers areas such as company disputes (shareholder and partner disputes), bankruptcy and insolvency (restructuring and reckless trading), business fraud and misrepresentation, due diligence and forensic investigations, property and construction disputes, mining disputes, employment and labour law. We have acted for government departments and organs of state in South Africa and former heads of state in Africa.

We are able to assist clients in complex disputes across a wide range of areas, advising on strategies to limit potential exposure to litigation and assess pre-litigation solutions.

Spain

Manuel Follía

Héctor Bros

Cuatrecasas, Gonçalves Pereira

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Spain?

In the past two years, Spain has successfully undertaken major banking and financial reforms, creating the Spanish publicly sponsored "bad bank" (SAREB – "*Sociedad de Gestión de Activos procedentes de la Reestructuración Bancaria*"), a company for the management of assets resulting from the restructuring of the banking system, responsible for managing assets transferred by the nationalised financial institutions.

A new corporate bond platform (MARF – "*Mercado Alternativo de Renta Fija*") has recently been launched, giving an alternative funding channel for small and medium size companies.

New players – such as distressed debt entities – have irrupted in the market, taking a substantial slice in transactions and bringing new savvy to the sector.

In this new scenario, the immediate future looks particularly promising for refinancing, distressed debt and high yield bond issuances.

1.2 What are some significant lending transactions that have taken place in Spain in recent years?

2013 has been other successful year for our practice. It was difficult to surpass the remarkable track record we had in 2012, when we advised on the largest and most relevant transactions carried out in Spain: a) the €30 billion loan granted to a public special purpose fund called "*Fondo para la Financiación del Pago a Proveedores*"; and b) the legal advice to the FROB (Fund for Orderly Bank Restructuring) and the Spanish "bad bank", SAREB, on the sale of assets and credit rights by the nationalised entities (total value: €50,700 billion).

In the area of public debt restructuring, we have been chosen by SAREB as advisors on their corporate finance issues, such as a new bond issuance as a consequence of the roll-over of the previous bond issuance and different disinvestment transactions.

Within the private sector, we can outline:

- €12 billion Aena debt novation previous to privatisation;
- €4.9 billion El Corte Inglés debt restructuring; and
- €1.1 billion refinancing of the Planeta Group.

Regarding the construction business we advised on the €1.2 billion Comsa Emte Group restructuring, and with respect to project financing, we may highlight the €1.3 billion global restructuring of 21 Catalan regional PPP road infrastructure projects (originally financed through "German method" structures).

Our firm has also helped to create the Spanish distressed debt market, advising the most relevant international funds regarding their activities in Spain (as recognised by the FT Innovative Lawyer Award), as well as counselling in many acquisition debt deals.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, subject to the restrictions of financial assistance (see question 4.1 below). In addition, although Spanish law does not provide for any specific obligation to justify a company granting a guarantee or security based on corporate benefit, it is advisable (and in some cases expressly required by law) for both the Management Body and the General Meeting of Shareholders to pass a resolution approving the transaction, referring to the corporate interest or benefit that the company granting the guarantee or security or the group as a whole will obtain through such transaction.

Finally, subject to certain case law, the relevant guarantee constituted by a Spanish subsidiary in favour of its parent company might be challenged by a Spanish court if no consideration (*contraprestación*) is provided to such subsidiary.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Directors of a Spanish company have a duty of care towards the company and must act faithfully and loyally towards it. When there is an evident disproportion between the benefit for the company and the granting of collateral by the guaranteeing/securing company, often borrowers request that certain limitation language is included both in the collateral documentation and in the corporate resolutions to minimise a potential liability risk for the Management Body of the company.

Additionally, in case of an eventual insolvency situation on the part of the company, there is a potential risk that the insolvency administrators might presume that the granting of collateral by the company could have resulted in the insolvency and allege that it is detrimental to the insolvency estate; in such case the Management Body could be held liable for its actions.

2.3 Is lack of corporate power an issue?

Yes, in Spain the agreements need to be executed by duly empowered representatives of the company, with sufficient corporate power to act on its behalf.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Usually, no governmental consents or filings are required to grant guarantees/security interests in Spain (see question 3.11 below).

Regarding internal corporate approvals, in general terms, any actions or activities which fall within the scope of the corporate purpose of the company are subject to fewer formalities. However, in case of private limited liability companies (*sociedades de responsabilidad limitada*), shareholders' approval must be obtained before carrying out certain transactions (such as upstream guarantees). In public limited liability companies (*sociedades anónimas*), despite not being mandatory, the shareholders' approval is also usually obtained. See also question 2.1 above in relation to corporate benefit.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No, although certain limitation language is included in case of disproportions (see question 2.2 above).

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange control regulations on the enforcement of a guarantee. However, Spanish Insolvency Law imposes an important restriction on lenders facing imminent or real insolvency of its debtors, as it renders unenforceable contractual early termination clauses solely based on a declaration of insolvency.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

The types of collateral most commonly used to secure financing transactions are generally classified into two main groups: (1) *in rem* security interests, the most common being: (i) mortgage over real estate (*hipoteca inmobiliaria*); (ii) ordinary pledge over movable assets with transfer of possession (e.g., pledge over shares, over credit rights or over bank accounts); (iii) chattel mortgage (*hipoteca mobiliaria*); and (iv) non-possessory pledge over assets (*prenda sin desplazamiento de la posesión*); and (2) personal guarantees, being mainly first demand guarantees.

The main difference between *in rem* security interests and personal guarantees is that, in the former, a specific asset secures fulfilment of the obligation, while in the latter, an individual or corporate entity guarantees fulfilment of the obligation. There are also material differences in proceedings for their enforcement and their treatment during insolvency (*concurso*) under the Spanish Insolvency Act.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Spanish law does not provide for a so-called "universal security" over the entire debtor's assets. Nor does it generally admit the creation of a "floating" or "adjustable" lien or encumbrance, except for certain mortgages over real estate. Therefore, a security agreement is usually required in relation to each type of asset.

The creation of guarantees and security interests requires notarisation in order for them to be considered as an executive title (*título ejecutivo*) in an enforcement scenario. Notarial deeds (being either *pólizas notariales* or *escrituras públicas*) provide certainty of the date and content of the applicable document *vis-à-vis* third parties. Furthermore, some of these types of security interests are subject to compulsory entry on public registries, such as the Land Registry (*Registro de la Propiedad*) (e.g., real estate mortgage) or the Chattel Registry (*Registro de Bienes Muebles*) (e.g., mortgage on inventory or non-possessory pledge over assets), while such registration is not required for other collateral (e.g., common pledge with transfer of possession).

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Real property is taken as security by means of a real estate mortgage (*hipoteca inmobiliaria*). Under Spanish law, real estate mortgages cover: (i) the plot of land and the buildings built on it; (ii) the proceeds from the insurance policies insuring such property; and (iii) the improvement works carried out on the property and natural accretions. Should the parties agree so, such mortgage may also include movable items located permanently in the property.

Security over machinery and equipment can be created by means of a chattel mortgage (*hipoteca de maquinaria industrial*) or a non-possessory pledge (*prenda sin desplazamiento de maquinaria industrial*). The choice will depend on whether the specific asset meets certain legal requirements.

For both types of security, notarisation is necessary, as well as registration with the relevant public registry (see question 3.2 above).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security over receivables can be taken in two different manners: (i) by creating a possessory pledge; and (ii) by creating a non-possessory pledge (*prenda sin desplazamiento de la posesión*) which may be registered in the Chattel Registry.

With respect to the possessory pledge over receivables, in order for the pledge to be perfected, notification to the debtor is required. However, and taking into consideration the commercial impact of the notification, sometimes the notice to the relevant debtors will only be given upon potential or effective default.

On the contrary, the non-possessory registrable pledge (*prenda sin desplazamiento de la posesión*) does not require notification to the relevant debtor on the basis that the filing of such pledge with the relevant Chattel Registry would give it the necessary publicity *vis-à-vis* third parties.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

The pledge of bank accounts is simply a pledge of the credit rights of the holder of the account *vis-à-vis* the bank, which should typically correspond to the account balance.

The formal requirements are identical to those that apply in the case of any other possessory pledge over receivables (notarisation is needed). Possession is transferred by notification to the depository bank. The creation of the pledge does not imply, unless otherwise agreed by the parties, the freezing of the accounts.

3.6 Can collateral security be taken over shares in companies incorporated in Spain? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, collateral security can be taken over shares in companies incorporated in Spain. However, and by virtue of the *lex rei sitae* principle, such pledges should be always governed by Spanish law, not New York or English law. Exceptionally, creating a pledge under a law other than Spanish law might be considered, although enforcement proceedings will be longer and burdensome.

Perfection requirements for pledges over shares in Spain usually include: (i) endorsement of share certificates (if these have been issued); (ii) registration of the pledge in the relevant Registry Book of Shareholders or Shares, as applicable; (iii) registration of the pledge in the deeds of acquisition of the relevant shares; and (iv) in the event of shares represented by book entries (*anotaciones en cuenta*), registration of the pledge in the book entry register.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, Spanish law foresees a specific mechanism for creating security over inventory, which is the non-possessory pledge over inventory (*prenda sin desplazamiento de inventario*). As provided in questions 3.2 and 3.3 above, this type of collateral requires notarisation as well as registration in the relevant Chattel Registry.

However, it is also possible to create a security over inventory by means of granting a chattel mortgage over business (*hipoteca de establecimiento mercantil*), which will include not only the inventory, but the whole business.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, it can be done although always subject to the Spanish prohibition of financial assistance (see question 4.1 below) and certain corporate benefit issues (see question 2.1 above).

Aside from this, and considering the restriction in Spain regarding floating charges (see question 3.2 above), if the obligations to be secured arise from different types of credit agreements, the Spanish principle of integrity (by virtue of which a security interest can secure only a main obligation and its ancillary obligations, such as interest, costs, etc.) must be complied with, which in practice means that where two different main obligations are to be secured, two different security interests (over different assets or portions of the same asset) must be created.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notary fees are fixed amounts that vary according to the secured liability (approximately 0.03% of the secured liability), although in transactions with aggregate value higher than €6 million, they can be reduced if negotiated with the notary.

As regards security subject to compulsory entry on public registries (particularly mortgages and non-possessory pledges), in addition to registry fees (approximately 0.02% of the secured liability), some also imply payment of stamp duty tax (varying from 0.5% to 1.5% of the secured liability – principal, interest and any related costs – depending on the Spanish region where the collateral is located). Stamp duty tax is not levied on ordinary pledges.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

As regards security documents that need to be filed within a public registry, the expected amount of time from the date the documents are notarised to the actual filing by the public registry is usually from 2 to 6 weeks, assuming the relevant security document was correctly drafted and no errors were found by the registry that need to be amended by the parties. As to related expenses, see question 3.9 above.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Regulatory or other consents with respect to the creation of security over real property or machinery would apply only in very limited cases, depending on the exact location of the asset, its nature and the parties involved (e.g. mortgage over administrative concessions).

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

In rem security interests securing a financing have, as a general rule and according to the Spanish Insolvency Act, the status of credits with special privilege. This privilege will be granted to claims arising under the credit facility as a whole, independent of the fact that it is of a revolving nature. Please see section 8 for a better understanding regarding the priority of such privilege.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

As explained in question 3.2 above, in Spain security interests are almost always notarised. To appear before a Spanish Notary, all parties must be duly empowered (they can act under powers of attorney, which in case of foreign entities, must bear an apostille in accordance with The Hague Convention).

Signature in counterparts is not used in Spanish law governed agreements. It is worth mentioning that all parties that are signatories to a Spanish notarial deed must have a Spanish Tax Identification Number (*Número de Identificación Fiscal* or "NIF"), even for non-resident parties and their non-resident attorneys (either

individuals or entities), which must request such number before the Spanish Tax Authorities (*Agencia Tributaria*).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Generally, Spanish law prohibits funds being provided (whether by way of loans, guarantees or any other kind of financial support provided before or after the acquisition) by a target company to a third party so that the third party is able to acquire shares or quotas issued by the target company, or by any other company in the group to which the target company belongs.

Financial assistance is currently prohibited in Spain for:

(a) *sociedades anónimas* (S.A.) (public limited companies): for their own shares or the shares of any direct or indirect parent company; and for

(b) *sociedades de responsabilidad limitada* (S.L.) (private limited companies): for their own units and the units of any member of their corporate group.

The consequence is that, if financial assistance is deemed to have been provided, any such financial assistance will be null and void.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Spain recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Spanish law does not recognise trusts as a legal figure. Therefore, security trustees, although used in transactions where foreign lenders are involved, are seldom used for the Spanish security package. Instead, lenders tend to appoint an agent for the Spanish security, which would hold the Spanish security in its own name and on behalf of the other lenders.

It is possible for the security agent to enforce claims on behalf of the lenders and the other secured parties, as long as each party grants a notarised power of attorney to the security agent, authorising it expressly to carry out the enforcement proceedings. However, authors and case law are inconsistent regarding the role of an agent acting on behalf of the syndicate of lenders upon enforcement.

5.2 If an agent or trustee is not recognised in Spain, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

As stated in question 5.1 above, the appointment of an agent for the Spanish security is usual market practice for cross-border financings.

5.3 Assume a loan is made to a company organised under the laws of Spain and guaranteed by a guarantor organised under the laws of Spain. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

In Spain, debt is traded through assignment (*cesión*), and due to the accessory nature of security interests under Spanish law, any assignment of a participation in a secured financing agreement would entail the proportional assignment of the security interests created to secure the full and punctual satisfaction of such financing agreement.

However, for certain types of collateral (mainly those acceding to registers such as mortgages and non-possessory pledges), in order to be effective against third parties, the assignment of the relevant collateral must be notarised and registered with the relevant public registry.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Generally speaking, interest paid by a Spanish borrower under a loan to a domestic lender (other than financial institutions) is subject to withholding tax at 21%. Likewise, interest income paid to a non-EU tax resident is subject to withholding tax at 21%, unless a lower rate applies under a tax treaty (treaty rates ranging between 5% and 15%). Interest payments to EU residents or EU permanent establishments (other than those residing in tax-haven jurisdictions) are not subject to withholding tax (irrespective of whether payments are made to a financial institution or a company).

On the other hand, proceeds of a claim under a guarantee or the proceeds of enforcing security are generally subject to withholding tax as if such payments were made by the borrower.

Also, since 2012 the Spanish Corporate Income Tax Act establishes some limitations to the deductibility of financial expenses:

(a) Financial expenses derived from intergroup indebtedness are not tax deductible if the funds are used to make capital contributions in other group entities or to acquire from other group entities shares in other entities, unless the taxpayer proves that there are valid economic reasons for doing so. Financial expense derived from indebtedness used for any other reasons is fully deductible, unless general anti-abuse clauses apply.

(b) Net financial expenses (financial expense minus financial income) exceeding 30% of the operating profit for the financial year are not tax deductible, with a minimum €1 million deductible amount guaranteed. Net financial expenses that, by application of the 30% limit, are not tax deductible, may be deductible in the following 18 financial years. If the 30% limit is not reached, the difference may increase the applicable limit for the 5 following financial years.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

As a Member State of the European Union, Spain benefits from the

free movement of capital within the EU, including exchange rate fluctuations and transaction costs. Therefore, Spain's EU membership represents an important part of its foreign policy.

Additionally, Spain has more than 85 income tax treaties currently in force, with the most remarkable treaty network with Latin American countries that reduce or eliminate the Spanish taxes payable to residents of treaty countries.

The main tax incentive is the Spanish international holding companies regime, (the "ETVEs"), nowadays a well-established legal framework that has turned Spain into one of the most favourable jurisdictions within the EU to channel and manage international investments. ETVEs can benefit from an exemption on inbound and outbound dividends and capital gains, as long as certain requirements are met. Since ETVEs are Spanish regular entities, they are treated like regular limited liability companies, and can therefore benefit from tax treaties signed by Spain, as well as from EU Directives.

Under Spanish law, there are no relevant additional taxes to foreign investments in addition to those that would apply to a Spanish investor.

6.3 Will any income of a foreign lender become taxable in Spain solely because of a loan to or guarantee and/or grant of security from a company in Spain?

No, under current Spanish Corporate Income Tax regulations, interest or fees to be paid to the lenders will not be subject to any withholding or deduction, provided that the lenders are lending entities or financial credit establishments entered on the special registries of the Bank of Spain with their registered office in Spain or entities resident in the European Union that have submitted certification of their tax residence.

None of the parties to a loan or guarantee and/or security from a company will be deemed as being domiciled, as being a resident or as having a permanent establishment in Spain solely due to entering into, or performing its obligations under, the aforementioned agreements.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

In order to obtain enforceability *vis-à-vis* third parties and benefit from summary proceedings (see question 7.3 below) a loan, a guarantee or a security document needs to be notarised, and eventually registered (depending on the asset).

For a better reference on notarial and registry fees, as well as stamp duty tax, please see question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

As a general rule, tax consequences do not differ depending on the tax residency and/or the applicable law of the borrower. As an exception, adverse tax consequences (e.g. documentation obligations) might arise where the borrower is a tax resident in a tax haven jurisdiction.

7 Judicial Enforcement

7.1 Will the courts in Spain recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Spain enforce a contract that has a foreign governing law?

Yes, courts in Spain recognise a foreign governing law in contracts, in line with Regulation (EC) No. 593/2008, of the European Parliament and of the Council of June 17, 2008, on the law applicable to contractual obligations ("Regulation Rome I").

Regulation Rome I has *erga omnes* effects, so that the foreign law chosen in the contract as the governing law can be from any country, irrespective of whether it is an EU Member State.

Courts in Spain will certainly enforce a contract that has a foreign governing law; however, the choice of the parties will not prejudice the application of provisions of Spanish law which cannot be derogated by agreement (public policy). Also, the content and validity of the foreign law must be proved in the proceedings; if the foreign law is not proved, the court will resort to Spanish law.

7.2 Will the courts in Spain recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

A distinction must be made between judgments rendered in English courts or courts of EU Member States and judgments rendered in New York ("NY") courts.

Regarding a judgment rendered in English courts, Council Regulation (EC) No. 44/2001 of December 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Regulation Brussels I") establishes that a judgment rendered in an EU Member State is to be recognised without special proceedings, in any other EU Member State, unless the recognition is contested. Under no circumstances can the merits of a foreign judgment be reviewed. A declaration that a foreign judgment is enforceable is to be issued following purely formal checks of the documents supplied.

A judgment will not be recognised if: (i) the recognition is manifestly contrary to public policy in the EU Member State in which recognition is sought; (ii) the defendant was not served with the document that instituted the proceedings in sufficient time and in such a way as to enable the defendant to arrange for his defence; (iii) it is irreconcilable with a judgment given in a dispute between the same parties in the EU Member State in which recognition is sought; or (iv) it is irreconcilable with an earlier judgment given in another EU or non-EU country involving the same cause of action and the same parties.

Regulation Brussels I does not apply to a judgment rendered in NY courts. In the absence of a multilateral or bilateral treaty between Spain and the United States addressing the matter, under the Spanish Civil Procedure Act, judgments rendered by US courts will have the same force as is given in the US to final judgments handed down in Spain. Spanish courts usually recognise judgments rendered in the US based on the positive reciprocity principle, and subject to the fulfilment of certain conditions.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Spain, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Spain against the assets of the company?

a) This depends primarily on whether the enforcement action is grounded on an executive title, such as public instruments, or on an ordinary title, such as private contracts.

Executive titles can be enforced directly, through summary proceedings, being a swift procedure that should not take more than 6 months. Otherwise, ordinary proceedings would be required to obtain a decision that can be enforceable (an average of 15 months is required to obtain an ordinary judgment).

b) Enforcement of an English court decision will follow the same proceeding as explained in point a), given that the judgment will be recognised without special proceedings. Enforcement of a US judgment would require prior *exequatur* proceedings (it takes on average between 6 and 9 months). Once the judgment has been recognised, enforcement will follow the same proceeding as explained in point a) above.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Enforcement of collateral security is typically carried out through a public auction, in the context of judicial or notarial proceedings. For notarial enforcements see question 8.4 below. Additionally, the enforcement of pledges over credit rights may also be achieved through set-off.

The rights derived from the relevant security can be judicially enforced either through declaratory civil proceedings or summary proceedings. The latter action is faster and more effective, while the former is costly and time consuming. However, to start summary proceedings certain requirements must be met, particularly, the determination of the due amount in accordance with the Civil Procedure Act.

Once the court has published a date for auction, the debtor will only be able to oppose foreclosure under limited circumstances, such as the prior extinction of the pledge, full payment of the secured obligation, or the existence of a material error.

Concerning the enforcement of pledges over shares, the Financial Collateral Directive was transposed in Spain by means of the Royal Decree Law 5/2005, a regime that only applies to obligations of a "financial" nature and which permits direct appropriation of the collateral by the creditor where the financial agreement expressly states so.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Spain or (b) foreclosure on collateral security?

Generally there is no distinction between domestic and foreign entities when it comes to foreclosing Spanish security.

7.6 Do the bankruptcy, reorganisation or similar laws in Spain provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

The most well-known of moratorium on enforcement of lender claims is the suspension of the enforcement proceedings due to the debtor's declaration of insolvency. In addition, since the recent Insolvency Act reform by Spain's Royal Decree-law 4/2014, of 7 March, the filing by the debtor of the protective shield of a "*pre-concurso*" (the so-called "5.*bis*" protection) also extends the moratorium of enforcement of lender claims since the date of such filing. Likewise, since such reform, individual enforcement proceedings by "financial debt creditors" ("*acreedores de pasivos financieros*") will not be able to start, and those in process will also be suspended, if it is proved that creditors representing at least 51% of the existing financial debt have engaged negotiations to reach a refinancing agreement and have committed to a standstill on enforcements.

If the lender is enforcing a mortgage or any other *in rem* right on assets connected to the debtor's business, suspension will last until a settlement with the creditors is approved or otherwise until one year has passed from the declaration of insolvency without beginning the process of the liquidation of the assets. If the assets are connected to the debtor's business, the suspension will be lifted in any event.

Enforcement of any other claim not related to an *in rem* right will be terminated and the credit will be paid according to the settlement with the creditors or with the liquidation of the business' assets. In relation to the enforcement of collateral securities, please see question 8.1 below.

In addition, the Civil Procedure Act provides the moratorium on enforcement on the grounds of criminal procedure may halt the enforcement and performance of such agreements until the criminal court issues a final resolution in such proceedings.

7.7 Will the courts in Spain recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes, Spain has been a party to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") since 1977, and it is therefore subject to recognition and enforcement of foreign arbitral awards in the terms established therein.

Given that Spain did not make any reservation to the New York Convention, its proceeding is applied to the enforcement of all arbitral awards, including those rendered in countries that did not sign the convention. The Spanish Arbitration Act specifically establishes that the exequatur of foreign awards will be governed by: (i) the New York Convention, without prejudice to the provisions of other, more favourable international treaties on the granting of foreign awards; and (ii) the proceedings established in the civil procedural system for judgments handed down by foreign courts.

Spanish courts will not re-examine the merits of the case. However, an arbitral award might not be recognised if certain requirements are not met (e.g. the arbitration agreement is not valid, irregularity in the composition of the arbitration authority or in the arbitral procedure, etc.). Furthermore, an award will not be recognised if the subject matter cannot be settled by arbitration in Spain or the recognition is contrary to public policy of Spain.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

As a general rule, as from the declaration of insolvency of a company, and since the recent Insolvency Act reform by Spain's Royal Decree-law 4/2014, of 7 March, as from the filing by the debtor of a "*pre-concurso*" or "5.*bis*" protection or if at least 51% of the "financial debt creditors" have engaged negotiations to approve a refinancing agreement and have a standstill agreement in place, secured lenders will be prevented from enforcing their security (as detailed in question 7.6 above).

Exceptionally, the above standstill period will not apply if the insolvency judge determines that the assets which constitute the object of security are not devoted to the business activity of the insolvent company, do not constitute a productive unit of such company or, eventually, such asset is not necessary for the continuity of the business operations.

At any time during the standstill period the insolvency administrator may decide to satisfy immediately any due amounts to the secured lenders, in order to avoid the relevant security being enforced.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The creditors' rights are divided into privileged, ordinary and subordinated. Aside from that ranking, there is a special and prioritised category of credits, namely credits against the insolvency estate (*créditos contra la masa*), which generally arise after the declaration of insolvency; such credits are not subject to ranking or acknowledgment and, in principle, must be paid by the insolvency administrator when they fall due.

Any claims of secured creditors will be qualified as "privileged claims" up to the value of the collateral on which they fall, any excess being qualified as an "ordinary claim" or, in the case of interest claims, as a "subordinated claim".

It may be possible to challenge security created "to the detriment of the insolvency estate" within the 2 years preceding the declaration of insolvency, even in the absence of fraudulent intent. However, the so-called "refinancing agreements" (and their related security) complying with certain requirements, such as certain quorum of consenting creditors and favourable report of an independent expert, may not be challengeable.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Governmental entities of any type (whether territorially based – such as national, regional, municipal authorities – or of a functional nature) will not be subject to the Insolvency Act. However, companies directly or indirectly controlled by governmental entities will also be subject to general bankruptcy laws.

Additionally, certain types of companies (such as banks and other credit entities, financial services companies or insurance companies) are subject to specific insolvency regulations, although the composition, appointment and operation of the insolvency administration will still be regulated by the Insolvency Act.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes, out-of-court foreclosure, available for certain types of security, is typically carried out by a Notary Public and takes the form of a public auction. The terms and conditions of such auction are loosely regulated in the law and hence they usually follow the provisions agreed by the parties in the relevant security document. For any unregulated aspects, the Notary Public tends to follow equivalent provisions applicable to judicial enforcements.

In the case of security over bank accounts or listed securities, particularly when the secured obligation consists of cash settlement agreements or derivative contracts, secured lenders may appropriate directly and immediately the secured assets, without conducting a public auction. Equally, certain regional laws (such as Catalan law) expressly permit either private sales or, in the case of highly liquid security, appropriation by set-off.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Spain?

The submission by the parties to a foreign jurisdiction is valid, binding and enforceable in Spain: (i) in the case of foreign courts covered by conventions, in accordance with the provisions of Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters or the applicable bilateral convention; and (ii) in the case of foreign courts not covered by Brussels/Lugano or bilateral conventions, in accordance with the domestic conflict of law regulations, which would reject the selection of foreign courts in cases where the exclusive jurisdiction of the Spanish courts under the Spanish Law of the Judiciary is violated.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Spain?

Under Spanish law, the waiver of immunity is legally valid and enforceable, unless it relates to certain entities which are affected by special immunities, such as (i) persons or entities under public law, and assets owned by such entities, (ii) autonomous organisations, semi-public entities or agencies, (iii) diplomatic and consular entities, and (iv) certain cooperatives. Further, the assets affected to a public service (such as the assets of an administrative concession) may also be subject to immunity, notwithstanding being operated by private entities.

10 Other Matters

10.1 Are there any eligibility requirements in Spain for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Spain need to be licensed or authorised in Spain or in their jurisdiction of incorporation?

There is no need for foreign lenders to be resident, licensed, qualified or entitled to do business in Spain to execute or enforce any rights in Spain under financing agreements or collateral agreements, provided that in their jurisdiction of incorporation they are qualified to do so (generally, there is no distinction between domestic and foreign creditors for the purposes of granting loans or security).

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Spain?

Most of the relevant issues have already been covered in the previous sections.

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Switzerland

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Switzerland?

The Swiss lending market has not had its most active year. In line with a general trend, many corporates considered financing by means of either bonds or notes. In part, this was due to the fact that some banks were not willing to lend large amounts of money due to regulatory capital requirements. Only in the second half of 2013 did the syndicated lending market become more active again, helped by banks becoming more comfortable again with lending to corporates.

Given the large engagement of Swiss banks in residential lending and following public discussions as to whether there is a bubble in the Swiss (residential) real estate market, the rules for residential mortgages have become more strict (10% equity requirements).

1.2 What are some significant lending transactions that have taken place in Switzerland in recent years?

In recent months the Swiss lending market has not seen very many large transactions. An example, of such a transaction is the Swiss-based Glencore Xstrata (listed in London and Hong Kong since 2011) refinancing credit facilities worth a total of over USD 17 billion. Several Swiss-based commodity-trading companies also entered into larger financings.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, a Swiss company can guarantee borrowings of one or more other members of its corporate group. Guarantees are widely used in secured lending transactions. According to Swiss law, a guarantee is a promise to another person that a third party will perform and that the guarantor will compensate for the damages caused as a result of the third party's failure to perform. There are no specific requirements as to the form of the contract. Once validly concluded, the existence of a guarantee is, in principle, independent from the existence of the obligation guaranteed.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Such concerns exist in certain circumstances.

First of all, a director of a Swiss company must act in the interest of the company. Non-compliance with such duty may lead to director liability. Further, Swiss corporate law does not recognise the overall legal concept of integrated company groups. Consequently, the board of directors of a Swiss group company may not take a consolidated view and fulfil its fiduciary duty merely by considering the overall interests of the entire group. It must rather assess and secure the financial status of the Swiss company on an independent and standalone basis, focusing on the company's distinct identity and status as a legally independent corporate entity.

In case the granting of a guarantee leads to so-called 'financial assistance', guarantees might not be enforceable and directors might become liable. Please refer to section 4 (financial assistance).

2.3 Is lack of corporate power an issue?

Yes, please see the answers to question 2.2 above and section 4 below.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Generally no. However, in the case of financial assistance, it is customary practice in Switzerland to require formal approval of upstream or cross-stream guarantees (which potentially qualify as constructive dividends) not only by the board of directors, but also by the shareholders of the Swiss guarantor. Please see the answers in section 4.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

This is the case for financial assistance. Please see the answers in section 4. An upstream guarantee may not be given in an amount exceeding the guarantor's so-called 'free equity'.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, there are not.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

The most common types of collateral in Switzerland are security in the form of a pledge or a transfer of ownership (for security purposes) of real estate, tangible moveable property, financial instruments, claims and receivables, cash and intellectual property.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Different types of security can theoretically be contained in a single general security document. In practice, each type of security is usually documented in a separate agreement, particularly if a specific security must be documented in a public deed.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, collateral security can be taken over real property.

The definition of real estate under Swiss law includes: edified and unedified land (that is, land with or without buildings); a flat or floor of a building; and the right to build on a track of land for a limited period of time (*Baurecht*).

The following forms of security are commonly granted over immovable property:

Mortgage assignment (*Grundpfandverschreibung*). This is to secure any kind of debt, whether actual, future, or contingent. The creditor of a claim secured by a mortgage assignment can demand an extract from the land register.

Mortgage certificate (*Schuldbrief*). A mortgage certificate establishes a personal claim against the debtor and is secured by a property lien. The mortgage certificate constitutes a negotiable security, which can be pledged or transferred for security purposes and is issued either in bearer form, in registered form or as a paperless version. An outright transfer has certain advantages in case of the security provider's bankruptcy and in multi-party transactions. Therefore, practitioners in cross-border banking transactions often prefer granting an outright transfer of a mortgage certificate instead of a pledge.

In both forms of security, the secured party's claims can be backed by property belonging to the borrower or a third party (third party security), subject to the rules on financial assistance and similar limitations (see question 2.2 above).

Mortgage assignments and mortgage certificates are created and perfected by the parties entering into an agreement regarding the creation of the security and finalised by means of a notarised deed and an entry into the land register.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, collateral security can be taken over receivables and rights under contracts in general. Common types of claims and receivables over which security is granted are: rights under contracts in general (existing and future); trade account receivables (existing and future); and balances in bank accounts.

Claims and receivables can be pledged or assigned for security purposes. The granting of security is based on the same principles as for security over movable property (see question 3.7) and, in particular, requires a valid agreement between the security provider and the security holder.

The security agreement must be in writing. There is no transfer of possession. In addition, an assignment of receivables or other claims requires that the assignor sign the assignment itself and not just the related undertaking in the assignment agreement. Perfection of a first-ranking security also requires that the claims or receivables be assignable under the governing law of those claims or receivables.

If a Swiss bank account (that is, the balance of the account standing to the credit of the security provider) is used as collateral, the Swiss bank's business terms usually provide that the bank has a first-ranking security interest over its client's account. A third party therefore only gets a second-ranking security interest over a Swiss bank account, unless the bank waives its priority rights. To create and perfect a second-ranking security interest, the bank must be given notice.

In the case of assignments, the third party debtors of the receivables are either: immediately notified of the assignment (open assignment (*offene Zession*)); or notified only in case of default of the assignor or other events of default (equitable assignment (*Stille Zession*)).

On notification, the assignee, as the new creditor of the assigned claims, can directly collect the receivables from the third party debtors. Because Swiss law also allows the assignment of future receivables arising before a potential bankruptcy of the assignor, assignments are commonly used in practice. If all of the present and future trade receivables are taken as security, notice of the creation of the security interest is usually only given to the relevant debtor if there is a default. Until this notification, a *bona fide* debtor can validly discharge its obligation to the security provider.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. See question 3.4 above.

3.6 Can collateral security be taken over shares in companies incorporated in Switzerland? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, collateral security can be taken over shares in companies incorporated in Switzerland. Shares can be in bearer, registered or dematerialised form. The perfection formalities depend on the form of the shares. Security can be validly granted under a New York or English law governed document. This is, however, not recommended due to conflict of law issues.

Shares can be pledged, transferred outright and/or assigned for security purposes.

Creation of a security is always based on a valid security agreement. Perfection of a security, however, differs according to the type of shares: certificated shares require possession of the certificates to be transferred to the security holder. Additionally, registered certificates must be duly endorsed and transferred to the security holder. Uncertificated financial instruments must be pledged, transferred or assigned in writing. Since 1 January 2010, the Federal Intermediated Securities Act has set out new rules in relation to intermediated securities (including the granting of security over intermediated securities).

A security over intermediated securities can be granted in one of the following ways: (i) by transferring the intermediated securities to the securities account of the secured party. This requires the security provider to give instructions to the bank to effect the transfer; and (ii) by crediting the intermediated securities to the securities account of the secured party. Alternatively, they can be granted by an irrevocable agreement (a so-called control agreement) between a security provider and its intermediary that the intermediary will comply with any instructions from the secured party. The security provider can, through the control agreement, grant a security right in specified intermediated securities, all intermediated securities in a securities account or a certain quota of intermediated securities in a securities account, determined by value.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Inventory is a form of tangible moveable property. Tangible moveable property comprises all property that is not classified as immovable. Security over tangible property is commonly granted in the form of a pledge or an outright transfer.

The pledge is the most widely used type of security. A pledge entitles the lender to liquidate the pledged property if the debtor defaults, and to apply the proceeds in repayment of the secured claims.

In case of an outright transfer, the transferee acquires full title in the transferred assets, but can, under the terms of the transfer agreement, only use its title to liquidate the assets on the debtor's default to apply the proceeds to the repayment of debt. Although the transfer has certain advantages over a pledge on the bankruptcy of a Swiss security provider and in multi-party transactions, its use is restricted by increased liability concerns.

Perfection of a pledge or an outright transfer requires both: a valid security agreement; and the secured party to obtain physical possession of the relevant assets. The security holder does not have a security interest over the collateral as long as the security provider retains possession and control over it (certain movable property, such as aircraft or ships, is not subject to this principle).

Certain movable assets are subject to particular rules. The most important are aircraft, ships and railroads where the security is perfected by the entry of the security in the respective register. In addition, the Federal Intermediated Securities Act sets out specific provisions for the granting of a security over intermediated securities.

Swiss law generally does not recognise the concept of a floating charge or floating lien. Therefore, taking a security over inventory, machinery or equipment (often used as collateral in other jurisdictions) is not practical under Swiss law, at least in relation to assets necessary for running the pledgor's business. The requirement of physical control over the relevant assets is generally too burdensome, costly and unmanageable.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

There are no particular company law rules on a Swiss company granting collateral to secure debt used to purchase its own shares or the shares of a parent company or of a subsidiary. The company itself must not purchase more than 10% of its own voting shares.

The granting of security by a Swiss company to secure debt used to purchase its own shares can result in Swiss income tax being levied on the party selling the shares. In addition, the restrictions under corporate benefit rules (see section 4) apply to the granting of any upstream security (for the benefit of a direct or indirect parent company) and/or any cross-stream security (for the benefit of another group company not fully owned by the party providing the security). This is irrespective of the purpose of the secured obligations.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The granting or enforcement of a guarantee or security does not in itself trigger any Swiss taxes. However, certain transactions may be subject to Swiss tax.

If loans are secured over real estate, the following fees may be payable depending on the transaction: notaries' fees; registration fees (land register); and cantonal and communal stamp duties. The rates depend on the security's face value and the location of the real estate. The rates for fees vary widely from canton to canton.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Generally, filing, notification or registration of security interests is done within a couple of days. However, in case of a mortgage over real estate, the notarisation and, in particular, the entry into the land registry might take some time. Similarly, in case of registration of a pledge over intellectual property rights, such registration might take some time.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Generally, there are no regulatory consents required with respect to the creation of security. In case of a regulated entity granting security over certain of its assets, consents might be required.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

In case of a mortgage, the mortgage agreement needs to be notarised.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Yes, there are general limitations as to such upstream or cross-

stream guarantees or security. The respective limitations apply in relation to guarantees or a security interest that guarantees or secures the finance or refinance of an acquisition of the shares of the company or shares of any company which directly or indirectly owns shares in the company or shares in a sister subsidiary.

Under Swiss law, it is market practice to deal with financial assistance as follows:

So-called upstream or cross-stream guarantees, i.e., guarantees granted to parent or affiliated companies (other than its direct and/or indirect subsidiaries), must generally meet arm's length conditions, as they would be requested by an unrelated third party, such as a bank, when granting the same guarantee. This means, generally, that: (a) the Swiss guarantor should carefully consider the third party's creditworthiness, as well as its willingness and ability to fulfil its obligations that shall be guaranteed; (b) the upstream guarantee should have customary terms of duration, termination and amortisation; (c) the upstream guarantee should provide for adequate interest to be paid regularly (and not just accrued); and (d) the upstream guarantee should be adequately secured (e.g., by the borrower providing a pledge or another form of security).

Non-compliance may notably lead to the invalidity of an upstream guarantee, as well as to directors' and officers' personal liability. Further, non-compliance may have adverse tax implications and may even, under certain conditions, qualify as a criminal offence (e.g., creditor preference or disloyal management) or as a fraudulent conveyance under the applicable provisions of Swiss bankruptcy law.

The following issues should be considered when granting a guarantee:

Corporate purpose: As a general rule, a commitment entered into on behalf of a Swiss company is binding on the company, to the extent it falls within the company's corporate purpose as set forth in the articles of incorporation. If that is not the case, the commitment in question could be deemed *ultra vires* (i.e., beyond the scope of its powers) and thus null and void from the outset. The fulfilment of this prerequisite is often questionable for upstream guarantees which are not entirely on arm's length terms. In case of doubt, it is advisable for the Swiss guarantor to amend its articles of incorporation by extending the article on corporate purpose to provide explicitly for the granting of financial assistance to group companies, including through upstream guarantees. In addition, it may be advisable to insert in the articles of incorporation a clear reference to the fact that the Swiss guarantor is part of a particular group of companies.

Adequate risk diversification: As a general rule, the board of directors of a Swiss company must adhere to the principle of adequate risk diversification. When granting an upstream guarantee, the board of directors must thus avoid an undue risk concentration by a substantial portion of the company's balance sheet assets consisting of such a guarantee to the benefit of a third party.

Guarantor's free equity: Unless it clearly meets the arm's length test, an upstream guarantee may not be given in an amount exceeding the guarantor's so-called 'free equity'. Free equity corresponds to the amount of the guarantor's total equity (as shown in the statutory balance sheet), minus 150% (or, in the case of a holding company, 120%) of the nominal issued share capital, minus any remaining special reserves which are not available for dividend distributions, such as any special paid-in surplus reserve.

An upstream guarantee exceeding the free equity threshold could be deemed to be an unlawful return of the shareholder's capital contributions and to violate the statutory limitations on the use of the company's legal reserves. As a consequence, such upstream guarantee could be challenged by any party as being null and void from the outset. This is particularly true where the guarantee was fictitious or where it was clear from the beginning that the borrower would not be in a position to fulfil its obligations when due.

Constructive dividend: Under Swiss corporate law, shareholders and related parties are obliged to return any benefits they receive from a Swiss company if those benefits are clearly disproportionate to the consideration received by the company, as well as to its financial status. An upstream guarantee which does not clearly have arm's length terms could be deemed as a constructive dividend. As a consequence, the board of directors of the guarantor would be forced to demand immediate repayment of the guarantee irrespective of its term. Characterisation as a constructive dividend would also lead to adverse tax consequences.

In this context, it has become customary to require formal approval of upstream guarantees (which potentially qualify as constructive dividends) not only by the board of directors, but also by the shareholders of the Swiss guarantor. However, this formal step as such does not necessarily prevent the upstream guarantee from being deemed as a constructive dividend.

Directors' and officers' duty of care: In general, the directors and the senior management of a Swiss company may become personally liable to the company, as well as to its shareholders and creditors, for any damage caused by an intentional or negligent violation of their duties. Such liability may also be incurred by the Swiss company's parent (and its corporate bodies) if the latter is deemed to be a *de facto* corporate body of the Swiss company. In addition, according to the Swiss Withholding Tax Act, directors and officers may become personally as well as jointly and severally liable for unpaid withholding tax obligations of a Swiss company which is liquidated or becomes bankrupt. This liability is stricter than the general directors' and officers' liability insofar as the officers and directors, in order to avoid liability, must prove that they have done everything which could reasonably be expected from them to ascertain and fulfil the company's tax payables.

Withholding and income tax implications: Ordinary, as well as hidden, profit distributions by resident companies are subject to Swiss withholding tax (currently at 35%) at source. Subject to certain conditions and upon request, the tax may be fully or partially refunded to the recipient of the profit distribution. For non-Swiss recipients, a refund may only be granted based on a double tax treaty between Switzerland and the country of residence of the recipient. Further, profit distributions are not income tax deductible – they are added back to the taxable profit of the distributing company and thus become subject to corporate income tax. From a tax standpoint, a constructive dividend is always assumed when a company executes non-arm's length transactions with related parties. This is also the case with regard to upstream guarantees.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Switzerland recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

In Switzerland, the agent concept is recognised and frequently used for syndicated facilities and agency arrangements governed by Swiss or foreign law.

As for trustees, a substantive trust law does not exist in Switzerland. Therefore, it is not possible to set up a trust under Swiss law. Since July 2007, the Hague Convention on the Law Applicable to Trusts

and on their Recognition 1985 (Hague Trust Convention) is applicable in Switzerland. Certain provisions of the Swiss Private International Law Act (PILA) transpose the Hague Trust Convention into national law. These provisions essentially allow recognition of foreign trusts (as defined in the Hague Trust Convention) in Switzerland. The relevant PILA provisions grant a settlor unfettered freedom to choose the law applicable to the trust. The trust can also contain a choice of jurisdiction, which must be evidenced in writing or in any equivalent form. A Swiss court cannot decline jurisdiction if either a party, the trust or a trustee has their domicile, place of habitual residence or a place of business in the canton of that court or a major part of the trust assets is located in Switzerland.

A decision by a foreign court on trust-related matters is recognised in Switzerland if it is made in any one of the following cases: (i) by a validly selected court; (ii) in the jurisdiction in which the defendant has its domicile, habitual residence or establishment; (iii) in the jurisdiction where the trust has its seat; and (iv) in the jurisdiction whose laws govern the trust. The decision is recognised in the country where the trust has its seat, provided the defendant was not domiciled in Switzerland.

Generally, a security trustee can enforce its rights; however, this depends on the nature of the security:

Pledge: Swiss law is based on the doctrine of accessory (*Akzessorietätsprinzip*), meaning that the secured party must be identical to the creditor of the secured claim. A pledge cannot be vested in a third party acting as a security holder in its own name and right; instead, the pledge must be granted to the lender or, in the case of syndicated loans, all of the lenders as a group. The lender(s) can, however, be represented by a third party acting in the name and on behalf of the lender(s).

Security transfer or security assignment: The doctrine of accessory (see above) does not apply. For this type of security, therefore, a security trustee can enter into the security agreement and hold the security in its own name and on its own account for the lender(s).

Intermediated securities: It is not clear yet whether the doctrine of accessory applies under the Federal Intermediated Securities Act. It is probable that it will not apply where securities are transferred to the secured party's account, but it may apply where a control agreement is entered into.

5.2 If an agent or trustee is not recognised in Switzerland, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

The agent and/or the trust concept is recognised in Switzerland.

5.3 Assume a loan is made to a company organised under the laws of Switzerland and guaranteed by a guarantor organised under the laws of Switzerland. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

A transfer from Lender A to Lender B is only possible if such transfer is not prohibited under the guarantee. Legally, such transfer will be effected by an assignment.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

The granting of security upstream or cross-stream on terms other than arm's length may trigger a 35% dividend withholding tax which must be deducted from the gross payment made.

Dividend withholding tax is fully recoverable if the recipient is a Swiss-resident entity. Non-resident companies with a permanent establishment in Switzerland can claim a full refund, if the relevant asset is attributable to the Swiss permanent establishment. Non-resident companies can claim a full or partial refund of the dividend withholding tax, based on an applicable double tax treaty between their country of residence and Switzerland. If no double tax treaty applies, the dividend withholding tax may become a final burden for the recipient (subject to any measures required in the country of residence of the recipient).

The Swiss Confederation and the cantons or communes levy an interest withholding tax on interest which is secured by a mortgage on Swiss real estate. The combined rate of the tax varies between 13% and 33%, depending on which canton the real estate is located in. This interest withholding tax is reduced to zero under many double tax treaties, including the ones with the US, the UK, Luxembourg, Germany and France.

Further, the transfer of ownership of a bond, note or other securities to secure a claim may be subject to securities transfer stamp tax of up to 0.3%, calculated on the transaction value, if a Swiss bank or other securities dealer as defined in the Swiss stamp tax law is involved as a party or intermediary. The tax is paid by the securities dealer and may be charged to parties who are not securities dealers. If no securities dealer is involved, no transfer stamp tax will arise.

In addition to this stamp tax, the sale of bonds or notes by or through a member of the SIX Swiss Exchange may be subject to a minor SIX Swiss Exchange levy on the sale proceeds.

The sale of goods for consideration in the course of a business is generally subject to VAT. The standard tax rate is currently 8%. Most banking transactions, including interest payments and transactions regarding the granting of security, are exempt from VAT. However, corresponding input taxes on related expenses are not recoverable.

VAT on the sale of real estate is only chargeable if the seller opts for tax. The option is permissible for buildings (but not for land) unless the new owner uses the buildings only for private purposes.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no specific incentives of such types and no specific taxes that apply to foreign lenders.

6.3 Will any income of a foreign lender become taxable in Switzerland solely because of a loan to or guarantee and/or grant of security from a company in Switzerland?

Generally, the granting or taking of security between related parties

must be at arm's length. This may mean that a security commission or guarantee fee is payable to the security provider. This commission or fee can be subject to income tax for a Swiss security provider as part of his overall earnings. The transfer of ownership of an asset to secure a loan may trigger corporate income taxes on the net income as part of the overall earnings of a Swiss security provider. Income tax rates depend, among other things, on the place of incorporation or residence of a person, entity or permanent establishment.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Please see question 3.9.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in Switzerland recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Switzerland enforce a contract that has a foreign governing law?

Yes. Subject to certain reservations, courts in Switzerland will generally recognise a governing law clause in a contract and will generally enforce a contract that has a foreign law governed contract.

The rules relating to conflicts of law applicable in Swiss courts are set out in the PILA. Generally, a contract is governed by the law chosen by the parties. The choice of law must be expressly and clearly evident from the terms of the contract or the circumstances.

These rules apply to different forms of security in the following way:

Acquisitions or losses of rights *in rem* in movable goods. These are governed by the *lex rei sitae*, that is, the law of the country of the asset's location at the time of the event giving rise to that acquisition or loss. The PILA allows the parties to subject the acquisition and loss of those rights to the law governing the underlying legal transaction (see above). However, that choice of law cannot be invoked against third parties who can rely on the *lex rei sitae*.

Outright transfers of a claim and/or of uncertificated securities effected by way of security. These assignments are subject to the law (PILA) chosen by the parties or governing the claim, in the absence of a choice. However, that choice of law cannot be invoked against the debtor of the claim and the issuer of uncertificated securities without the debtor's prior consent.

Pledges of securities and debts. If the parties have not chosen the applicable law, the pledge of securities and debts is not governed by the *lex rei sitae* but by the law of the pledgee's domicile. (However, if the parties make a choice of law, it cannot be invoked against third parties (see above).) Irrespective of the law applicable between the parties, the only law which can be invoked against the issuer of a security or the debtor of a claim is the law governing the pledged security or right.

Specific rules apply to intermediated securities. The law applicable to dispositions over intermediated securities, as well as further rights to such intermediated securities, is the law chosen by the parties to the relevant account agreement (Hague Convention on Intermediated Securities). However, this law can only apply if the relevant intermediary has an office (as described in the Hague Convention on Intermediated Securities) in that jurisdiction at the time the agreement is entered into. Otherwise, the applicable law is the law of the jurisdiction in which the intermediary's office, with which the relevant account agreement was entered into, is located.

7.2 Will the courts in Switzerland recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

A final judgment obtained in New York or English courts is amenable to recognition and enforcement in the courts of Switzerland according to (i) the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters dated 30 October 2007, (ii) such other international treaties under which Switzerland is bound, or (iii) PILA, provided that the prerequisites of the Lugano Convention, such other international treaties or the IPLA, as the case may be, are met.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Switzerland, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Switzerland against the assets of the company?

In case the guarantor is in possession of a so-called '*Rechtsöffnungstitel*', i.e. if the debtor recognised in a written document that it owes the amount to the guarantor, the guarantor's rights might get enforced in summary proceedings which may take two to three months. In the more likely case that no such '*Rechtsöffnungstitel*' is available, the guarantor will have to go through normal court proceedings. A judgment might be rendered within one year (first instance).

The latter is true also in case (b) if a foreign judgment needs to be enforced.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Under Swiss law, it is possible that in the security agreement the parties mutually agree that a pledgee take over the pledge in case of enforcement ('*Selbsteintritt*') and/or that the pledgee is entitled to sell the pledge ('*Privatverwertung*'). In case there is no such agreement and/or in case of formal bankruptcy proceedings, the enforcement of collateral will take place by public auction in accordance with the Swiss procedural rules. The Swiss bankruptcy law foresees several different time lines depending on the type of collateral (movables, real estate, etc.).

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Switzerland or (b) foreclosure on collateral security?

No, they do not.

7.6 Do the bankruptcy, reorganisation or similar laws in Switzerland provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Generally, in the case of bankruptcy, pledged assets form part of the bankrupt estate. As a result, the private enforcement of pledged assets is no longer permitted and enforcement can only occur according to the Debt Enforcement Act. Intermediated securities traded on a representative market are not subject to this restriction, and private enforcement remains possible.

The pledgee's priority rights remain effective, and the proceeds from the sale of the pledged assets in the bankruptcy proceedings are first used to cover the claims secured by the pledge. If the proceeds from the sale of the pledged assets exceed those secured claims, the surplus is available for distribution to other creditors.

All claims against the bankrupt company become due at the time the bankruptcy is declared and the enforcement of all claims occurs in accordance with the procedures prescribed by the Debt Enforcement Act.

As to moratorium, Swiss law provides for company rescue procedures (*Nachlassverfahren*) in the Debt Enforcement Act. The rescue proceedings can be started by the company or in certain circumstances by a company's creditor. In those proceedings, the competent court can grant a moratorium (*Nachlassstundung*). A moratorium may, if certain conditions are fulfilled, lead to a composition agreement (*Nachlassvertrag*) that is binding on all creditors and affects the creditors' unsecured claims. For a composition agreement to be effective, it must be approved by at least a majority of the creditors holding two-thirds of all the debts or a quarter of the creditors holding three-quarters of the debt, and the competent bankruptcy court.

If a moratorium is granted by the competent court, the security granted by the company is not directly affected. However, as a rule, enforcement proceedings for the security cannot be started or continued as long as the moratorium is in effect. Private enforcement (see question 8.4) should still be possible and not be affected by a moratorium. If the rescue proceedings result in a composition agreement, the security granted by the company will not be affected by this. A composition agreement does not affect security granted by the company.

7.7 Will the courts in Switzerland recognise and enforce an arbitral award given against the company without re-examination of the merits?

An arbitration award rendered against a Swiss company in an arbitration proceeding is generally enforceable in Switzerland according to and subject to the New York Convention of 10 June 1985 on the recognition and enforcement of foreign arbitral awards.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

All claims against the bankrupt company – as well as claims resulting from a guarantee – become due at the time the bankruptcy is declared and the enforcement of all claims occurs in accordance with the procedures prescribed by the Debt Enforcement Act.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The Debt Enforcement Act provides, in connection with bankruptcy and composition of a security provider, that a transaction is voidable if any of the following apply:

The security provider or the guarantor disposes of assets for free or for inadequate consideration (not at arm's length) in the year before the adjudication of bankruptcy or an equivalent event.

The security provider repays debts before they become due, settles a debt by an unusual means of payment or grants collateral for previously unsecured liabilities, which the security provider was not obliged to secure, in the year before the adjudication of bankruptcy or an equivalent event, provided that both the security provider was overindebted (i.e., its liabilities exceeded its assets) at that time and the secured party was aware of the overindebtedness of the security provider. A *bona fide* secured party is therefore protected. However, the law presumes the secured party's knowledge of the security provider's overindebtedness, so the secured party bears the burden of proof in relation to his good faith.

The granting of security by the security provider (or the granting of the guarantee) occurred in the five years before the adjudication of bankruptcy proceedings or an equivalent event, provided that the security provider intended to disadvantage or favour certain creditors or should reasonably have foreseen that result and the security provider's intent was, or must have been, apparent to the secured party.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Under Swiss law, it is not possible to start debt enforcement proceedings against Swiss municipalities ('*Gemeinden*') with the aim of inducing bankruptcy. In accordance with the applicable ordinance on debt enforcement, only enforcement proceedings on the enforcement of collateral are possible against Swiss municipalities.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

The conditions under which security (including guarantees) can be enforced are determined by general principles of law, as well as by the specific provisions of the security agreement. This applies to loans, guarantees, pledged assets and assets transferred by way of security. For a secured party to be permitted to enforce security, the secured party must have a secured claim, and this claim must be due. The relevant security agreement may set out additional conditions for the enforcement of the security. Usually, security agreements refer to the occurrence of an event of default, as specified in the credit agreement governing the secured loan, as a condition for enforcing the security.

Guarantees under Swiss law are basically independent from the underlying claim. Therefore, it is not a requirement for the enforcement of a guarantee that an underlying claim must exist or be due (in contrast to pledges). It is sufficient that the conditions for enforcement set out in the guarantee are fulfilled. However,

depending on the circumstances, the enforcement of a guarantee where there is no underlying claim may constitute an abuse of rights, which is not protected under Swiss law.

In the case of pledged assets, there are two main forms of enforcement, namely by way of a private enforcement and under the rules of the Debt Enforcement Act. Private enforcement is generally only permitted where the parties have agreed to this in advance, for example, in the security agreement. Private enforcement is possible in relation to all forms of assets, but in practice mainly occurs in connection with movable assets. Private enforcement can take place by a private sale or a public auction or, in relation to assets, the value of which can be objectively determined (for example, listed securities), the pledgee itself purchasing the pledged assets, and applying the proceeds to its claims (*Selbsteintritt*). For securities over intermediated securities, as a matter of law, private enforcement does not need to have been agreed between the parties but is only permitted in respect of intermediated securities that are traded on a representative market. Pledges over intermediated securities can also be enforced privately on the bankruptcy of the security provider. This is in contrast to pledges over any other assets.

In all forms of private enforcement the pledgee must protect the interests of the pledgor and, in particular, must obtain the best price possible in the sale of the pledged assets, fully document the enforcement and provide the documentation to the pledgor and return any surplus remaining after the application of the proceeds to the secured debt to the pledgor.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Switzerland?

Basically, yes.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Switzerland?

A sovereign entity is either acting with its so-called administrative assets or with its financial assets. The administrative assets are the assets that directly serve the administrative tasks of an administration. The financial assets do not directly serve such purpose. If a sovereign entity is entering into agreements concerning its financial assets, it may validly waive sovereign immunity because in such cases the sovereign entity is acting as a normal third party. In the case of administrative assets, a sovereign entity may also waive sovereign immunity; however, in extreme cases (e.g. public policy issues) such waiver might be doubtful.

10 Other Matters

10.1 Are there any eligibility requirements in Switzerland for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Switzerland need to be licensed or authorised in Switzerland or in their jurisdiction of incorporation?

No, there are no eligibility requirements in Switzerland for a lender to a company. Any person can lend to a third party.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Switzerland?

No, there are not.

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Taiwan

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Taiwan?

The Central Bank of the Republic of China (Taiwan) ("CBC") and the People's Bank of China signed a memorandum of understanding regarding the clearing of New Taiwan Dollars, Taiwan's lawful currency, and Yuan, China's lawful currency, in August 2012. It is anticipated after the signing of the memorandum that more syndicated loans denominated in Yuan will be extended by Taiwanese banks to Taiwanese companies and individuals.

As for local lending markets, the price of real property in Taiwan has been soaring over the past decade. In order to cool the real property market, the CBC has imposed restrictions on banks lending to real property developers for their financing of the acquisition of land and construction of buildings.

Further, as the funding costs in Taiwan are relatively low compared to those in PRC and Hong Kong, increasing numbers of syndication loans were granted to foreign borrowers, especially enterprises incorporated in PRC and Hong Kong, which provides a win-win solution for both foreign enterprises who can borrow money at lower cost and banks who can earn higher profits from this business.

1.2 What are some significant lending transactions that have taken place in Taiwan in recent years?

(1) On January 8, 2010, Bank of Taiwan, acting as the facility agent of eight Taiwan prestigious financial institutions, entered into a syndicated loan agreement with Taiwan High Speed Rail Corporation ("THSRC") in the amount of NT$382 billion (US$12.73 billion approximately), marking the largest syndicated loan in the banking history of Taiwan. The deal not only reached a new milestone in the syndicated loan sector in terms of deal amount but also helped ensure the continuance and prosperity of the most crucial public project, i.e., the Taiwan high speed rail road, in Taiwan.

(2) The Bank of Taiwan took the lead in extending a syndicated loan in the amount of US$125 million to China Huiyuan Juice Group, China's leading juice and beverage producer, at the end of August 2012. This is the first syndicated loan granted to a Chinese enterprise by a lending consortium headed by a Taiwanese bank.

(3) On April 29, 2013, China Gas Holdings Limited ("China Gas") signed a US$450 million three-year syndicated loan agreement with 23 banks from Taiwan, with the Bank of Taiwan as the Facility Agent. In terms of the deal amount, it is one of the largest syndicated loans granted by Taiwanese banks to a Chinese enterprise.

(4) On November 14, 2013, 20 banks signed an agreement to provide a NT$83 billion syndicated loan to the Formosa Plastics Group ("FPG"), representing the largest borrowing programme by the conglomerate in the past nine years since the group's completion of its Sixth Naphtha Cracking Project over a decade ago. Management of the syndicated loan will be led by Mega International Commercial Bank, Bank of Taiwan, Taiwan Cooperative Bank, Hua Nan Bank, Land Bank, and China Construction Bank. Most notably, China Construction Bank was listed among lenders participating in the syndicated loan, marking its first large deal since establishing a Taipei branch in June 2013.

(5) On January 22, 2014, Standard Chartered Bank (Taiwan) announced that it has completed a two-way cross-border lending transaction for Hong-Wei Electrical Industry Co. ("Hong-Wei"). Hong-Wei, with its brand VOLBIN, is the largest custom-made industrial elevator manufacturer in Taiwan. With Standard Chartered's assistance, Hong-Wei's subsidiary in Kunshan has gained access to RMB 40 million of working capital through the RMB cross-border structure to support its operations and future expansion. Through the two-way cross-border lending transaction, it is reported that Hong-Wei will be able to better manage its RMB liquidity.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

According to the Company Act, any company shall not act as a guarantor of any nature, unless otherwise permitted by laws or by the company's Articles of Incorporation. Thus, if permitted by its Articles of Incorporation, the company may provide guarantees for other members of its corporate group.

If the company is a public company, there will be additional restrictions. Pursuant to the Regulations Governing Loaning, Endorsement or Guarantees of Public Companies ("Guarantee Regulation"), a public company may provide guarantees only for the following companies: (1) a company with which the public company conducts business; (2) a company in which the public company directly and indirectly holds more than 50% of the voting shares; and (3) a company that directly and indirectly holds more than 50% of the voting shares in the public company. In addition, the guarantee provided by a public company should comply with

the internal rules adopted in accordance with the Guarantee Regulation.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Generally, there is no concern about the enforceability in this circumstance so long as all legal requirements are satisfied. However, if a company provides guarantees for others in return for only a disproportionately small benefit or without benefit in return in the absence of a justifiable cause, there may be concern that the directors resolving the guarantees may breach their fiduciary duties. Further, the creditors of the guarantor may apply to the court for revoking the guarantee if, due to the guarantee, the guarantor has no sufficient assets to repay the debts owed to its creditors.

2.3 Is lack of corporate power an issue?

Please refer to our answer to question 2.1. If a company's Articles of Incorporation does not permit the company to provide guarantees to others, but the company's responsible person, such as a director, still provides guarantees to others on behalf of the company, the responsible person alone should be liable for the guarantees. The guarantee does not constitute a valid obligation of the company.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental approval is required for a company to provide guarantees. As for due authorisation, a board resolution adopted by the board of directors of the company to provide guarantees normally would suffice, unless the Articles of Incorporation provides otherwise. In practice, however, it is not common for a company's Articles of Incorporation to require that the provision of guarantees be approved by a shareholders' meeting.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

The Guarantee Regulation and a company's internal rules adopted in accordance therewith impose certain limitations on the amount of the company's guarantees to all counterparties and the amount of the company's guarantees to a single counterparty. If the internal rules are incorporated into the company's Articles of Incorporation, the violation of the internal rules and the Articles of Incorporation by the company in providing a guarantee may affect the enforceability of the guarantee. By contrast, if the company only violates the internal rules in providing the guarantee, it is generally considered that violation of such limitations will only result in an administrative fine imposed by the Financial Supervisory Commission or breach of fiduciary duty by the directors but will not affect the enforceability of the guarantees.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

A Taiwanese corporate entity or individual has an annual foreign exchange quota of US$50 million (or its equivalent) or US$5 million (or its equivalent), respectively. No prior approval from the CBC is required if the Taiwanese onshore guarantor converts New Taiwan Dollars into foreign currency for remittance to the offshore guaranteed and the conversion does not exceed the above quota. The CBC has the sole discretion to grant or withhold its approval on a case-by-case basis if the onshore Taiwanese guarantor's quota would be exceeded for such conversion.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Among other things, the following types of collateral are commonly seen in secured lending transactions:

(1) a mortgage over real property, such as land and buildings;

(2) a chattel mortgage over a movable asset, such as machinery and equipment;

(3) a pledge over movable assets or securities, or a pledge over the pledgor's property rights which are transferable, such as the pledgor's rights in bank accounts, accounts receivable or patents; and

(4) an assignment of property rights, which are transferable.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

As a general rule, the security provider and the security interest holder should enter into an agreement to identify the specific asset subject to the security interest. A general security agreement without identifying such specific asset, such as a floating charge, is not enforceable under Taiwan law. (Please note that in January of 2014, the proposed amendments to the Enforcement Rules of the Chattel Secured Transaction Act were announced permitting the parties to create chattel mortgage without identifying specific assets, provided that the scope of assets (chattels) could be reasonably ascertained according to the agreement between the parties. However, the proposed amendments are still under review and have not come into effect.) In addition, different types of assets may be subject to different requirements, such as registration or filing with the competent authorities, on the perfection of the security. We will briefly advise such requirements in our answers to questions 3.3 to 3.7.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. In order to create a valid mortgage over the land, buildings and plants, the mortgagor and the mortgagee should enter into a written agreement, and a registration with the competent authority is required.

As for machinery and equipment, the security to be created may be a pledge or a chattel mortgage. The machinery and equipment that a chattel mortgage can be created thereupon are subject to the list promulgated by the authority. Both security interests give the security interest holder a first priority over the machinery and equipment. To create a pledge, the pledgor and the pledgee have to enter into a written agreement and the pledgor should deliver the possession of the machinery and equipment to the pledgee, but a registration with the competent authority is not required. To create a chattel mortgage, the mortgagor need not deliver the possession thereof to the mortgagee; however a registration with the competent authority would be necessary in order for the mortgagee to claim the chattel mortgage against a *bona fide* third party.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. To create a pledge over receivables, the pledgee and the pledgor must enter into a written agreement. In addition, the receivables must be identifiable according to the content of the pledge agreement. Further, the obligor should be notified of the creation of the pledge in order for the pledgee to be able to claim the pledge against the obligor.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. To create a pledge over cash deposits, the pledgee and the pledgor must enter into a written agreement. The pledge shall not become effective against the account bank taking the cash deposits unless the account bank is notified of the creation of the pledge. Nevertheless, please note that the concept of a floating charge is not recognised under Taiwan law. In other words, the pledge covers only the cash in the bank account when such pledge is created and notified to the account bank. The pledge will not cover the cash deposited in the bank account after the account bank is notified of the pledge. To deal with this issue, the pledgor in practice will be required to periodically confirm with the account bank the amount of cash in the bank account to ensure that the pledge also covers the cash deposited after the creation of the pledge.

3.6 Can collateral security be taken over shares in companies incorporated in Taiwan? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes. According to the Company Act, a company should issue shares in certificated form if its issued capital reached a certain amount specified by the competent authority. Currently, the threshold amount is NT$500,000,000. In addition, a public company may issue shares in scripless form. To create a pledge over shares in certificated forms, a written agreement is required. The certificates of the pledged shares shall be duly endorsed and delivered by the pledgor to the pledgee. Furthermore, the company issuing the shares shall be notified of the creation of a pledge in order to register such pledge on the shareholders' roster. The creation of a pledge is valid between the pledgee and the pledgor when the certificates of the shares have been endorsed and delivered to the pledgee. However, the creation of the pledge cannot be claimed against the company unless the company is notified of the creation of the pledge.

To create a pledge over listed shares which are traded and transferred through the book-entry system of Taiwan Depository and Clearing Corporation ("TDCC"), the pledgor and the pledgee have to sign a form prescribed by the TDCC and have the pledge registered with the TDCC.

A pledge over shares can also be created based upon the document governed by New York or English law, as long as the creation and perfection of the pledge follow the procedures and requirements described above.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

A floating charge over the inventory is not enforceable under Taiwan law. Please refer to our answer to question 3.2.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

(i) Yes, it can.

(ii) This issue is whether a company may provide guarantees for others. Please refer to our answer to question 2.1.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

No notarisation or stamp duty is required for the creation of security over different types of assets mentioned in our answer to question 3.1. The registration fee for creating a chattel mortgage over a movable asset is NT$900. The registration fee for creating a mortgage over real property is equivalent to 1/1,000 of the total amount secured by the mortgage.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Regarding the registration fee, please refer to our answer to question 3.9. The authority in charge of the registration will only conduct a formality review and it is not expected that the registration will take a significant amount of time.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

In addition to the requirement of registration for certain types of security interests above-mentioned, generally, the creation of the security interests does not require a regulatory or similar consent.

However, it is worth noting that, according to the interpretation of the Ministry of Economic Affairs ("MOEA"), a foreign company that does not have a branch office in the ROC is not allowed to be registered as a security interest holder. In local practice, the competent authorities will not permit such a foreign company to be registered as a mortgagee of real property or a chattel mortgagee of a movable asset.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Take a real property mortgage for example. The mortgage can be divided into a general mortgage and a maximum amount secured mortgage. As for a general mortgage, the obligations to be secured should exist upon the creation of the mortgage. Otherwise, the mortgage will be held unenforceable. By contrast, a maximum amount secured mortgage is to secure the obligations created and owed to the mortgagee for a period of time. So long as the secured obligations exist at the end of the mortgage period, the mortgagee may foreclose the real property. Since the obligations under a revolving credit facility may arise and be satisfied from time-to-time according to the borrower's drawdown and repayment, the mortgage to secure such obligations should be a maximum amount secured mortgage instead of a general mortgage. The above also applies to a chattel mortgage and a pledge.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

No, there are not.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Regarding the prohibitions and restrictions on the provision of guarantees by a company, please refer to our answer to question 2.1. The provision of security other than a guarantee generally will be deemed as providing a guarantee as well and is subject to the same prohibitions and restrictions.

In addition, according to the Company Act, a company cannot redeem or buy back any of its outstanding shares unless permitted by law. For instance, a company may purchase up to 5% of its outstanding shares and transfer the same to its employees. To give another example, a listed company may buy back its outstanding shares in the circumstances permitted under the Securities and Exchange Act. The restriction on a company's ability to buy back its outstanding shares extends to the company's controlled company; in addition, the violation of such restriction may cause the buy-back to be void. A subsidiary of the parent company cannot purchase the shares of the parent company. Nevertheless, the Company Act does not prohibit a sister subsidiary from purchasing the shares of another sister subsidiary.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Taiwan recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

As a general practice for a syndicated loan, syndicated banks will appoint an agent bank to act for and on behalf of the syndicated banks, including registering the agent bank as, for instance, a mortgagee and foreclosing the mortgaged property. In addition, there will be a clause in the syndicated loan agreement to the effect that the syndicated banks' claims against the borrower under the syndicated loan agreement are joint and several. Given this, the agent bank may claim the whole amount of the loan from the borrower and distribute the proceeds obtained therefrom to the syndicated banks in accordance with their proportion of participation in the loan.

5.2 If an agent or trustee is not recognised in Taiwan, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable in Taiwan.

5.3 Assume a loan is made to a company organised under the laws of Taiwan and guaranteed by a guarantor organised under the laws of Taiwan. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The transfer of the loan from Lender A to Lender B will not be effective against the borrower and the guarantor until either Lender A or Lender B has notified the borrower and the guarantor of such transfer.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

(a) For a domestic non-bank lender who is a Taiwan resident or a profit-seeking enterprise with a fixed place of business in Taiwan, the withholding tax rate for interest is 10% but such withholding tax is applicable to a corporate borrower instead of an individual borrower.

For a foreign lender who is a non-Taiwan resident or a profit-seeking enterprise without a fixed place of business in Taiwan, the withholding tax rate for interest applicable to a corporate borrower is 20%, but if the interest derives from short-term commercial papers, securitised instruments, government/corporate/financial institution bonds, or conditional transactions, the withholding tax is 15%. Moreover, most of the tax treaties provide a reduced income tax withholding rate of 10%. Taiwan has signed tax treaties with 25 jurisdictions, namely, Australia, Belgium, Denmark, France, Gambia, Germany, Hungary, Indonesia, India, Israel, Macedonia, Malaysia, New Zealand, the Netherlands, Paraguay, Senegal, Singapore, Slovakia, South Africa, Sweden, Swaziland, Switzerland, Thailand, the United Kingdom and Vietnam.

(b) Where the portion of the proceeds is to indemnify the principal of the loan made by the lender, it will not be subject to income tax. If the portion of the proceeds is to indemnify the default interest sustained by the lender, it may be subject to income tax, as mentioned above. Moreover, in the event that the proceeds include a penalty pursuant to an agreement between the lender and the borrower, such penalty will be subject to income tax, unless the lender may prove that the penalty is to indemnify losses suffered by the lender.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

(1) Income tax on the following categories of income shall be exempted:

Interest derived from loans offered to Taiwanese government or legal entities within the territory of Taiwan by foreign governments or international financial institutions for economic development, and interest derived from the financing facilities offered to their branch offices and other financial institutions within the territory of Taiwan by foreign financial institutions.

Interest derived from loans extended to legal entities within the territory of Taiwan by foreign financial institutions for

financing important economic construction projects under the approval of the Ministry of Finance.

Interest derived from favourable-interest export loans offered to or guaranteed for the legal entities within the territory of Taiwan by foreign governmental institutions and foreign financial institutions which specialise in offering export loans or guarantees.

Moreover, some of the tax treaties provide an exemption from income tax withholding for interest payment. For example, the Netherlands-Taiwan Tax Treaty provides that the interest which is paid in respect of a bond, debenture or other similar obligations of a Taiwanese public entity, or of a subdivision or local authority of Taiwan, should be taxed only in Netherlands.

(2) For the purposes of effectiveness or registration, there is no tax applicable to foreign investments, loans, mortgages or other security documents.

6.3 Will any income of a foreign lender become taxable in Taiwan solely because of a loan to or guarantee and/or grant of security from a company in Taiwan?

No, a foreign lender (except for a foreign entity's Taiwan branch) will not be subject to Taiwan income taxes solely because of a loan to or guarantee and/or grant of security from a Taiwanese company.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Please refer to our answer to question 3.9.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

A thin capitalisation rule was incorporated into the Income Tax Act effective from January 28, 2011. That is, retroactively from January 1, 2011, if the ratio of a company's debts (to its related party) to its equity exceeds a certain ratio, the interest expense arising out of the portion of the debts exceeding said ratio is not deductible, except for financial institutions (including banks, cooperatives, financial holding companies, bills finance companies, insurance companies, and securities firms). The Ministry of Finance, by referring to international practices, has set a safe harbour debt-equity ratio of 3:1.

The same treatment in respect of the thin capitalisation rule applies to both domestic and foreign lenders.

7 Judicial Enforcement

7.1 Will the courts in Taiwan recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Taiwan enforce a contract that has a foreign governing law?

Generally, the choice of a foreign governing law to govern a contract would be recognised as a valid choice of law and given effect by the courts of Taiwan, provided that the relevant provisions of the foreign governing law would not be applied to the extent such courts hold that: (i) the application of such provisions would be contrary to the public order or good morals of Taiwan; or (ii) such provisions would have the effect of circumventing mandatory and/or prohibitive provisions of Taiwan law. However, where the contract is about the creation/perfection of a security interest, such as a pledge and mortgage, the choice of law will be subject to the conflicts of the law of Taiwan.

7.2 Will the courts in Taiwan recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Any final judgment rendered by a foreign court shall be recognised and enforceable in Taiwan without review of the merits, provided that the court of Taiwan in which the enforcement is sought is satisfied that:

(i) the foreign court rendering the judgment has jurisdiction over the subject matter according to Taiwan law;

(ii) the judgment and the court procedures resulting in the judgment are not contrary to the public order and good morals of Taiwan;

(iii) if a default judgment was entered into against the losing party, the losing party was (a) duly served within a reasonable period of time within the jurisdiction of such court in accordance with the laws and regulations of such jurisdiction, or (b) process was served upon the losing party with the judicial assistance of Taiwan; and

(iv) judgments of the Taiwan court are recognised by the foreign court on a reciprocal basis.

To our knowledge, there is reciprocity for enforcement of judgments between Taiwan and New York/England.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Taiwan, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Taiwan against the assets of the company?

(a) Depending on the complexity of the case in dispute, it could take half a year to one year or longer for each of the district court, the high court and the Supreme Court to render a judgment. Regarding the enforcement of the final judgment against the assets of the company, it also depends on the value and types of the company's assets. For example, to foreclose a mortgaged real property, it may take from several months to one year or longer to conduct the auctions for the real property if there is no bidder or if the bid price is below the set auction price.

(b) Depending on whether the Taiwan court or the counterparty has raised any objections to the elements set forth in our answer to question 7.2, it may take months or one year or longer for the Taiwan court to render a judgment recognising the foreign judgment. In addition, as mentioned in our answer to question 7.3 above, the enforcement of a final judgment against the assets of the company depends on the value and type of the company's assets.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

(a) Depending on the types of collateral security, foreclosure of

collateral security through a court proceeding may require a public auction. For instance, if the real property is foreclosed through a court proceeding, the court will designate an expert to assess the value of the real property and hold a public auction to sell it. If the real property has not been sold due to the fact that no bidder has attended the auction or the bidding price is below the auction price set by the court, the court will have to reduce the auction price and repeat similar exercises to sell the real property in accordance with the Mandatory Execution Act. Accordingly, foreclosing the real property may take longer through a public auction than by other means of enforcement such as a private agreement between the mortgagor and the mortgagee to settle debts by transferring ownership of the real property to the mortgagee.

(b) Generally, no regulatory consent is required in order for the security interest holder to enforce the collateral interest.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Taiwan or (b) foreclosure on collateral security?

(a) Generally, no. However, according to the Code of Civil Procedure, if a plaintiff has no domicile, office, or place of business in Taiwan, the court shall, by a ruling on motion filed by the defendant, order the plaintiff to provide a security for the litigation expenses. Such requirement will not apply in the case where either the portion of the plaintiff's claim is not disputed by defendant or the plaintiff's assets in Taiwan are sufficient to compensate the litigation expenses.

(b) Please refer to our answer to question 3.11.

7.6 Do the bankruptcy, reorganisation or similar laws in Taiwan provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Regarding bankruptcy, all enforcement actions against the debtor will be stayed by the bankruptcy of the debtor and all unsecured creditors must follow the bankruptcy proceeding administered by the court to file their claims against the debtor. Nevertheless, if a creditor, such as a lender, has a mortgage, pledge or right of retention over the debtor's assets, the lender may enforce such collateral security without going through the bankruptcy proceeding.

As for reorganisation, all enforcement actions against the debtor subject to reorganisation will be stayed no matter whether the lender is a secured (such as a mortgagee or a pledgee) or unsecured creditor. The lender may not foreclose the collateral security regardless of other stakeholders and should follow the reorganisation proceeding administered by the court.

7.7 Will the courts in Taiwan recognise and enforce an arbitral award given against the company without re-examination of the merits?

According to the Arbitration Law, a foreign arbitration award would be recognised and enforceable by the courts of the ROC without reviewing the merits, provided that none of the followings exists:

(i) where the recognition or enforcement of the arbitral award is contrary to the public order or good morals of the ROC; or

(ii) where the dispute is not arbitrable under the laws of the ROC.

In addition, if there is no reciprocity in the recognition and enforcement of an arbitral award between the ROC and the country in which the arbitral award is made or the country whose arbitration rules are applicable, the ROC court may dismiss the petition for the recognition of a foreign arbitral award.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Please refer to our answer to question 7.6 regarding foreclosure of the collateral interest by a lender. In addition, if a lender's claims cannot be fully satisfied by foreclosing the collateral security, the lender may still participate in the bankruptcy proceeding as an unsecured creditor to seek possible repayment.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Regarding the preference period/clawback right, according to the Bankruptcy Law, the bankruptcy administrator shall, within 2 years of the declaration of the bankrupt's bankruptcy, file with the court to rescind the transaction which the bankrupt conducted with or without consideration before the declaration of the bankrupt's bankruptcy if such transaction is deemed to be detrimental to the rights of the bankrupt's creditor and is revocable under the Civil Code. In addition, the bankruptcy administrator may cancel the collateral security created by the bankrupt in the six months before the declaration of the bankrupt's bankruptcy: (i) to secure its outstanding debts except if the bankrupt has committed to create collateral security before the foregoing six-month period; and (ii) to secure debts which have not yet become due and payable.

As for preferential creditors' rights, below are certain examples:

(i) land value increment tax, land value tax and house tax levied on the sale of the real property which will rank before the mortgagee and the unsecured creditors;

(ii) labour wages due and payable by the employer but overdue for a period up to six months which will rank before unsecured creditors; and

(iii) fees and debts incurred for the benefit of the bankruptcy estate which will rank before unsecured creditors.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

According to the Deposit Insurance Act, the Central Deposit Insurance Corporation may set up a bridge bank as a vehicle to take over a distressed bank. The bridge bank may assume the businesses, assets and liabilities of a distressed bank and the Bankruptcy Law will not apply to the bridge bank during its existence.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

According to the Civil Code, the creditor may initiate certain self-help remedies to seize the debtor's property and will not be liable therefor, provided that: (i) the assistance of the court or of other relevant authorities is not accessible in time and the satisfaction of the creditor's claim will be impossible or manifestly difficult without the self-help remedy; and (ii) the creditor shall apply for the court's assistance immediately after the self-help remedy is exercised.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Taiwan?

The Judicial Yuan of Taiwan has held an internal conference and reached a conclusion that a submission to jurisdiction clause will be valid in the absence of any of the following circumstances: (1) it would be unfair for the subject matter to be adjudicated by the chosen jurisdiction; (2) the consent of a party to submit to the chosen jurisdiction was obtained by fraud, duress or other unlawful means; (3) the parties were not equal-footed when they entered into the submission to jurisdiction agreement; (4) it would be inappropriate or inconvenient for the chosen jurisdiction to adjudicate the subject matter; and (5) the country of the chosen jurisdiction does not recognise and enforce judgments of Taiwan courts on a reciprocal basis. The conclusion made by the Judicial Yuan is, however, subject to test in court.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Taiwan?

Yes, it is. It will be binding upon that party under Taiwan law unless (i) the waiver would be contrary to the public order or good morals of Taiwan, or (ii) the wavier would have the effect of circumventing mandatory and/or prohibitive provisions of Taiwan law.

10 Other Matters

10.1 Are there any eligibility requirements in Taiwan for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Taiwan need to be licensed or authorised in Taiwan or in their jurisdiction of incorporation?

Taiwan law does not require a local lender to meet specific requirements to be a bank or to be specifically licensed in order to provide loans to a company. Nevertheless, the Company Act provides that a company may provide loans to a counterparty that has a business relationship with the company. In the absence of such business relationship, the company may only provide short-term loans to the counterparty and the total amount of such short-term loans cannot exceed 40% of the company's net worth. Due to these restrictions on companies, loans are generally provided by banks.

As for cross-border financing provided by a foreign lender, the issue is whether the foreign lender would be considered as conducting business in Taiwan and therefore triggers the requirements on establishing a local presence, such as a branch office or a subsidiary. A rule of thumb is that so long as the foreign lender does not come to Taiwan for soliciting customers for the lending business, the risk that providing loans on a cross-border basis is considered as conducting business in Taiwan is low.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Taiwan?

For foreign lenders who will participate in financing in Taiwan, please refer to our answer to question 3.11 regarding the MOEA's ruling on the ability of a foreign entity without a local presence to take collateral security.

If a foreign lender provides a loan with the term of more than one year to a Taiwanese company in which it owns shares or capital or a Taiwanese partnership in which it is one of the partners or a Taiwanese business of which it is the sole proprietor or a branch created by it, please note that a prior approval from Investment Commission, MOEA is required.

As to the foreign exchange control, please refer to our answer to question 2.6.

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Hsin-Lan Hsu graduated from National Taiwan University (LL.B.). She served as a notary public at Keelung and Taipei District Courts for nearly two years. Then she won a scholarship from the Ministry of Education to study International Economic Law in France, where she obtained the DEA at Paris I University.

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Lee and Li now is the largest law firm in Taiwan and its services are performed by over 100 lawyers admitted in Taiwan, patent agents, patent attorneys, trademark attorneys, more than 100 technology experts, and specialists in other fields. With expertise covering all professional areas and building on the foundations laid down over decades, the firm has been steadfast in its commitment to the quality of services to clients and the country and is highly sought after by clients and consistently recognised as the preeminent law firm in Taiwan.

Lee and Li is often named as one of the best law firms in evaluations of international law firms/intellectual property right firms. For instance, it was selected as the best *pro bono* law firm in Asia and the best law firm in Taiwan many years in a row by the International Financial Law Review (the IFLR); it was also named the National Deal Firm of the Year for Taiwan and awarded the Super Deal of the Year by Asian Legal Business.

Thailand

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Thailand?

In 2013, borrowers obtained a higher amount of loans locally than from abroad. Lenders in Thailand also provided more loans for M&A transactions outside of Thailand. The debt market grew at a high rate. Domestic loans for FDI overseas started to pick up.

1.2 What are some significant lending transactions that have taken place in Thailand in recent years?

In 2013, the three Thai banks (Siam Commercial Bank, Bangkok Bank and Krungthai Bank) and the four foreign banks (HSBC Holdings, Standard Chartered, Sumitomo Mitsui Banking Corporation and UBS AG) provided a bridge loan of around THB180 billion (US$6 billion) to CP All PCL for the acquisition of shares in Siam Makro PCL, with a plan to establish distribution channels to the ASEAN countries.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes. It is not prohibited for a company to guarantee borrowings of one or more of the other members of its corporate group.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

A guarantee can be given without consideration. A guarantee made by authorised directors in compliance with the company's objectives and Articles of Association (the "**AoA**") under the control of the shareholders' meeting under Section 1144 and 1168 of the Civil and Commercial Code (the "**CCC**") binds the guarantor.

If the directors create a guarantee for the company without the prudence of a careful business man or without the best interest of the company in mind and such guarantee results in damages to the company, the company or its shareholders can file a lawsuit against the directors for compensation from such damages under Section 1169 of the CCC and the guarantee may not bind the company.

2.3 Is lack of corporate power an issue?

Yes. The guarantee will not bind the company if it does not comply with the objectives of the issuing company or if the directors who sign the guarantee act outside the scope of their authorisation.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

A guarantee must be made in writing as a unilateral agreement by the guarantor under Section 680 of the CCC. A guarantee is not required to be registered or filed with any governmental authority. An approval from the board of directors or the shareholders of the company is also required if such approval is specified in the AoA of the company.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No. The net worth, solvency or similar limitations are not imposed on the guarantee amount.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There is no exchange control or similar obstacles to the enforcement of a guarantee. Remittance of funds from Thailand is allowed on a routine basis if all the requirements under the exchange control law are met.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Types of collateral available to secure lending obligations in Thailand are mainly mortgages, pledges, assignment of rights and guarantees.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

A general security agreement is not enforceable in Thailand. An agreement for a specific type of the security showing the specific details of the security must be specified. Legal requirements are different for each type of security. For example, a mortgage of real property must be made in writing and registered with the Land Office. A pledge of moveable property must be made in writing but it is not required to be registered or filed with any authority. The pledged assets must be physically delivered to the pledgee or a person designated by the pledgee to act as its representative or custodian of the pledge assets under Sections 747 and 749 of the CCC.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. Land, plant and registered machinery can be used as a collateral security by way of mortgage. The mortgage must be made in writing. A Mortgage of land and plant must be registered with the Land Office. A mortgage of registered machinery must be registered with the Central Machinery Registration Office. A mortgage of registered ships of 5 tons or over must be registered with the Harbour Department.

Equipment can be used as a collateral security by way of pledge. A pledge must be made in writing but it is not required to be registered or filed with any authority.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Receivables cannot be pledged. But they can be assigned as a collateral security to the creditor. The assignment must be made in writing and a written notice must be given to the debtor of the receivables or the debtor must give his written consent under Section 306 of the CCC.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. The rights to receive money deposited with a bank under a bank account can be assigned. The procedure set out in question 3.4 applies.

3.6 Can collateral security be taken over shares in companies incorporated in Thailand? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes. Shares in companies incorporated in Thailand can be pledged. The share pledge agreement must be made in writing. The pledge must also be recorded in the share register book of the company. The certificate of the pledged shares must be given to the pledgee. Registration with any public office is not required.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes. Inventory can be pledged by way of the warehouse master issuing a warrant or a warehouse receipt with details of the stock. The warrant can then be endorsed as evidence of the pledge of the stock. Registration with any public office is not required.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes. A company can grant a security interest to secure its own obligations as (i) a borrower under a credit facility, or as (ii) a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility in the form of pledge, mortgage, assignment or guarantee.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notarisation is not required in relation to security over any type of assets. Only the mortgage is required to be registered with the authorities. The official fees for registration of the mortgage are as follows:

1. Land: 1% of the mortgage but not exceeding THB200,000.
2. Machinery: THB1 for every THB1,000 of the value of the mortgage but not exceeding THB100,000.
3. Vessel:
   - THB500 for vessels not exceeding 100 GT.
   - THB1,000 for vessels between 100 GT and 200 GT.
   - THB100 for each ton for vessels size over 200 GT (but not exceeding THB20,000 for each vessel).

A duty stamp is required for the mortgage, the pledge, and the guarantee under the Revenue Code at the following rates:

1. Mortgage: THB1 for every THB200 of the mortgage.
2. Pledge: THB1 for every THB2,000 of the pledge.
3. Guarantee:
   (1) THB10 for no limitation of the guaranteed amount;
   (2) THB1 for a guaranteed amount of not exceeding THB1,000;
   (3) THB5 for a guaranteed amount exceeding THB1,000 but not exceeding THB10,000; and
   (4) THB10 for a guaranteed amount exceeding THB10,000.

A duplicate of the said agreements must also be affixed with a duty stamp of THB1 if the original duty does not exceed THB5 or THB5 if the original duty payable exceeds THB5.

According to the *Notification of the Director of Revenue Department in relation to Stamp Duty (No. 37) re: Method of Payment of Stamp Duty in Cash Instead of Affixing Duty Stamp for Certain Instruments* dated 2nd December 1995, the stamp duty for a Guarantee Agreement made with a financial institution (not including an insurance company) as one of the other parties must be paid in cash to the financial institution and the financial institution shall then pay duty to the Revenue Office.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Registration of a mortgage can be carried out within one day if the

documents required are completed. Duty stamps can be purchased at the Revenue Office and affixed by the guarantor for the guarantee or the pledgee for the pledge as required by law. The rates of the official fees and the stamp duty are mentioned in question 3.9.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

For pledges and mortgages, only the owners of the assets can pledge or mortgage such assets. For the assignment of receivables, consent is required from the debtor or a written notice is given to the debtor. No other regulatory approval or consent is required for the creation of other forms of security.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

The security provides priority to the security assets over all other unsecured creditors. When the debtor is in default and the assets of the debtor have been sold at a public auction by an order of a competent court, the proceeds from the sale of the security assets shall be applied for payment of the secured debt and the remaining debts after the payment of the debt to the secured creditors, if any, shall be paid to unsecured creditors. This applies to both term debt and revolving debt.

Creditors holding guarantees are unsecured creditors with respect to the security assets of the guarantors.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

A power of attorney is required for the execution of any type of security agreement if the person(s) who signs the security agreement for and on behalf of any person or any company has no authorisation to sign them. As the pledge, mortgage, guarantee and assignment are required by law to be made in writing, the appointment of an agent to sign agreements for these transactions must also be made in writing under Section 798 of the CCC.

The power of attorney must be affixed with the duty stamps at the rate THB30 per attorney, as specified under the Revenue Code.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company.

(b) Shares of any company which directly or indirectly owns shares in the company.

(c) Shares in a sister subsidiary.

Unless prohibition or restriction is specified in the AoA of the company, the company can guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of (a) to (c) above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Thailand recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Thailand recognises the role of an agent, but not a trustee, and allows the agent to enforce the loan documentation and collateral security and to apply the proceeds from the security to the claims of all lenders if such agent has been appointed by the lenders to act on their behalf.

In Thailand, a trust can only be created by specific juristic persons for transactions in the capital market, i.e. issuance of securities, securitisation under the law on an SPV for securitisation and other transactions supporting or beneficial to the development of the capital market under the Trusts for Transactions in Capital Market Act B.E. 2550.

5.2 If an agent or trustee is not recognised in Thailand, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

No. Appointment of a security agent can amount only to the appointment of an attorney, not a trustee.

5.3 Assume a loan is made to a company organised under the laws of Thailand and guaranteed by a guarantor organised under the laws of Thailand. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The loan and the guarantee will be enforceable if the assignment of receivables (rights under the loan) complies with the provisions of law on assignment of rights under the CCC. Please see Clause 3.4. Once the receivables are transferred, the rights under the guarantee will also be transferred to the transferee to the extent of the original obligation under Sections 305 of the CCC.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

(a) It is required for a borrower to deduct the withholding tax from interest payable on loans.

Domestic lenders: If the borrowers are commercial banks, companies, partnerships or other legal entities and the lenders are companies, partnerships or other legal entities, the borrowers are required to deduct the withholding tax at the rate of 1% under Section 3 Tredecim and Clause 4 of the Revenue Order No. TorPor. 4/2528. If the borrowers are individuals, however, the borrowers are required to deduct the withholding tax at a rate of 15% from the interest payable on the loan under Section 50(2) of the Revenue Code.

Foreign lenders: If the borrower is a company or other legal entity, the borrower is required to deduct the withholding tax

at a rate of 15% from the interest payable on loans made to the foreign lenders under Section 70 of the Revenue Code. But if the borrower is an individual, the borrower is required to deduct the withholding tax at a rate of 15% from the interest payable on the loan under Section 50(2) of the Revenue Code.

(b) Deducting the withholding tax from the proceeds of a claim under a guarantee or the proceeds from enforcing security is not required, unless there is an interest or other income from such claim or enforcement of security.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Neither tax incentive nor other incentive is provided preferentially to foreign lenders. Foreign lenders must be liable to income tax, special business tax and stamp duty as specified under the Revenue Code.

6.3 Will any income of a foreign lender become taxable in Thailand solely because of a loan to or guarantee and/or grant of security from a company in Thailand?

Yes. Interest on a loan with or without a security, other income similar to interest, benefits or other consideration derived from a loan with or without security is taxable in Thailand under Section 40(4) and Section 41 of the Revenue Code.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Apart from stamp duty payable, there is no significant cost incurred for the grant of a loan, guarantee or other security, except for mortgages, which will be subject to the official fees for registration of a mortgage mentioned in question 3.9.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

There is no provision of law to prevent or control the thin capitalisation in Thailand. If the lenders are organised under the law of another jurisdiction the consequence is only the exchange rate risk.

7 Judicial Enforcement

7.1 Will the courts in Thailand recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Thailand enforce a contract that has a foreign governing law?

Thai courts recognise a foreign governing law as a valid governing law and enforce a contract that has a foreign governing law but only to the extent that such law is:

- proven to the satisfaction of the Thai courts (such satisfaction is at the discretion of the said courts); and
- not considered contrary to the public order or good morals of the people of Thailand.

7.2 Will the courts in Thailand recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

No. A foreign judgment would not itself be enforced in Thailand, whether by lawsuit on the judgment or by registration, but would be admissible only as evidence in a legal action in Thailand.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Thailand, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Thailand against the assets of the company?

The time spent for preparing the documents and filing a lawsuit with the court will depend on the complexity and a number of documents in each case. The court proceedings until obtaining a judgment will take around 1-3 years after filing a lawsuit with the court. The enforcement of the judgment against the assets of the company will take around 1-3 years.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Enforcement of collateral security after the debtor has failed to perform its obligations depends on the types of security. This may impact the timing and value of enforcement.

1. Mortgage: The security holder must file a lawsuit in court against the debtor and the mortgagor. The court will then order the mortgaged assets to be seized and sold by public auction under Section 728 of the CCC.

   But after occurrence of the default, if all parties agree that the mortgage will not be enforced in court, it is legally possible for the mortgaged assets to be foreclosed or disposed of otherwise. However, the law does not allow the parties to agree when the mortgage agreement is initially created that the mortgage will be enforced outside of the court.

2. Pledge: Under Section 746 of the CCC, the pledgee can sell the pledged assets by a public auction without filing a lawsuit in court.

   The legal proceedings for filing the lawsuit and granting the court order, as well as the public auction process, can be lengthy and may impact the value of the assets to be enforced.

   For the guarantee and the assignment, the claims can be enforced without filing a lawsuit in court. The creditors or the assignee can simply give a default and demand notice to the debtor. If the debtors under the guarantee or the assignment failed to comply with the demand, a lawsuit must be filed with the court to enforce their rights.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Thailand or (b) foreclosure on collateral security?

Yes. The same principles as mentioned under question 7.4 above

are applied also to foreign lenders in (a) filing lawsuit against a company in Thailand, or (b) foreclosure on collateral security.

7.6 Do the bankruptcy, reorganisation or similar laws in Thailand provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes. The enforcement of lender claims will be subject to the automatic stay in the insolvency proceedings for rehabilitation of the debtor or the absolute receivership over the security assets of the debtor in the bankruptcy proceedings. The enforcement of security will also be subject to the said automatic stay or the absolute receivership.

In a reorganisation case, the creditors will need to file a petition with the court for a release of the security assets from the automatic stay on the grounds that they are not essential to the business reorganisation of the debtor or the creditor's rights as the secured creditors are not sufficiently protected under the automatic stay under Section 90/13 of the Bankruptcy Act B.E. 2483 (1940), as amended (the "**Bankruptcy Act**").

In a bankruptcy case, the secured creditor can: (i) enforce its security assets without claiming for payment from the asset pool of the debtor but the creditor must allow the official receiver to examine the details of the security assets under Section 95 of the Bankruptcy Act; or (ii) file a claim for sharing payments from the asset pool of the debtor and agree to release its security for sharing with other creditors. Otherwise, it can file a claim for payment from the asset pool of the debtor without releasing the security assets, for the difference between the amount of its claim and the proceeds from enforcement of the security assets.

7.7 Will the courts in Thailand recognise and enforce an arbitral award given against the company without re-examination of the merits?

The Thai courts will recognise and enforce an award irrespective of the country in which it was given without re-examining of the merits. Such award will bind the parties and will be enforced upon filing a petition with the court that has jurisdiction under Section 41 of the Arbitration Act B.E. 2545 (the "**Arbitration Act**"). But if the award was granted in foreign countries, it shall be enforced by the court only if it is granted under an international convention, treaty or agreement to which Thailand is a party and only to the extent that Thailand agreed to be bound. Thailand is a member state of the New York Convention on Enforcement of Foreign Arbitral Award 1958.

The court may:

1. refuse to enforce the arbitral award only if the party who will be enforced by the award can prove any of the grounds specified under Section 43 of the Arbitration Act, e.g. an arbitration agreement is not binding under the law of the country agreed to by the party, the award granted was not within the scope of the arbitration agreement, the award is not binding under the law of the country where it was made, etc.; or
2. dismiss the petition for enforcement of the award if the court finds that the award cannot be settled by arbitration under the law or if the enforcement would be contrary to the public policy or the good morals under Section 44 of the Arbitration Act.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Please see question 7.6. The lender cannot enforce its rights as a secured creditor without restriction. Its enforcement will be subject to the automatic stay in the insolvency proceedings for rehabilitation of the debtor or the absolute receivership over the security assets of the debtor in the bankruptcy proceedings.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes. If the debtor receives any payment of the debt or a transfer of any assets or the creation of any right without consideration paid to the debtor or with consideration with a value of less than the fair market value within a period of one year before the insolvency or bankruptcy petition date or thereafter, such transactions can be subject to cancellation or a "claw-back" as a fraudulent transaction under Sections 113 and 114 of the Bankruptcy Act.

If the debtor received any payment of the debt or made any transaction with a creditor within 3 months before the filing date of the petition or thereafter whereby the debtor made such payment or transaction knowing that it would prejudice other creditors, such payment or transaction can be subject to cancellation on the grounds of undue preference under Section 115 of the Bankruptcy Act.

Under Section 130 of the Bankruptcy Act, the rights of the creditors to receive payments from the asset pool of the bankrupt debtor are junior to the payment of expenses related to the administration of the assets of the debtor, the expenses of the official receiver, the lawyer fees, the court fees, the State taxes and the employee wages.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

No there are not.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes. Enforcement of the pledged assets can be made by the creditors by means of a public auction, without entering into the court proceedings, if the debtor fails to comply with the demand notice under Section 764 of the CCC.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Thailand?

Submission to a foreign jurisdiction is legally valid but does not give such party immunity from a lawsuit in a Thai court on the grounds of sovereignty or otherwise. A final judgment of a foreign court to enforce the obligations of a debtor would not itself be enforced in Thailand (whether by lawsuit on the judgment or by registration) but would be admissible as evidence in a legal action in Thailand.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Thailand?

Yes. Thai law is silent on waiver of sovereign immunity. Legal experts have been of the view that such a waiver is legally binding and enforceable especially if made expressly and as by a commercial party. Thailand does not have a specific law on sovereign immunity, but it does have the Diplomatic Privileges and Immunity Act B.E. 2527 and the Consular Privileges and Immunity B.E. 2541.

10 Other Matters

10.1 Are there any eligibility requirements in Thailand for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Thailand need to be licensed or authorised in Thailand or in their jurisdiction of incorporation?

No. The lender can be a bank, a non-bank juristic person, an individual, an agent or a security agent. No licence or authorisation is required in Thailand for the lenders, except in case the lenders are financial institutions, a non-bank providing personal loans under the control of the Bank of Thailand, a private limited company or a public limited company providing loans for securities business.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Thailand?

The lenders should conduct a legal due diligence against the borrower, the guarantor and the security assets to ensure that the lenders will be able to enforce the collateral when the debtor fails to perform its obligation. Legal advice and a legal opinion from a Thai lawyer on validity and enforceability of the loan and security agreements should also be obtained.

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Our clients include multinational financial institutions, global investment funds, regional and international telecommunications companies, leading manufacturers and service providers in the automobile industry, US and European food and drug companies, top tier computer hardware and software manufacturers, international film and music production companies, department stores, real property developers, engineering consultant and construction companies.

Trinidad & Tobago

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Trinidad and Tobago?

Trinidad and Tobago has become heavily industrialised in the past 20 years through the development of industrial estates, in particular the Point Lisas Industrial Estate where a large variety of manufacturing plants have been established. In the early stages, loan financing for these plants was provided mainly by foreign lenders with minimal participation by local lenders. In recent years, local banks have grown substantially in lending capacity and expertise and can now participate to a much greater extent in loans for large projects. Local banks are now willing to offer different financing packages through a variety of bonds, notes and other securities in addition to standard loan transactions. The Government has also become a significant borrower to raise funds for its development projects and is now the largest debtor to local banks.

1.2 What are some significant lending transactions that have taken place in Trinidad and Tobago in recent years?

Typically, the significant lending transactions have been the loans to establish or acquire large plants or projects aircraft, strategic acquisitions and loans to the Government.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Generally yes. In Trinidad and Tobago, a parent can guarantee the debt of a subsidiary, a subsidiary may guarantee the debt of a parent and a subsidiary may guarantee the debt of a sister company. The power of guarantee is subject to certain restrictions under Section 56 of the Companies Act, Chap 81:01 ("the Companies Act") which is discussed at length in our response to question 2.5 below.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

It is a general principle of company law that the directors of a company must exercise their powers in the best interests of the company. That principle is codified in Section 99 of the Companies Act which provides *inter alia* that every director and officer of a company shall, in exercising his powers and discharging his duties, act honestly and in good faith with a view to the best interests of the company. Based on the foregoing, there must be a commercial justification for what the directors cause the company to do. Failure to act in the best interests of the company amounts to a breach of trust or a breach of duty owed by the directors to the company which is enforceable by the members of the company. A breach of that duty gives rise to a claim by the members of the company against the directors for breach of trust or misfeasance.

If a transaction is entered into otherwise than in the best interest of a company then any recipient of assets or benefits from the company who knew or ought reasonably to have known, that the transaction was carried out in breach of trust will be a constructive trustee of the assets or benefit received and will have to surrender the asset or benefit back to the company.

Where a company guarantees the debt of another company within an affiliated group, the directors would be entitled to consider the benefit to the group as a whole and not be limited to any direct benefit to the company.

2.3 Is lack of corporate power an issue?

The lack of corporate power is not an issue. The Companies Act has abolished the concept of "*ultra vires*" by conferring the broadest possible capacity upon companies. Section 21(2) provides that a company has the capacity and, subject to the Act and any other law, the rights, powers and privileges of an individual. Accordingly, a company has the power to do anything unless expressly restricted by its articles, the Companies Act or any other law. Section 23 of the Companies Act provides that no act of a company is invalid by reason only that the act or transfer is contrary to the articles.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

The guarantee must be properly authorised, which generally means that the procedural rules of the company as set forth in its constituent documents must be followed and the board of directors take the proper measures to authorise the transaction, unless the shareholders are given this power under the articles or bye-laws or by way of a Unanimous Shareholder Agreement.

No governmental consents, filings or other formalities are required in connection with giving a guarantee.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Normally net worth, solvency or similar limitations on the amount guaranteed are not regulated by law and would be based on the lender's credit risk requirements. Section 56 of the Companies Act restricts a company or any of its affiliates from giving loan guarantees and other forms of financial assistance:

(i) to its shareholders, directors, officers or employees or to its affiliates or associates for any purpose; or

(ii) to any person for the acquisition of shares in the company or in its affiliate.

A company cannot provide such financial assistance unless it can satisfy, at the time of giving the financial assistance, a dual test, which is as follows:

(i) a liquidity test as contained in Section 56 (2) (a); and

(ii) a solvency test as contained in Section 56 (2) (b).

Under Section 56, the liquidity and solvency tests are used to determine whether circumstances prejudicial to the company exist. Section 56 (2) is set out in full:

> "*(2) Circumstances prejudicial to the company exist in respect of financial assistance mentioned in subsection (1) when there are reasonable grounds for believing that:*
>
> *(a) the company is unable or would, after giving the financial assistance, be unable to pay its liabilities as they become due; or*
>
> *(b) the realizable value of the company's assets, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, would, after giving the financial assistance, be less than the aggregate of the company's liabilities and stated capital of all classes*."

In order to determine whether or not the liquidity test is satisfied at the time of giving financial assistance, one must form a reasonable opinion, at the time of giving of financial assistance, based on the facts of each case to see what the likelihood would be of the security being called upon in the future so as to constitute it a "liability" which must be paid as part of the "liabilities as they become due". Any such liability must be assessed on the basis of the reasonable likelihood of the obligation or security being called upon under the liquidity test. A company fails to satisfy the liquidity test only in cases where there is cogent evidence to demonstrate that the particular transaction will be in breach of the provisions of Section 56 (2) (a).

The realisable value of a company's assets for the purposes of the solvency test must be determined at the time of giving the financial assistance. The valuation methodology will depend on the financial circumstances and prospects of the company. Normally, a company's assets would be valued as if sold on a going concern basis if that would maximise the price. However, a company's assets would be valued as if sold on a piece meal or break-up basis if the going concern approach was shown to conceal undervalued or redundant assets. "Distress" liquidation values are applicable where there is reason to believe that a company will experience financial difficulty, for example it has experienced years of losses with no chance of a turnaround, or it has major creditors ready to call in the company's financial obligations which the company is unlikely to honour. If it is not reasonably foreseeable at the time of providing the financial assistance that a company is likely to experience financial difficulty in the near future, then the company's assets should be valued on a going concern basis.

The failure by a company to satisfy either the liquidity test or the solvency test or both tests will render the security provided by the company in those circumstances void and unenforceable.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No. There are no exchange control restrictions in Trinidad and Tobago. Although not an issue relating to enforcement, it is worth mentioning that withholding tax is to be deducted from interest payable to a non-resident lender.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

A wide variety of assets (including land, buildings, equipment, inventory, accounts, contract rights, deposit accounts, shares, receivables, etc.) are available as security for loan obligations. Assets used as security are divided into two broad categories: (a) "personal property" which refers to property other than real property (land and buildings); and (b) real property.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Generally, security on a company's assets can be given by a single security agreement, typically equitable charges under a debenture on all its property both present and future. Under this type of security, the charges on certain types of assets (real property, plant and equipment, intellectual property, personal property of all kinds, goodwill, etc.) may be fixed charges and the charges on other types of assets (typically inventory) will be floating charges under which the assets can be disposed of by the charger in the normal course of business without any consent of the secured party.

Legal charges are given by separate charging documents (often collateral to a debenture). It is recommended that there be a specific legal mortgage of real property to be registered in the Protocol of Deeds or the Real Property Register. These types of charges are discussed in greater detail in our responses to question 3.3 below.

A statement of charge which includes certain statutory particulars regarding a security given by a company, together with a copy of the instrument by which the security interest is created, must be registered at the Companies Registry within 30 days after creation of the charge.

Stamp duty is payable on security documents which are principal securities at the rate of 0.4 per cent of the principal amount secured. Security documents given as collateral security for another security document which is stamped as principal security are to be stamped with a fixed duty of TT$25.00.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. Collateral security over real property (land) is given by way of a deed of mortgage to be registered in the Protocol of Deeds (lands held under common law title) or the Real Property Register (lands held under the Real Property Act whereby the title is guaranteed by the State with certain limited exceptions normally involving fraud). The mortgage instrument creates a legal charge on the charged property, priority of which dates from date of registration. Enforcement of the mortgage is effected by (i) appointment of a receiver to collect rents, and (ii) sale of the charged property.

Alternatively, real property together with plant, machinery and equipment thereon may be charged under a debenture as described in our answer to question 3.2 above. The charge under this type of security is a fixed equitable charge and is normally enforced through appointment of a receiver by the secured creditor who in law is the agent of the company and is given, in the security document, a power of attorney containing the normal powers required for sale of the charged assets. No registration is required in the Deeds Registry unless the security includes real property.

Where the security is provided by a company a statement of charge must be registered within 30 days from the date of the creation of the charge. Security documents on real property are subject to stamp duty at the same rates as provided in our response at question 3.2.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. A collateral security over receivables may be effected by (i) an assignment by way of charge, or (ii) an equitable charge by the chargor in favour of the secured party. In either case, it is recommended that the charging document contain a provision requiring the charger to deposit the receivables into a bank account over which the chargee has a charge (see the answer to question 3.5 below) or a right of control over withdrawals.

The assignment is effected by a deed and gives legal title to the receivables to the assignee. Written notice of the assignment must be given to the debtor(s). The assignee takes the receivables subject to all equities arising between the assignor and the debtor(s) at the date of giving notice of the assignment, so notice should be given immediately after the assignment. The deed of assignment need not be registered in the Protocol of Deeds.

An equitable charge on receivables is often contained in a debenture as described in our answer to question 3.2 above. The charge under this type of security is usually a fixed charge by way of mortgage but the charge may be deemed to be only a floating charge unless supported by an obligation of the chargor to deposit the receivables into an account controlled by the chargee. A floating charge is not a very effective security as the right of control over the receivables prior to the floating charge being crystallised into a fixed charge is limited.

Where the security is provided by a company a statement of charge must be registered within 30 days from the date of the creation of the charge. Security documents on receivables are subject to stamp duty at the same rates as provided in our response at question 3.2.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. Collateral security over cash deposited in bank accounts can be created by way of (i) a general charge such as a debenture, or (ii) a specific account charge. Unless a general charge gives the chargee a right of control over the account, it will be deemed a floating charge. Therefore, we recommend that the charge be subject to the condition that withdrawals be permitted only with the prior consent of the chargee.

A specific account charge creating a legal charge on the account is recommended in cases where an account has been established for receiving funds that are to be utilised in payment of the debt, especially where the funds are also being utilised to pay other creditors or persons under a waterfall type arrangement. Under a charge of this type, the chargee will have full control over the account and the disposal of funds deposited therein.

3.6 Can collateral security be taken over shares in companies incorporated in Trinidad and Tobago? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes. Shares in a private company or a public company whose shares are unlisted are in certificated form. Collateral security over shares is normally given by (i) a fixed equitable charge under a debenture, or (ii) by a memorandum of deposit or deed of charge of shares. The charge normally includes dividends, bonuses and all other rights accruing to the shares or the registered shareholder. Such security can also be validly granted under a New York or English law governed document. A shares charge is supported by delivery to the security holder of the share certificates (where the shares are certificated) accompanied by a transfer signed by the registered holder of the shares in the name of the security holder or a nominee as transferee or in blank with authority to complete the transfer in favour of a purchaser of the shares upon enforcement of the charge.

The Articles or By-laws of private companies often contain restrictions against transfer and provisions giving the directors discretion to refuse to register a transfer of shares without having to show good cause. Therefore, it is recommended that, in such cases, the charge be supported by a special resolution of the company irrevocably waiving these rights in favour of the chargee.

The shares of public companies listed on the Trinidad and Tobago Stock Exchange are usually uncertificated and are held by a central share depository under a single global certificate in trust for the registered shareholders. A charge on uncertificated shares must be supported by a pledge registration form by the registered shareholder whereby the shares are transferred to the pledgee or his nominee as security and the central depository is instructed to place them in a blocked account in favour of the pledgee. The pledge registration form is usually accompanied by an undated letter of authority from the registered shareholder to the pledge (i) authorising the pledge to instruct the registered shareholder's stockbroker, the company, or the pledgee's stockbroker to act as the pledgee's broker or participant under the rules of the central depository with respect to the pledged shares, and (ii) irrevocably appointing the pledgee as its agent to give instructions to such broker/participant with respect to disposal of the pledged shares and in particular in the event of any default to sell the shares through the central depository.

Where security is granted by a debenture, a statement of charge must be registered at the Companies Registry. Where security is granted by a memorandum of deposit or deed of charge, a statement of charge is often registered but is not mandatory.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, security can be taken over inventory. A charge over inventory is normally a floating charge created under a debenture which leaves the chargor free to deal and manage the inventory in the ordinary course of business until an event occurs which causes the floating charge to crystallise. When the floating charge crystallises, it fastens on the inventory and becomes a fixed charge.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, a company can grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors under a credit facility subject to any restriction set out in its Articles of Incorporation or any Unanimous Shareholder Agreement. However, please note the restrictions under section 56 of the Companies Act on a company giving financial assistance by means of a guarantee to a shareholder, director, officer or employee of a company or affiliated company or to any associate of such person (see the answer to question 2.5 above).

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notarisation of security documents executed in Trinidad and Tobago is not required. Execution of documents to be registered in the Protocol of Deeds that are executed abroad must be certified by a Notary Public in the manner required under the Registration of Deeds Act. In such case, notarial fees are not payable locally. The stamp duty payable on the creation of a security is 0.4 per cent of the principal amount secured. The registration fee (in the case of instruments to be registered in the Protocol of Deeds) is TT$100.00. The fee for registration of a statement of charge is TT$300.00

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

No, they do not.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No, they are not.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Priority of the security for a revolving credit facility may be lost in the event that a second charge is registered. Based on the well known rule in **Clayton's Case**, once the amount advanced under the revolving facility at the time of registration of the second charge is repaid, further advances under the revolving facility may rank after the debt secured by the second charge. For that reason, it is customary to provide in the security document for such a facility that (i) the borrower shall not charge the security assets without the lender's consent, and (ii) upon registration of a second charge, the original account will be closed and further advances made under a new account to be kept in credit. Normally, the provision includes a condition that the new account is deemed to have been opened once the second charge is registered. Where the second charge is given with consent of the first secured party, the lenders often enter into a deed whereby they agree the priorities of their respective securities.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

All loan and security documents must be executed by duly authorised officer(s) of the borrower or party giving security. Deeds are usually sealed with the common seal of the company in the manner prescribed in the By-laws. Deeds that are to be registered under the Registration of Deeds Act must be executed (if locally) in the presence of an adult witness who signs his/her name and writes his/her address and occupation and certain legal functionaries (usually an attorney-at-law). Such deeds, if executed abroad, must be executed in the presence of an adult witness who will attend before a Notary Public to swear an affidavit of due execution. There are stipulated formalities in the Registration of Deeds Act for notarisation of the Deed.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Yes. Section 56 1(b) of the Companies Act expressly prohibits a company from giving financial assistance by means of a loan guarantee or otherwise to any person for the purpose of, or in connection with, a purchase of a share issued or to be issued by the company, in the case where circumstances prejudicial to the company exist. This is discussed in detail in our answer to question 2.5 above.

(b) Shares of any company which directly or indirectly owns shares in the company

Yes. The above restriction also applies to provision of financial assistance for the purchase of shares in an affiliate.

(c) Shares in a sister subsidiary

Yes. The above restriction also applies to provision of financial assistance for the purchase of shares in a sister subsidiary.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Trinidad and Tobago recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes. A collateral agent or trustee may hold debt security in trust for the secured parties and enforce the security on their behalf. The appointment of the collateral agent or trustee is effected by an agency agreement or trust deed which will contain the general powers of the collateral agent/trustee including any restrictions on enforcement of the security, typically a condition requiring approval of a particular majority of the secured parties for this purpose.

5.2 If an agent or trustee is not recognised in Trinidad and Tobago, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

No answer is required for Trinidad and Tobago.

5.3 Assume a loan is made to a company organised under the laws of Trinidad and Tobago and guaranteed by a guarantor organised under the laws of Trinidad and Tobago. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The benefit of the guarantee must be expressly assigned by Lender A to Lender B along with the principal loan contract to which the guarantee relates. The guarantee will normally contain a provision that it shall be binding upon and shall inure to the benefit of and be enforceable by and against the respective successors of each of the parties. It is not necessary, although it may be prudent for Lender A to give notice to the guarantor of the assignment of the guarantee.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Pursuant to section 5 of the Corporation Tax Act Chap 75:02 ("CTA"), interest payable on loans made to a domestic lender will be classified as taxable profits of the lender and will be subject to corporation tax at the rate of 25 per cent. The domestic lender is solely responsible for payment of corporation tax on its profits.

Pursuant to section 50 of the Income Tax Act Chap 75:01 ("ITA"), interest payable on a loan made by a non-resident lender to a Trinidad and Tobago resident is deemed to be income arising in Trinidad and Tobago and will be subject to withholding tax at the rate of 15 per cent (or such lower rate as provided in any double taxation treaty between Trinidad and Tobago and the country in which the lender is resident). The borrower or other person paying interest is responsible for deduction and payment of withholding tax to the local Revenue Authority before the interest is remitted to the non-resident payee.

It is normal to include in loan agreements/security documents for loans by overseas lenders a provision for grossing up interest payments so that, after deduction of withholding tax on the grossed up amount, the lender receives a net amount equal to the full amount which he would have received had such payment not been subject to withholding tax.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Under Trinidad and Tobago law there is no provision for tax incentives or other incentives to be provided preferentially to foreign lenders nor any taxes applicable specifically to foreign lenders for the effectiveness or registration of loans, mortgages or other security documents issued by them.

6.3 Will any income of a foreign lender become taxable in Trinidad andTobago solely because of a loan to or guarantee and/or grant of security from a company in Trinidad andTobago?

The income of a foreign lender will not become taxable in Trinidad and Tobago solely because of a loan to or guarantee and/or grant of security from a company in Trinidad and Tobago. A single transaction will not constitute "carrying on business in Trinidad and Tobago" by the foreign lender, which is a requirement for tax liability under the CTA. A foreign lender would have to be cautious about entering into additional loan transactions in Trinidad and Tobago to ensure that it will not thereby be deemed to be carrying on business.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Execution by the foreign lender of the transaction documents outside of Trinidad and Tobago will not require notarisation except in the case of deeds that are required to be registered under the Registration of Deeds Act. There are no other significant costs which would be incurred by the foreign lender.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Our company and tax laws permit thin capitalisation and there are no adverse consequences to a local company with a small equity capital if it raises capital through borrowing from foreign lenders.

7 Judicial Enforcement

7.1 Will the courts in Trinidad and Tobago recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Trinidad and Tobago enforce a contract that has a foreign governing law?

Yes. Where the parties expressly stipulate that a contract is to be governed by a particular law, that law will be the proper law of the contract. This freedom of choice is subject to some limitations. The selection of a foreign law must be *bona fide* and legal (at least under Trinidad and Tobago law if a Trinidad court is required to adjudicate on this issue) and there must be no reason for avoiding the choice on the grounds of public policy. Express selection of a foreign law will not prevent the application of mandatory provisions of any local law which would normally have been applicable to the transaction but for the parties' choice of foreign law.

7.2 Will the courts in Trinidad and Tobago recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The courts in Trinidad and Tobago will recognise and enforce a final non-appealable judgment given against a company in a foreign court without a re-examination of its merits whether for fact or law by permitting such judgment to be sued upon and enforced through

the courts of Trinidad and Tobago without retrial as a civil debt subject to four exceptions. These exceptions are: (i) where the foreign court acted without jurisdiction; (ii) where the judgment was obtained by fraud; (iii) where the judgment was obtained by breach of the rules of natural justice; and (iv) where the enforcement of the judgment will be contrary to Trinidad and Tobago public policy.

A judgment obtained in the English Courts may also be registered in Trinidad and Tobago pursuant to the Judgment Extension Act Chap 5:02. Section 3 of this act provides that where a money judgment has been obtained in a Superior Court in the United Kingdom, the judgment creditor, on production of a certified copy of the judgment, may apply to the High Court, at any time within 12 months after the date of the judgment, or such longer period as may be allowed by the Court, to have the judgment registered in the Court, and on any such application the Court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in Trinidad and Tobago and subject to this Act, order the judgment to be registered accordingly. Once a judgment has been registered under the Act, as at its date of registration, it is of the same force and effect as a judgment originally obtained in Trinidad and Tobago.

Under section 4, an English judgment will not be registered where:

- the original court acted without jurisdiction;
- the judgment creditor being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to the jurisdiction of that court;
- the judgment debtor, being the defendant in the proceedings was not duly served;
- the judgment was obtained by fraud;
- the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or
- the judgment was in respect of a cause of action which, for reasons of public policy or some other similar reason, could not have been entertained by the registering court.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Trinidad and Tobago obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Trinidad and Tobago against the assets of the company?

(a) A claim can be instituted against the borrower and guarantor in the High Court of Justice for recovery of the debt as soon as it has become due and any grace period allowed has expired. The Rules of Court contain procedures for the claimant to apply for summary judgment. The application must be supported by an affidavit on behalf of the claimant deposing to the truth of the facts and matters pleaded in the statement of case as to the debt having been incurred and the failure to pay same when due and that there is no defence to the claim. The period for filing and service of the claim form and statement of case, allowing time for the defendant(s) to enter an appearance and the filing and hearing of the application for summary judgment would normally be 4-8 months.

(b) The procedure for filing a claim for recovery of the judgment amount as a civil debt and applying for summary judgment described above is available for enforcement of a foreign judgment against the borrower and guarantor.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There is no requirement under Trinidad and Tobago law that the sale of security assets upon default of the debtor be effected by public auction. In some cases, the consent of a party to a transaction document over which security is granted may be required. In such cases, the original consent for granting the security will often provide that consent for a further assignment by the secured party is waived or will be readily given. Regulatory consents would not normally be required except in the case of a regulated borrower, such as an insurance company or financial institution, where, on a sale of the shares of the borrower, consent of the regulator is required for a change of controlling shareholder and change of chief executive officer. Except as aforesaid, there are no significant restrictions under Trinidad and Tobago law which may impact the timing and value of enforcement.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Trinidad and Tobago or (b) foreclosure on collateral security?

A foreign lender who institutes proceedings in the Trinidad and Tobago courts for recovery of the debt may be required to give security for the defendant's costs of the claim. Security is normally given by (i) depositing the amount ordered or agreed in court, or (ii) providing a guarantee from a local bank. Otherwise there are no restrictions. It is unnecessary to seek enforcement of a collateral security under a legal charge through the courts. Enforcement may be effected by the sale of the charged asset(s). Enforcement of a collateral security under an equitable charge is normally effected through the courts by an order for sale unless the charging document contains a power of attorney in a form that may be registered in the Protocol of Deeds in favour of the secured party or a receiver appointed under the charging document.

7.6 Do the bankruptcy, reorganisation or similar laws in Trinidad and Tobago provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

In a winding up by the court, no action or claim may be proceeded with or commenced without leave of the court and subject to such terms as the court may impose. Typically, leave will be granted where the company disputes the claim or the court is required to determine a complex issue of law. Where the debt is admitted, the creditor must prove the claim in the normal manner.

A company may be wound up voluntarily by the creditors without recourse to the court. The members are required to pass a special resolution for winding up. They must also convene a meeting of creditors to receive a report on the company's financial condition. The liquidator is usually appointed by the creditors at their meeting but he may be appointed by the members if the creditors fail to do so. The liquidation is conducted under the supervision of the creditors.

In a members' voluntary winding up, the directors must make a statutory declaration that the company will be able to pay its debts within 1 year. The liquidator is appointed by the members and they are entitled to supervise his actions. However, if the liquidator on examination of the affairs of the company forms the opinion that the company is insolvent, the liquidation must thereafter be conducted as a creditors' voluntary liquidation.

The effect of winding up on the remedies of a secured creditor is discussed in our answer to question 8.1 below.

In any winding-up a judgment creditor who has not completed execution under the judgment loses the benefit of any execution commenced before the winding-up in favour of the liquidator and must claim as an unsecured creditor. Execution cannot be commenced after the winding up.

7.7 Will the courts in Trinidad and Tobago recognise and enforce an arbitral award given against the company without re-examination of the merits?

Trinidad and Tobago law recognises and will enforce an agreement to refer disputes to arbitration whether locally or in a foreign jurisdiction. All awards must be enforced through the courts on application by the successful party.

Local arbitration is governed by the Arbitration Act, Chap. 5:01 which is more than 50 years old and provides for an appeal against the award to the High Court on questions of law so that the decision on an arbitration conducted under Trinidad and Tobago law is not necessarily final and may be subject to further appeals to the Court of Appeal and the Judicial Committee of the Privy Council with the possibility of considerable delay and substantial cost before an award can be enforced. Even though the parties to the arbitration agree that the arbitral panel's decision will be final and binding, such an agreement is not enforceable in the courts of Trinidad and Tobago.

Arbitration may also be conducted in a foreign jurisdiction under the domestic law of the venue or other procedural law as agreed by the parties. Trinidad and Tobago has enacted the Arbitration (Foreign Arbitral Awards) Act, 1996 which gives effect to the New York Convention on the recognition and enforcement of foreign arbitral awards. A final non-appealable award is enforceable in Trinidad and Tobago and is not impeachable or examinable on the merits whether for fact or law subject to the same exceptions as set out in our answer to question 7.2 above with respect to foreign judgments. A final award in a convention country is enforceable in Trinidad and Tobago on application to the court. A final award in a non-convention country is enforceable by permitting such judgment to be sued upon and enforced as a civil debt through the courts of Trinidad and Tobago. The local court order may be enforced through the normal remedies available to a judgment creditor.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The Companies Act provides for the winding up of a company which is deemed to be unable to pay its debts as defined therein. A secured creditor has the option of either giving up the security to the liquidator and claiming *pari passu* with unsecured creditors or enforcing the security in the normal manner. If he chooses to enforce the security, he will be entitled to utilise the proceeds in payment in full of the principal of the debt and interest thereon to commencement of the winding up with any surplus being given to the liquidator. If the proceeds are insufficient then he is entitled to claim as an unsecured creditor for any outstanding balance of the debt.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Sections 48 of the Bankruptcy Act and section 435 of the Companies Act provide that any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property, made or done by or against a company within 3 months before the commencement of its winding up which had it been done by or against an individual within 3 months before the presentation of a bankruptcy petition on which he is adjudged bankrupt, would be deemed in his bankruptcy a fraudulent preference, is in the event of the company being wound up, to be a fraudulent preference of its creditors and invalid accordingly.

By section 437, the provisions with respect to fraudulent preferences are extended to the holders of security over the company's property.

A preference is deemed to be fraudulent when the substantial and dominant motive in the mind of the debtor was to prefer one creditor or particular creditors. A preference made to shield the company from the legal consequences of some prior act is not a fraudulent preference, though a mere sense of moral obligation is not sufficient to prevent the preference being fraudulent.

The following are classified as preferential debts under the Companies Act:

(a) rates, charges and taxes, assessments or impositions, and National Insurance contributions;

(b) wages or salary of an employee;

(c) severance payments due, or accruing, to an employee; and

(d) amounts for compensation or liability for compensation under the Workmens Compensation Act.

The above-mentioned preferential debts have no preference or priority over the claims of secured creditors in relation to their securities except that so far as the company's assets available for payment of general creditors are insufficient to meet them, they have priority over the claims of holders of debentures under any floating charge created by the company, and are to be paid accordingly out of any property comprised in or subject to that charge.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The Financial Institutions Act 2008 and the Insurance Act, Chap 84:01 (as amended by Act No. 3 of 2009) govern the winding up of banks and financial institutions and insurance companies respectively. Those acts expressly provide for the application of the winding up provisions under the Companies Act to the winding up of those entities subject to the provisions of the said acts. The Co-operative Societies Act, Chap 81:03, governs the winding up of credit unions and specifically excludes the Companies Act. Further, the Companies Act does not govern the winding up of statutory corporations.

Pursuant to the Central Bank Act Chap 79:02 (as amended by the Central Bank (Amendment) Act No.18 of 2011 (the Amendment Act),) the Central Bank of Trinidad and Tobago is provided with special emergency powers (including the power of appointment of person to act as a receiver or manager with regard to financial institutions, insurance companies and societies registered under the Co-operative Society Act) where the Bank is of the opinion *inter alia* that the financial system of Trinidad and Tobago is in danger of disruption, substantial damage, injury or impairment.

The constitutional validity of the Amendment Act has been challenged in the Trinidad and Tobago Courts. In one action, it was decided that the Amendment Act was unconstitutional in its entirety, while in another it was held that the Amendment Act was only partially unconstitutional. Both decisions are subject to appeal to the Court of Appeal of Trinidad and Tobago which has not yet given a ruling.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

A creditor is entitled to seize the assets of a debtor through enforcement of (1) any security held for the debt, and (2) a judgment obtained against the debtor for recovery of the debt. Enforcement of a security is normally effected by sale of the charged asset or, in the case where the security is a general charge such as a debenture by appointment of a receiver, proceedings for enforcement of a judgment usually require the creditor to make a further application to the court for an appropriate order except that a writ of execution against goods and chattels of the debtor may be taken out by the creditor without further order.

Insolvency proceedings against a company are normally instituted in court for an order that the company be wound up and for appointment of a liquidator. The winding up is conducted by the court.

The Companies Act also provides for a company to be wound up voluntarily under the supervision of its creditors. The company will pass a special resolution for voluntary winding up. A meeting of creditors must be summoned for the day or the day following the day on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed. Notices of the meeting of creditors shall be sent by post to the creditors simultaneously with the sending of the notices of the meeting of the company.
The meeting of creditors shall be advertised once in the Gazette and once in at least one daily newspaper printed and circulating in Trinidad and Tobago. The directors of the company shall: (i) cause a full statement of the position of the company's affairs together with a list of its creditors and the estimated amount of their claims to be laid before the meeting of creditors; and (ii) appoint one of their number to preside at the meeting. The director so appointed shall attend and preside at the meeting of creditors. The liquidator will normally be appointed by the creditors at their meeting but in the absence of an appointment the company may appoint the liquidator.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Trinidad and Tobago?

Yes, it is.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Trinidad and Tobago?

Yes, it is.

10 Other Matters

10.1 Are there any eligibility requirements in Trinidad and Tobago for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Trinidad and Tobago need to be licensed or authorised in Trinidad and Tobago or in their jurisdiction of incorporation?

In Trinidad and Tobago, a lender is not required to be a bank. With the exception of money lenders licensed under the Money Lenders Act, entities engaged in the business of lending of money must be licensed by the Central Bank of Trinidad and Tobago under the Financial Institutions Act, No. 26 of 2008 ("FIA") to carry on the business of banking or business of a financial nature (which is very widely defined in the FIA). The role of a trustee/security agent constitutes business of a financial nature and accordingly a trustee/security agent carrying on business as such must be the holder of a licence issued by the Central Bank under the FIA. A licence may be granted to an entity incorporated in Trinidad and Tobago which meets the minimum capitalisation requirements and other conditions set by the Central Bank or to a foreign entity. An entity incorporated in Trinidad and Tobago must have in cash a minimum stated capital of TT$15 million or such larger amount as may be specified by the Minister of Finance. A foreign financial institution may be issued with a licence to carry on banking business or business of a financial nature on a branch basis, where such foreign bank or foreign financial institution is subject to regulation and supervision in its home jurisdiction that is satisfactory to the Central Bank of Trinidad and Tobago. A foreign bank or financial institution may engage in a lending or security transaction without being licensed provided that it is not deemed to be engaged in a business in Trinidad and Tobago. A single transaction or multiple occasional transactions by the same foreign entity would not be deemed carrying on a business.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Trinidad and Tobago?

Under the Foreign Investment Act Chap 70:07, a foreign investor is required to obtain a licence from the Minister of Finance to hold land in excess of 5 acres for the purpose of his business. Lenders financing major projects where prospective purchasers in the event of security being enforced are likely to be other foreign investors should bear in mind the need in such case for the purchaser to obtain a licence.

Cautionary Statement

The Parliament of Trinidad and Tobago has enacted the Bankruptcy and Insolvency Act 2007 which repeals the Bankruptcy Act. The new act will come into force on proclamation but it has not yet been proclaimed and we have no indication when this will be done. We caution that the provisions of the new act when proclaimed may require variation of the responses to some of the questions herein, especially those relating to bankruptcy or insolvency of a party.

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Chapter 61

USA

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in the USA?

The corporate lending markets in the United States are broad and deep. Market trends are often associated with certain segments of the lending markets, and market segmentation in the United States is based on a number of factors. These factors include: the size of the borrower (from so-called "large-cap" borrowers, to those in the "middle-market" to "small-cap"); the credit profile of the borrower (from investment-grade to below investment-grade or "leveraged"); the type of lender (banks, versus non-bank lenders, such as hedge funds, finance companies and insurance companies); the number of holders of the debt (from syndicated loans, to "club" and bilateral facilities); whether the loan is secured, and the relative positions of the lenders *vis-à-vis* one another (from senior unsecured, to senior secured, mezzanine and second-lien loans); the basis on which the loan is made and repayment is (hopefully) assured (from a company's general credit rating, to cash flow loans, to asset-based loans); and the purpose of the loans (from acquisition finance, asset finance, to general working capital loans, to the development of specific projects). While there are trends within each of these market segments, there are also some broad trends which impact multiple segments. For example:

Low Interest Rates and "Tapering". In 2013, the Federal Reserve reaffirmed its commitment to keeping interest rates low. This is an effort to strengthen economic growth and curb unemployment by making it cheaper for companies to borrow. This effort has helped to push yields on investment grade bank loans and bonds to near record lows. As a result, investors have sought higher returns, increasing demand for leveraged loans and high-yield bonds. This increase in demand has coincided with generally depressed levels of M&A activity, a driver for the supply of these assets. This imbalance of demand and supply has generally resulted in a spike in refinancings and repricings at lower rates and dividend recapitalisations. It has also resulted generally in higher leverage levels, lower yields and weaker covenants and structures for lenders and investors (helpful, of course, for borrowers negotiating these transactions). In 2013, the Federal Reserve announced that it would take measured steps to "taper" its bond buying program, which should gradually result in an increase in rates and, potentially, an increase in defaults for at-risk borrowers unable to refinance.

Certain Trends in Loan Documentation: ***"Convergence", Covenant-Lite, etc***. The same investors often invest in syndicated leveraged loans and high-yield bonds. While pricing on leveraged loans is generally lower than high-yield bonds, leveraged loans typically have floating rates compared to a bond's fixed-rate (thus protecting against interest rates moving higher). Leveraged loans typically have more restrictive covenants than high-yield bonds and are generally secured, so recoveries on leveraged loans in the case of default are considered better. Investors judge the relative values of each of these instruments on a company-by-company basis. With each of these asset classes "competing" with the other, many loans are taking on more and more bond-like characteristics, thus blurring the traditional distinctions. Some aspects of this so-called "convergence" of loans and bonds, as well as certain other documentation trends, are further described below.

The Popularity of Covenant-Lite Loans. 2013 saw a flood of "covenant-lite" loans which were popular before the financial crisis (the amount of loans issued with covenant-lite terms in the first five months of 2013 was greater than the total amount of such loans in all of 2012). In covenant-lite loans, the borrower generally pays a higher interest rate in exchange for less restrictive covenants and no financial maintenance covenants (similar to high-yield bonds). While financial maintenance covenants test the borrower on a periodic basis, covenant-lite loan agreements typically only include "incurrence" covenants (which test the borrower upon a specific activity). Covenant-lite loans are viewed as creating a risk of greater loss after default. With a covenant-lite loan, the first default is often a payment default, occurring long after a financial covenant default would have occurred. By that time, the borrower's financial condition is likely to have deteriorated substantially. As of the writing of this chapter, covenant-lite loans continue to be less prevalent at the lower end of the middle market, but are available to strong borrowers and sponsors in the large corporate market and the upper-end of the middle market. In addition, in deals that do provide financial covenants, it is becoming more common to set the covenant levels at more significant cushions to the borrower's business model, making financial covenants less meaningful as an early-warning tool for lenders.

Equity Cures, Builder Baskets and Incremental Facilities. "Equity cures" have continued to gain traction since the financial crisis and are typical in many large corporate deals and sponsored deals at the high end of the middle market. An equity cure allows a borrower's shareholders to make an additional equity investment in the borrower to cure breaches of its financial covenants. The specifics of an equity cure (the number of times it can be exercised, specific impact on financial covenants, etc.) are subject to negotiation. Loan agreements are also giving borrowers more flexibility around so-called "builder baskets" which provide the borrower with more alternatives for using its excess cash flow. Typically, borrowers are permitted to use builder baskets for capital expenditures, permitted investments and acquisitions, and in larger deals and for stronger sponsors, for equity distributions and repayment of subordinated

debt. Non-committed incremental facilities have become standard in most middle-market transactions, and incremental facilities in large corporate loans offer borrowers more flexibility, permitting in many cases an uncapped amount of additional debt, so long as certain *pro forma* leverage ratios are satisfied. Incremental facilities commonly contain most favoured nation (MFN) provisions, which permit the interest rate margin on the original loans to increase to maintain a certain level of closeness to the incremental loan. Some sponsor deals successfully eliminate or "sunset" MFN provisions after a specified period of time.

Prepayment Premiums. Consistent with bank loan and bond "convergence", in the leveraged market "soft call" prepayment premiums have become increasingly common. Soft call payment premiums are payable when the borrower refinances or reprices an existing financing on better terms (better pricing). This feature benefits institutional investors who seek a relatively long stream of interest payments. "Hard call" premiums, which are premiums payable on any voluntary prepayments, are more often seen in middle-market deals than in large corporate deals.

Unrestricted Subsidiaries. The "unrestricted subsidiary" concept is consistent with features seen in bond indentures, and borrowers in large corporate and middle-market deals have made some headway in negotiating for these provisions. These provisions typically exclude specified subsidiaries from coverage in the representations, covenants and events of default, thus allowing a borrower to use an unrestricted subsidiary to incur indebtedness and liens or make investments without being subject to loan agreement restrictions. In effect, the lender loses the ability to monitor or restrict the unrestricted subsidiaries. The trade-off is that all financial attributes of the unrestricted subsidiaries are excluded from the loan agreement provisions (including any benefit the borrower may have otherwise realised from cash flow generated by such subsidiaries for purposes of loan agreement financial ratios).

Commitment Papers. With respect to commitment papers for equity sponsors in acquisition financings, so-called "SunGard" provisions continue to be standard (SunGard provisions help equity sponsors who rely on financings to fund an acquisition to compete with strategic buyers who do not need such financing, by aligning the conditionality of lending commitments closely to conditions in the acquisition agreement). In terms of commitment papers generally, "market flex" provisions (used to ensure a successful syndication and allow underwriters to sell down exposure) have had less impact on deals in this borrower-friendly market, with deals often being over-subscribed.

The Regulatory Environment: Pushing the Needle in the Opposite Direction? While the Federal Reserve has kept interest rates low in an effort to boost economic activity, other federal regulators with a mandate to protect the US economy from excessive risk-taking associated with the financial crises have, at least in the opinion of some commentators, pushed the needle in the opposite direction by increasing the cost of making loans. For example, the "Guidance on Leveraged Lending" issued by federal regulators, and which became effective in May 2013, applies to all financial institutions supervised by agencies that are substantively engaged in leveraged lending activities. The guidance outlines high level principles to assist institutions in establishing safe and sound leveraged finance activities and will likely significantly increase lending costs as lenders re-evaluate their internal policies and programs and tighten their underwriting standards. "Risk retention rules" and the "Volcker Rule" could seriously impact CLO managers and banks that structure, warehouse and make markets in CLOs. The final Volcker Rule was released on December 10, 2013, and will significantly limit certain investing and trading operations of banking entities. In addition, banking entities engaged in permitted fund activities and permitted trading will be required to create extensive compliance programs and meet new reporting requirements. Although the Federal Reserve extended the Volcker compliance period to July 2015, the new reporting requirements become effective in June 2014. Finally, in an effort to fill the government tax coffers, the Foreign Account Tax Compliance Act ("FATCA"), which is scheduled to come fully into effect on July 1, 2014, is a major revamp of the US withholding tax regime. FATCA imposes a new 30% gross withholding tax on certain amounts, including interest and, by January 1, 2017 at the earliest, principal, paid by U.S. borrowers to a foreign lender unless that lender (i) enters into an agreement with the IRS to identify and report specified information with respect to its US account holders and investors, or (ii) is resident in a jurisdiction that has entered into an intergovernmental agreement (an "IGA") with the United States pursuant to which the non-U.S. government agrees to report similar information. This sweeping law could have a significant impact on loan payments and receipts and will likely prompt loan parties to create ways of managing FATCA risk (express allocation of risk set forth in loan documentation, operation of gross-up clauses, etc.). In the US loan market, for example, loan agreements typically contain provisions whereby any FATCA withholding is exempt from a borrower gross-up obligation, and a borrower may request information from a lender to determine whether such lender is in compliance with FATCA.

The Courts: *The TOUSA Decision*. In the US, the TOUSA decision continues to spread broad concern among lenders. TOUSA obtained loans from lenders supported by upstream secured guaranties and used the proceeds of the loans to repay existing indebtedness and to settle related litigation (see questions 2.1 and 2.2 below). In a much criticised 2009 decision, the Bankruptcy Court not only avoided the guaranties and liens provided by the subsidiaries to the new lenders, but also ordered that the re-financed lenders repay to the TOUSA estate over $400 million received in settlement of their litigation with TOUSA. On appeal in 2011, the District Court overturned much of the Bankruptcy Court's ruling (to the relief of lending markets). Then, in an unanticipated move, in May 2012 the Eleventh Circuit reversed the District Court decision in significant part. The decision upends what had been previously considered to be established notions of market practice when dealing with fraudulent transfer issues, and appears to put increased responsibility on lenders lending into or refinancing distressed companies (including on the part of lenders being re-financed) especially if credit support is being provided by subsidiaries of a borrower. In the future, lenders will pay careful attention to the corporate structure between parents and subsidiaries. Lenders will also perform their own diligence of loan repayments to limit their risk of disgorgement in a later bankruptcy proceeding.

Argentine Sovereign Debt Litigation. The litigation between Argentina and certain holders of Argentine sovereign debt (the so-called "Sovereign Debt Litigation of the Century") stems from Argentina's default in 2001 on nearly $100 billion of its sovereign bonds. While the litigation covers many issues, one issue of particular interest to cross-border lenders is how the *pari passu* clause in the Argentine bonds has been interpreted by the courts. The court ordered Argentina to make "ratable payments" to all its creditors who have the benefit of such a clause. While warning that it was not holding that *pari passu* necessarily requires ratable payment, the court did appear to rule that *pari passu* can limit a borrower's right to pay one creditor while refusing to pay another. Such an interpretation would, by many accounts, be contrary to previously established notions that such clauses only precluded formal legal subordination. The litigation continues, and the meaning of *pari passu* under New York law continues to be a much

discussed topic, though until the dust settles on the litigation it seems unlikely there will be a consistent market approach to documentation on the topic.

European Borrowers and US Lenders. Given the reduced liquidity of European banks in recent years, there has been an increase in the number of European borrowers seeking financing from US lenders. As a result, lenders in the US have become increasingly familiar with European documentation and structure norms. For example, in contrast to the SunGard language in commitment papers relied on in US deals, European acquisition financings typically use a "certain funds" model that requires fully negotiated loan documents at the time an acquisition agreement is entered into (compared to the US model of requiring only a commitment letter at this stage). Collateral packages also may differ: European mezzanine lenders expect to be secured, whereas US mezzanine lenders are typically unsecured. But this security often comes with a cost, as European mezzanine lenders often are *structurally* subordinated to senior lenders. In US deals, mezzanine lenders are often only *contractually* subordinated. Documentation and deal structures also take into account the difference in secured transaction laws and bankruptcy laws in the US and Europe. European-based deals rely more on underlying intercreditor agreements and out-of-court restructurings since there is no pan-European insolvency regime.

Innovations in the Loan Markets: Given the depth and breadth in the loan markets in the US, many loan market innovations originate or are further developed here (consider, for example, the development of a sophisticated secondary trading market, certain mezzanine and second-lien structures, the securitisation of loans and CLOs).

The Unitranche Facility. One innovation that has become popular is the so-called "unitranche" facility. Unitranche loans combine what would otherwise be separate first/second-lien or senior/mezzanine facilities into a single debt instrument, where all the debt is subject to the same terms, and with a blended interest rate. Lenders in unitranche facilities often enter into a so-called "agreement among lenders" which legislates payment priorities among lenders in a manner that may not be visible to the borrower. One advantage of unitranche loans for a borrower is speed and certainty of closing (important in a competitive acquisition process), since negotiation of an intercreditor agreement is not a condition to funding. Another advantage for the borrower is the simplicity of decision-making during the life of the loan since there is no "class voting" from the perspective of the borrower (though the "agreement among lenders" may impact voting issues in ways not visible to the borrower). The use of these facilities has so far been restricted to the middle-market, and lenders of unitranche loans are typically finance companies and hedge funds (and not banks).

Litigation Finance. While more commonplace in countries such as Australia, the business of litigation finance has recently gained traction in the United States. A common type of litigation finance occurs when a third party investor provides funds to a plaintiff (or plaintiff's attorney) in exchange for a contractual commitment to receive a share of the award or settlement (or contingency fee) resulting from litigation. Such financing is typically limited recourse, and the investor is only repaid if plaintiff (or plaintiff's attorney) wins an award, though investors can realize significant returns, usually a multiple of their initial investment. Litigation finance has its share of critics, including those who characterize such finance as "turning the court system into a stock exchange". Other legal observers argue litigation finance helps to "level the playing field" when parties in litigation have unequal financial or bargaining positions. In recent years, established financial institutions and new investment firms have raised hundreds of millions of dollars to invest in litigation finance and the US market will likely see an increase in this form of financing in the future.

Peer-to-Peer Lending. Peer-to-peer ("P2P") lending is a form of financing that allows lenders and borrowers to bypass traditional brick-and-mortar lenders by connecting through online platforms. While many believe P2P lending will not enter the corporate lending markets in the foreseeable future, P2P lending already reaches other asset classes such as residential and commercial real estate and car loans, with corporate lending perhaps not far behind. In light of the recent strong growth of P2P lending, federal and state regulatory regimes within which it operates continue to evolve. Critics believe P2P platforms will have to overcome fraud issues as the platforms become more prominent in the lending markets. In any event, this innovative source of financing is a hot topic in lending circles.

1.2 What are some significant lending transactions that have taken place in the USA in recent years?

Given the large number of transactions in the US corporate loan markets, it is difficult to differentiate certain lending transactions as being more significant than others. Any such comparison necessarily excludes transactions for which documentation is not publically available and therefore favours large corporate deals filed with the SEC compared to those in the middle-market, where much loan product innovation takes place. Nevertheless, some transactions that illustrate some of the concepts discussed above include: *Covenant-Lite*: RadioShack Corporation (December 10, 2013); Teledyne Technologies Incorporated (November 21, 2013); and Activision Blizzard, Inc. (October 11, 2013); *Equity Cures*: Vince, LLC (November 27, 2013); and Great Wolf Resorts, Inc. (August 6, 2013); *Builder Baskets*: Travelport LLP (June 26, 2013); and Revlon Consumer Products Corporation (August 3, 2013); *Unrestricted Subsidiaries:* Scientific Games International, Inc. (October 18, 2013); and Hilton Worldwide Finance LLC (October 25, 2013); and *Incremental Facilities*: H.J. Heinz Company (June 7, 2013); and Generac Power Systems, Inc. (May 31, 2013).

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Generally, yes. In the US, guarantees are commonly referred to as one of three types: (a) "downstream" guarantees, whereby a parent company guarantees the debt of a subsidiary; (b) "upstream" guarantees, whereby a subsidiary guarantees the debt of a parent; and (c) "cross-stream" guarantees, whereby a subsidiary guarantees the debt of a "sister company". Generally, "upstream" and "cross-stream" guarantees may be subject to increased scrutiny given enforceability issues in the context of a bankruptcy, as further described below.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

First, as a matter of contract law, some "consideration" (bargained-for contractual benefit to the guarantor) must be received for the guarantee to be enforceable, though this contract law threshold is typically easy to meet.

As a matter of insolvency law, certain types of enforceability issues arise in the context of a bankruptcy. These issues are analogous to, but not the same as, contractual concepts of "consideration". With downstream guarantees, there is typically little concern, since the parent will indirectly realise the benefit of a loan through the value of its equity ownership of the subsidiary (unless the subsidiary is already, or is rendered, insolvent). However, "upstream" and "cross-stream" guarantees should be subject to increased analysis since the benefit to the guarantor is less evident.

For example, a guarantee or other transaction may be voided by a bankruptcy court in the US if it is found to be a "fraudulent transfer". Very generally, under the federal Bankruptcy Code, a guarantee may be considered a fraudulent transfer if, at the time the guarantee is provided (a) the guarantor is insolvent (or would be rendered insolvent by the guarantee), and (b) the guarantor receives "less than reasonably equivalent value" for the guarantee. (Note that both prongs of the test must occur in order for the guarantee to be voided as a fraudulent transfer; if the guarantor receives "less than reasonably equivalent value" though is nevertheless solvent at the time the guarantee is provided (after giving effect to the guarantee), then the guarantee should not be voided as a fraudulent transfer.) As mentioned above, in a downstream guarantee context, the parent would more likely receive "reasonably equivalent value", therefore fraudulent transfer is less of a concern for these types of guarantees. In addition to the federal Bankruptcy Code fraudulent transfer test, under state laws there exist similar fraudulent transfer statutes and a federal bankruptcy trustee may also use these tests to void the guarantee in a bankruptcy.

Loan documentation will often provide for solvency representations from borrowers and guarantors in order to address fraudulent transfer concerns. In some high-risk transactions (such as acquisition loans or loans provided so the borrower can make a distribution to shareholders), a third party is required to provide a solvency opinion in order to provide protection from fraudulent transfer attack, though the more common practice today is for lenders to do their own analysis given the expense of such outside opinions. The market practice and documentation norms in connection with subsidiary and affiliate guarantees are in somewhat of a state of flux at this time in light of the recent TOUSA decision (see question 1.1).

Under relevant corporate law, if a guarantee or similar transaction is structured in such a way that it would be tantamount to a distribution of equity by a company while the company is insolvent (or is rendered insolvent), or would impair the company's capital, the transaction may be improper under the corporate law and could result in director liability. See also question 2.3 below for a general discussion of corporate power issues.

2.3 Is lack of corporate power an issue?

Entity power to enter into a guarantee is generally governed by the corporation (or equivalent) law in the state in which the company is organised, as well as the company's charter and bylaws (or equivalent documentation).

For corporations, the corporation law of most states provides a broad range of permitted business activities, so few activities are considered to be *ultra vires* or beyond the power of a corporation (note that certain special purpose or regulated entities, such as banks, insurance companies, and utility companies, may be subject to additional statutes which impact corporate power). In a lending context, however, many state corporation statutes limit the power of subsidiaries to guarantee the indebtedness of a corporate parent or a sister company, and a guarantee may be *ultra vires* if not in furtherance of the guarantor's purposes, requiring analysis of the purpose of the guarantee and the benefit to the guarantor. If the benefit to the guarantor is intangible or not readily apparent, this may provide additional concern. Many corporate power statutes, however, provide safe harbours for certain types of guarantees, irrespective of corporate benefit, including if the guarantor and the borrower are part of the same wholly-owned corporate family, or if the guarantee is approved by a specified shareholder vote, for the guarantor entity. For limited liability companies, state statutes are usually more generous, with a limited liability company generally able to engage in any type of legal activity, including entering into guarantees, unless the charter provides otherwise.

In lending transactions in the US, the analysis that a company has the corporate or other requisite power to enter into a guarantee is often provided in a legal opinion provided by the guarantor's internal or external counsel (though these opinions will typically assume away the tough factual issues, such as the level of corporate benefit).

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

In addition to having "corporate power" (or equivalent power for other types of entities) to enter into a guarantee, the guarantee must be properly authorised, which generally means that the procedural rules of the corporation, as set forth in its charter or by-laws, must be followed and that the stockholders or the governing board take the proper measures to authorise the transaction. These procedures are customary and also typically covered in a legal opinion provided by the guarantor's counsel.

One situation that requires special attention in a guarantee context is when a guarantor is providing an upstream or cross-stream guarantee, and the guarantor has minority shareholders. In this context, often the consent of the minority shareholders would be required in order for the guarantee to be provided in order to address fiduciary duty concerns.

Generally, no governmental consents, filings or other formalities are required in connection with guarantees (though, as noted above, certain special purpose companies and regulated entities may be subject to additional requirements).

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Yes, please see question 2.2.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Generally, no. Though there are a few other issues worth mentioning that do not relate to "enforcement" *per se*. For example, there may be withholding tax issues if the payment is to a foreign lender (please see question 6.1).

Also, there may be adverse US tax consequences for a US borrower resulting from the involvement of any foreign subsidiary guaranteeing the debt of a US borrower. Under US tax rules, such a guarantee could be construed to result in a "deemed dividend" from the foreign subsidiary to the US parent in the full amount of the guaranteed debt, and this deemed dividend would generally be subject to US tax. The same result could apply if collateral at the foreign subsidiary is used to secure the loan to the US parent, or if

the US parent pledges more than 66% of the stock of a first-tier foreign subsidiary. These types of tax issues are important to consider when structuring a transaction with credit support from foreign subsidiaries of US companies. There are many ways to address these types of issues, including having the loans made directly to the foreign subsidiary.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

A wide variety of assets (including land, buildings, equipment, inventory, accounts, contract rights, investment property, deposit accounts, commercial tort claims, etc.) are available for use as security for loan obligations with many of the most common types of collateral described more fully below. Assets used as security are often divided into two broad categories: (a) "personal property" which generally refers to property other than real property (land and buildings); and (b) real property.

The Uniform Commercial Code ("UCC") provides a well-developed and predictable framework for providing security interests in a wide variety of personal property assets. The UCC is a state law statute rather than a federal one, but the UCC has been adopted by all 50 states in the US and the District of Columbia, with only a few non-uniform amendments of significance.

Under the UCC, when a security interest "attaches", it becomes enforceable as a matter of contract by the lender against the borrower. "Attachment" typically occurs when credit is extended to the borrower, the borrower has ownership or other rights in the collateral in which to grant a security interest, and the borrower signs and delivers to the lender a written security agreement describing the collateral.

After attachment, the security interest must be "perfected" by the lender in order for the lender's security interest to have priority over the rights of an unsecured creditor who later uses judicial process to obtain lien on the collateral. Since a federal bankruptcy trustee has the same status as a state law judicial lien creditor under U.S. law, a bankruptcy trustee will be able to set aside the security interest if the security interest is not perfected.

The method of perfecting a security interest under the UCC depends on the type of collateral in question. The most common method of perfecting a security interest is by "filing" a financing statement in the appropriate state filing office. The UCC provides specific rules for where to file a financing statement, with the general rule that the filing takes place in the jurisdiction where the borrower is located. A borrower organised under a state law in the United States as a corporation, limited partnership, limited liability company or statutory trust is considered to be located in the state in which it is organised. The filing contains only brief details including the name of the borrower, the name of the secured party and an indication of the collateral, and the filing fee is generally fairly nominal. Security interests in some collateral may be perfected by "possession" or "control" (including directly-held securities, securities accounts and deposit accounts). A security interest in certain collateral may be perfected by more than one method.

If two or more lenders have perfected security interests in the same collateral, the UCC provides rules for which lender has "priority" over the other security interest. This is usually determined by a "first-in-time" of filing or perfection rule, but there is a special rule for acquisition finance ("purchase-money") priority and special priority rules also apply to certain collateral (e.g., promissory notes, investment securities and deposit accounts) if a security interest is perfected by possession or "control".

In addition, security interests in certain types of personal property collateral may to some extent be governed by federal statutes and pre-empt the UCC rules. For example, the perfection of a security interest in an aircraft is governed by the Federal Aviation Act and the perfection of a security interest in a ship above a certain tonnage is governed by the federal Ship Mortgage Act.

The requirements for taking a security interest in real property (referred to as a "mortgage" or "deed of trust" in the US) are determined by the laws of the state where the real property is located. Typically the office in which to file the mortgage or deed of trust is in the county of the state where the land is located. These statutes are fairly similar from state to state, but less consistent than the rules for personal property. As a result, mortgage documents from state to state appear quite different, while security agreements with respect to personal property (governed by the more consistent UCC of each state) are more uniform. Lenders often obtain a title insurance policy in order to confirm the perfection and priority of their security interest in real property.

A security interest in fixtures (personal property that permanently "affixes" to land) is generally perfected by filing in the place where the real property records are filed. A security interest in fixtures may be perfected under the UCC or under the local real estate law.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

In general, a single security agreement can cover all UCC personal property which is taken for security as a loan, no matter where the personal property is located.

With respect to real property, generally a separate mortgage or deed of trust document is used for each state where real property is located, given that the mortgage document is typically governed by the laws of that particular state.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. Please see question 3.1.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. Receivables are considered personal property, and a security interest in the receivables granted under a security agreement would typically be perfected by filing a financing statement in the appropriate filing office. If the receivable is evidenced by a promissory note or bond or by a lease of or loan and security interest in specific goods, the receivable may also be perfected by the lender's possession or "control". Debtors on the receivables are not required to be notified of the security interest in order for perfection to occur.

The security agreement can grant a security interest in future receivables. An already filed financing statement will be effective to perfect a security interest in a future receivable when it arises.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. A security interest granted under a security agreement in a deposit account as original collateral must be perfected by control (not by filing). To obtain control of the deposit account, a secured lender typically enters into a control agreement with the borrower and the institution that is the depositary bank by which the bank agrees to follow the lender's instructions as to the disposition of the funds in the deposit account without further consent of the borrower. Many depositary banks have forms of control agreements which they will provide as a starting point for negotiations. (However, if the secured lender is also the depositary bank or the lender becomes the depositary bank's customer on the deposit account, control is established without the need for a control agreement to perfect the security interest.)

3.6 Can collateral security be taken over shares in companies incorporated in the USA? Are the shares in certificated form? Can such security validly be granted under an English law governed document? Briefly, what is the procedure?

Yes. Companies are typically incorporated under the laws of individual states in the US, and usually not under federal law. Shares may be issued in either certificated or uncertificated form.

A security interest may be created by either a New York law or English law-governed security agreement. If the security agreement is governed by English law, the UCC in New York requires that the transaction bear a reasonable relationship to England for the choice of law clause to be enforceable. (Please also see question 7.1 as to the extent a court in New York will enforce a contract that has a foreign governing law.)

In general, a security interest in such directly-held shares can be perfected either by filing or by control, though perfection by control has priority. The law governing perfection of such security interest in certificated securities depends on whether perfection is achieved by filing (location of debtor) or by control (location of collateral).

If the shares are credited to a securities account at a bank or broker and are therefore indirectly held, a borrower's interest in the securities account can be perfected either by filing or control. Once again, perfection by control has priority. The law governing perfection of a security interest in a securities account depends on whether perfection is achieved by filing (location of debtor) or by control (location of bank or broker as determined usually by the law governing the securities account relationship).

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes. Please see question 3.1. A security interest may be granted under security agreement and may be perfected by the filing of a financing statement in the appropriate UCC filing office. Perfection may also be achieved by possession, though this method is seldom practical from a secured lender's perspective.

The security agreement can grant a security interest in future inventory. An already filed financing statement will be effective to perfect a security interest in a future inventory when it is created or acquired.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes to both (i) and (ii). Note that with respect to item (ii), a guarantor would be subject to the same fraudulent transfer analysis discussed in question 2.2.

A security agreement may also secure obligations relating to future loans. An already filed financing statement perfecting a security interest securing existing loans will be effective to perfect a security interest in a future loan when the loan is made.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

With respect to personal property governed by the UCC, and the filing of financing statements, there are typically no material costs and UCC filing fees are usually minimal.

With respect to real property, there may be significant recording taxes and fees. These taxes and fees will depend on the state and local laws involved. A number of practices are used in loan transactions in an attempt to minimise such costs. For example, in the case of refinancings, lenders may assign mortgages rather than entering into new mortgages; and in the case of mortgage tax recording states, lenders may limit the amount secured by the mortgage, so that the mortgage tax payable is set at a level commensurate with the value of the property as opposed to the overall principal amount of the loans.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Please see question 3.9. In terms of a time-frame, UCC personal property security interests may be perfected in a matter of days. Real property security interests typically take longer, though they can usually be completed in a couple of weeks.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Generally no, except in the case of certain regulated entities where consent of the regulatory authority may be required for the grant or enforcement of the security interest.

Also, please see question 2.6 for a quick summary of tax issues that may arise in connection with foreign subsidiaries providing guarantees or collateral to secure loans to US borrowers.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Under the UCC, many traditional concerns under revolvers have been addressed by the "first to file or perfect" rule, though lenders should be aware of certain priority issues. For example, with respect to secured creditors who each have perfected security

interests in UCC collateral, as stated previously certain "purchase-money" security interests and security interest in certain collateral perfected by possession or control may obtain over a security interest perfected merely by the filing of a financing statement. In addition, tax liens and some other liens created outside of the UCC may obtain priority over a UCC perfected security interest. Judgment liens may pose a priority problem for future advances, and tax liens may pose a priority problem for some after-acquired property and future advances. Otherwise, under the UCC, the first secured creditor to "file or perfect" has priority.

With respect to real property, the matter is less clear. As a general matter, absent special legislation in the state, future loans may not have same priority as loans advanced when the mortgage or deed of trust is recorded if there is an intervening mortgage, deed of trust or lien recorded before the future loan is made. Accordingly, a close review of state rules and individual state documentary requirements is required in order to ensure priority.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

With respect to UCC collateral, the documentation requirements are spelled out clearly in the UCC and the requirements generally are straightforward. No notarisation is required. Under prior versions of the UCC, the debtor was required to sign a written security agreement, though as the world moves away from paper and into electronic media, the model UCC, including the UCC as adopted in New York, now requires the debtor to "authenticate a record" that may include an electronic record. Nevertheless, most lenders in corporate loan transactions still generally require a written security agreement. With respect to real property collateral, the documentary and execution requirements tend to be more traditional by looking to a writing, but various law reform efforts are underway to permit electronic mortgages and deeds of trust and electronic recording of mortgages and deeds of trust. The requirements may vary significantly from state to state (for example, real property mortgages often require notarisation under state law, whereas this is generally not the case for UCC collateral).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

(b) Shares of any company which directly or indirectly owns shares in the company

(c) Shares in a sister subsidiary

Generally no. There is no "financial assistance" law *per se* in the United States, but please see the discussion of fraudulent transfer and related principles described in question 2.2.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will the USA recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes. In loan documentation, the role is typically that of an "agent", with bond documentation typically using a "trustee".

5.2 If an agent or trustee is not recognised in the USA, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Not applicable, please see question 5.1.

5.3 Assume a loan is made to a company organised under the laws of the USA and guaranteed by a guarantor organised under the laws of the USA. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

In a syndicated lending transaction that includes a lender acting in an agency capacity, a guarantor typically would provide a guaranty to the agent "for the benefit of the lenders under the loan agreement" (or some similar formulation). As such, it should not be necessary for a guarantor to sign the transfer (assignment) documentation in order to be bound, though the contractual language should be carefully reviewed for specific requirements. In the case of a bilateral loan, the contractual terms should also be closely reviewed, though it is advisable to obtain the guarantor's consent to such assignment in any event.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

There is no US federal income tax withholding from payments of interest or principal to US lenders, provided certain documentation requirements are complied with. With respect to the payment of interest to foreign lenders (other than such payments to a US branch of a foreign lender that is engaged in business in the US), the general rule is that a withholding rate of 30% is applied to the gross amount of payments constituting interest and other income (but, subject to the discussion of FATCA below, not to principal). The US has in place bilateral treaties with many jurisdictions, which reduce or entirely eliminate this withholding tax for qualifying foreign lenders. A listing of these treaties is available at http://www.irs.gov/Businesses/International-Businesses/United-States-Income-Tax-Treaties---A-to-Z. Such withholding taxes may also be avoided if the requirements of the so-called "Portfolio Interest Exemption" are satisfied. This exception is generally not available to banks, but could be available to non-bank lenders such as

hedge funds. Note that under FATCA (mentioned in question 1.1), foreign lenders generally will be required to identify and report directly to the US Internal Revenue Service information about accounts in such institutions that are held by US taxpayers. The failure to comply with FATCA would result in withholding as discussed above even for treaty-resident lenders, which would then be required to file a refund claim pursuant to the applicable bilateral tax treaty to recoup any amounts withheld. Generally, the proceeds of a claim under a guarantee or the proceeds of enforcing security are taxed in a manner similar to payments made directly by the borrower.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders?

The US federal government has generally provided few incentives targeted to foreign lenders (as there has not been a policy focus on promoting foreign loans into the United States), though please refer to the bilateral tax treaties and Portfolio Interest Exemption referred to in question 6.1.

6.3 Will any income of a foreign lender become taxable in the USA solely because of a loan to or guarantee and/or grant of security from a company in the USA?

In general, a foreign lender, with no presence or activities in the US, does not become subject to US federal income taxation on its net income solely as a result of loaning to, or receiving a guarantee or grant of security from, a borrower or guarantor in the US. However, income derived specifically from a loan made to a US borrower (i.e., interest and other income) would be subject to gross-basis US taxation, typically at a rate of 30%, unless a treaty specified a lower rate, or the Portfolio Interest Exemption applied (please see question 6.1). Moreover, if a foreign lender has a presence or activities in the United States (for instance, employees or agents working out of, or a lending office located in, the US), the foreign lender could be viewed as being engaged in a trade or business in the US, and if so would be subject to net-basis US taxation on any income deemed "effectively connected" with that trade or business.

6.4 What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration? Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

With regards to mortgages and other security documents, there are generally no taxes or other costs applicable to foreign lenders that would not also be applicable to lenders in the US (please see question 3.10 for a general summary of such costs).

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

If a corporation is "thinly capitalised", and certain other factors are present, the US tax authorities may assert that instruments described as debt actually constitute equity for US tax purposes. The effect of such re-characterisation would be that payments on the instrument would not be deductible to the borrower for US federal income tax purposes and could be subject to withholding in a manner different than interest payments(for instance, because the Portfolio Interest Exemption would not be available). Moreover, even if treated as debt, US tax rules may deny a deduction (in whole or in part) for payments of interest by a thinly-capitalised borrower (i.e., a borrower with a debt to equity ratio in excess of 1.5 to 1) to a "related party" that is exempt from US federal income tax on the interest, taking into account any treaty-based reductions in tax rate. If the lenders are organised in a jurisdiction other than that of the borrower, this should not impact the thin capitalisation analysis itself, but, as mentioned above, may impact the withholding rate as well as any relevant "gross-up".

7 Judicial Enforcement

7.1 Will the courts in the USA recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in the USA enforce a contract that has a foreign governing law?

Generally, yes, so long as the choice of law bears a "reasonable relation" to the transaction and application of the foreign governing law would not be contrary to the public policy of the forum state.

On a related note, in connection with a choice of *New York* law as a governing law, a New York statute allows for New York law to be chosen by parties to a contract and, with certain exceptions, such choice of law will be given effect by New York courts if the transaction exceeds $250,000 in value, regardless of whether the choice of New York law bears any reasonable relationship to the transaction. (The choice of New York as a forum is subject to additional requirements under the statute.) California has a similar statute.

7.2 Will the courts in the USA recognise and enforce a judgment given against a company by English courts (a "foreign judgment") without re-examination of the merits of the case?

In most instances, yes. Despite the strong commercial ties between the United States and the United Kingdom, there is no international treaty on reciprocal recognition and enforcement of court judgments (attempts to come to terms on a bilateral treaty in 1981 broke down over the negotiation of the final text). Nevertheless, the Uniform Foreign Country Money Judgments Recognition Act has been adopted by most states (including New York) and sets out basic rules of enforceability in connection with the enforcement of judgments between states in the United States, with "foreign-country" judgments treated in a similar manner as the judgment of a sister state. Generally, if a judgment is obtained in accordance with procedures compatible with United States due process principles, it will be recognised under the Uniform Act. There are many examples of English judgments having been enforced in New York courts.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in the USA, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in USA against the assets of the company?

In New York, a court could rule almost immediately, perhaps within 3 to 6 months or less, with enforcement against assets of the company in New York beginning as soon as the judgment was

entered (unless the defendant obtained a stay of enforcement). However, in practice, particularly if an opposing party appears and raises procedural or other issues, matters could take materially longer, up to a year or more.

Enforcement of a foreign judgment is generally pursued in New York by having the foreign judgment "confirmed", with time frames similar to those mentioned above.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

In a non-bankruptcy context, the timing and restrictions that apply to enforcement of collateral can vary significantly, depending on the type of collateral and relevant state law that applies. The UCC provides a great deal of flexibility in the rules governing disposition of personal property collateral (see question 3.1). The UCC generally permits either "private" or "public" sale, with the only real limitation on the power to sell that the secured party must "act in good faith" and in a "commercially reasonable manner". Under the UCC, after the sale, the secured party generally may pursue the debtor for amounts that remain unpaid (the "deficiency"). The requirements with respect to real property collateral will vary significantly from state to state (and note in particular that in California, there may be limitations with respect the ability of a creditor to collect on a deficiency if the creditor is secured with real property collateral). With respect to regulated entities (including certain energy and communications companies) enforcement may require regulatory approval.

In a bankruptcy context, enforcement would be restricted by the automatic stay (please see question 8.1).

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in the USA or (b) foreclosure on collateral security?

For the most part, distinctions will not be made between foreign and domestic creditors in such proceedings. However, there are certain issues a foreign lender would need to consider in connection with such activities. For example, generally a foreign creditor will need to be authorised to do business in New York before availing itself as a plaintiff of the New York courts. In addition, foreign creditors may be subject to federal or state limitations on or disclosure requirements for the direct or indirect foreign ownership of certain specific types of companies or collateral, including in the energy, communications and natural resources areas.

7.6 Do the bankruptcy, reorganisation or similar laws in the USA provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, please see question 8.1.

7.7 Will the courts in the USA recognise and enforce an arbitral award given against the company without re-examination of the merits?

The United States is party to the New York Convention. As set forth in the Convention, the Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states, subject to certain limitations and/or potential challenges. Note, however, that loan agreements under New York law generally do not include arbitration clauses.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In the US, a bankruptcy proceeding may be initiated by either the company (debtor) itself or by its creditors. Once the proceeding is commenced, the relevant statutes in the United States (the "Bankruptcy Code") provide that an "automatic stay" immediately occurs. This automatic stay is effectively a court order that prevents creditors from taking any actions against the debtor or its property, including enforcement actions against collateral. A creditor that violates the automatic stay could face severe penalties, including actual damages caused to the debtor and other creditors, as well as having its enforcement action declared void (punitive damages are typically limited to individual, rather than corporate debtors).

There are, however, a number of protections for a secured creditor who has properly perfected its liens and such liens are not subject to avoidance. First and foremost, upon a liquidation of a debtor, a secured creditor is paid its claim (up to the value of its collateral) prior to the payment of general unsecured creditors or, alternatively, it may receive its collateral back in satisfaction of its secured claim. Also, in the case of a reorganisation of a debtor, cash collateral cannot be used by the debtor without specific authorisation from the bankruptcy court or consent of the secured party, and in other circumstances the Bankruptcy Code mandates that a secured party's interest in its collateral be "adequately protected".

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In short, yes. A lender's security interest could be voided as a "preferential transfer" if it is provided to the lender within 90 days before a bankruptcy filing (or one year if the lender is an "insider," or related party of the debtor) and as a result of the transfer the lender receives more than it would have otherwise received in the liquidation of the debtor. There are a number of exceptions to this rule, including where there has been a substantially contemporaneous exchange for new value. Please also see the discussion of "fraudulent transfers" in question 2.2.

There are certain claims that may have priority even over a properly perfected security interest, including tax liens, mechanics lines, and certain costs associated with the bankruptcy itself.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

There are a number of entities that are either excluded from the Bankruptcy Code or for which special provisions of the Bankruptcy Code or other special legislation apply, including banks, insurance companies, commodity brokers, stockbrokers and government entities and municipalities. Municipalities and government-owned entities (but not states themselves) are eligible for relief under Chapter 9 of the Bankruptcy Code.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes. The UCC allows for so-called "self-help" remedies without first commencing a court proceeding. Note that the relevant provisions of a security agreement and governing law should be considered before exercising these types of remedies. These remedies typically can only be used so long as no "breach of the peace" would occur. Subject to the above, the market generally accepts these types of remedies for collateral, such as bank accounts and certificated securities.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of the USA?

Generally, yes.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of the USA?

Yes. The Foreign Sovereign Immunities Act ("FSIA") codifies the law of sovereign immunity in the US. The FSIA allows for such immunity to be waived, and generally upholds waivers, with some limitations (for example, non-commercial property of a sovereign cannot be attached). Certain organisations also receive immunity under authority separate from the FSIA: the International Organizations Immunity Act covers immunity for certain institutions like the IMF, the OECD and the African Union. One issue in connection with the enforcement of such waivers is whether a borrower actually had the immunity to waive when it provided a waiver. Such scenarios arise in the context of the nationalisation of a company. In such a case, a company may not have had any immunity to waive (since it was not previously owned by the state) when it entered into the loan, so any waiver provided prior to being taken over by a state may be considered void. For this reason, New York law-governed loan agreements often include a representation that a loan represents a "commercial act", which excludes the transaction from protection under relevant immunity statutes, whether or not such immunity was in fact effectively waived.

10 Other Matters

10.1 Are there any eligibility requirements in the USA for lenders to a company (for instance, that the lender must be a bank) or for the agent or security agent? Do lenders to a company in the USA need to be licensed or authorised in the USA or in their jurisdiction of incorporation?

In the US, a lender is not required to be a bank (indeed, many lenders are non-banks). A lender should be aware of any relevant state lending licensing laws which may require a lender to be licensed. These licensing laws are much more stringent in the consumer lending area than in the commercial or corporate lending area, though in any event are typically easier to obtain than a "banking licence". In some cases, one needs to be "in the business of making loans" in order for the licensing statute to be given effect (for example, the New York lender licensing law indicates those lenders who engage in "isolated, incidental or occasional transactions" are not "in the business of making loans" and therefore not covered for purposes of the statute). Non-compliance with a licence statute could have a material impact on the lender, from not being able to access a state's court system to having a loan be determined to be unenforceable. Whether an agent on a lending transaction would also need to be licensed will depend on the wording of each state's particular statute.

Note there are often contractual restrictions in New York law-governed loan documentation that require a lender be a certain type of organisation that is in the business of making loans. The rationale for this is many-fold, from securities law concerns to the preference of the borrower to only deal with sophisticated financial institutions should the loan be sold.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in the USA?

The material considerations to be considered in connection with a financing in the US will vary depending on the type of financing and the parties involved, and a discussion with counsel is encouraged before entering into any financing in the US. However, the above questions address many of the main material issues that arise.

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Venezuela

Rodner, Martínez & Asociados

Jaime Martínez Estévez

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Venezuela?

Domestic lending activities are to a large extent determined by compulsory lending mandated by law and regulations for the housing, tourism, agriculture and industrial sectors of the economy. International lending has been practically reduced to the financing of Government projects and, particularly, further development of the Orinoco heavy oil basin, which are not subject to the foreign exchange restrictions.

1.2 What are some significant lending transactions that have taken place in Venezuela in recent years?

Major recent lending transactions include those involving Petrolera Sinovensa S.A. (US$ 4,015 MM, China Development Bank Corporation), Petroboscán S.A. (US$ 2,000 MM, Chevron Boscan Finance B.V.), PDVSA Petróleo S.A. (US$ 1,000 MM, Credit Suisse A.G.), Petróleos de Venezuela S.A., Petro Junín S.A. and Petrobicentenario S.A. (US$ 1,742 MM, ENI Investments Plc.) and Republic of Venezuela (Siderúrgica Nacional C.A. project, € 446 MM, Banco Bilbao Vizcaya Argentaria S.A.).

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

There are no particular legal restrictions for intercompany loans. However, tax provisions on presumed dividends and transfer pricing could be applicable.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

No, as long as there is not a conflict with the corporate charter or an insolvency situation.

2.3 Is lack of corporate power an issue?

Definitely. If there is no capacity to issue the consent, the act would not be valid (Article 1141 of the Civil Code and Articles 243 and 270 of the Commercial Code).

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental consent or filing is required. Shareholder approval would be necessary if the respective charter and by-laws establish that the power to guarantee third party obligations rests on the shareholders.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

None, except that the enforceability of the guarantee could be set aside if given while insolvent (Article 946 of the Commercial Code).

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There has been an exchange control in effect since 2003. Conversion of local currency into foreign currency ordinarily requires governmental authorisation (from CENCOEX, CADIVI or the Central Bank). There is no prohibition of Venezuelan companies holding foreign currency assets abroad. If the guarantor has foreign currency funds abroad, it can make the payment in foreign currency without authorisations. Government controlled entities require Central Bank authorisation to hold foreign currency abroad.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Security interest can be created over tangible and intangible assets, including real estate, chattel property, inventory, a business establishment, credit rights, intellectual property rights, shares and other securities.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Depending on the type of collateral, the security interest document will vary. Some security interest can be created by way of a mortgage (e.g. real estate, chattel property) and others pursuant to a pledge (e.g. shares, account receivables). Some require governmental authorisation and special filings. A single security interest document can cover different types of collateral and forms of encumbrance (mortgage, pledge without transfer of possession). Registrations of the same security interest document may be done in registries of various municipal jurisdictions.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

A real estate mortgage may cover the land and the plant (governed by the Civil Code, Article 1877), and the machinery and equipment may be covered by a chattel mortgage (governed by the Chattel Mortgage and Pledge Without Transfer of Possession Act). The mortgage document must be registered in the registry with jurisdiction over the location of the assets.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security interest may be taken over receivables by way of a pledge. The pledge agreement must be executed before a notary or filed with a notary (to have a certain date). Notice must be given to the debtors (notice of transfer as security interest, Article 1550 of the Civil Code).

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A pledge agreement can be entered into in connection with the rights associated with a bank or brokerage account. Notice must be given to the bank or brokerage entity holding the account.

3.6 Can collateral security be taken over shares in companies incorporated in Venezuela? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares of a Venezuelan corporation may be pledged. In addition to executing a pledge agreement, a transfer as security interest note should be inscribed in the shareholders' registry book of the corporation. Share certificates are commonly issued (Article 293 of the Commercial Code). However, the transfer of the rights of a shareholder is done by a note in the shareholders' registry book (Article 296 of the Commercial Code). The agreement must be governed by Venezuelan law (Articles 20 and 27 of the International Private Law Act).

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security interest can be taken over inventory by way of a chattel mortgage (Article 30 of the Chattel Mortgage and Pledge Without Transfer of Possession Act) or pursuant to an arrangement with an authorised general warehouse and delivery of warehouse certificates (in accordance with the General Deposit Warehouses Act).

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A security interest can be granted to several creditors and for different transactions. However, if different creditors are receiving a security interest with respect to different transactions, ranking of the security interest and inter-creditors agreements may be necessary.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The notarisation charges for documents creating security interest are not calculated based on the type or value of the assets but rather on the particulars of the document (e.g. number of pages). Registrations of security interests, however, generate fees which are calculated based on the value assigned to the security interest. The registration fees will be calculated pursuant to a progressive rate of up to 0.40% (Article 84 of the Public Registry and Notary Act).

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

When authorisations are required, the procedure may be a lengthy one. Registration of complex transactions may also require extra time. When the assets are located in different jurisdictions, the security interest document may need to be registered in all of the registries with jurisdiction over the different locations, which may prove to be a long process.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Chattel mortgages and pledges without transfer of possession can only be created in favour of qualified secured creditors, including foreign banks authorised by the Superintendency of Banks (Article 19 of the Chattel Mortgage and Pledge Without Transfer of Possession Act). To request such an authorisation, a draft of the security interest document must be presented.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There is no problem in creating a security interest with respect to a revolving credit facility. Priority of mortgages will be set by the date of registration.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Mortgage documents must be registered. Registration must be done in the registry office with jurisdiction given by the location or the type of asset. Pledges are to be executed before a notary or a counterpart of the pledge agreement must be filed with a notary soon after.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Guarantees and security interest can be provided to support financing for the acquisition of shares, although making loans or giving security interest for the acquisition of a company's own shares is prohibited. This prohibition originates from the provision regarding Treasury shares, which establishes that the company cannot purchase its own shares apart from with amounts corresponding to retained earnings (Article 263 of the Commercial Code). A more evolved and far reaching provision is found in the Securities Market Act of 2010 (Article 45).

(b) Shares of any company which directly or indirectly owns shares in the company

Case law has expanded the above-mentioned prohibition to preclude transactions that attempt to bypass the prohibition by using interposed persons.

(c) Shares in a sister subsidiary

The answer for question 4.1(b) above applies here as well.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Venezuela recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

A security agent could be created, empowering such agent to act on behalf of all the secured lenders. However, the secured interest must be created in favour of the secured lenders. The security agent may also serve as a payment agent and be authorised to receive payments and to make distributions of such payments among the secured lenders.

5.2 If an agent or trustee is not recognised in Venezuela, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable. See comments above.

5.3 Assume a loan is made to a company organised under the laws of Venezuela and guaranteed by a guarantor organised under the laws of Venezuela. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Notice must be given to the debtor and the guarantor if an assignment of a loan takes place (Article 1550 of the Civil Code and 150 of the Commercial Code). The transaction documents may establish additional conditions for the transferability of a loan.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest payments are subject to withholding tax when made to foreign lenders (Article 9 (3) of Decree 1808 of 1997). Interest payments to local banks are not subject to withholding (Article 10 of Decree 1808). Guarantee and proceeds of enforcing a security interest are not subject to withholding, unless deemed allocated to the payment of interest.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Currently, there are no tax incentives for foreign lenders. From time to time, exonerations are given to induce the financing of projects in certain economic sectors. Interests on loans made by foreign financial institutions are taxed at the rate of 4.95% (Article 52 of the Income Tax Act). Other rates may apply because of tax treaties. The stamp taxes and fees that are to be paid for the documentation of a loan or a security interest are the same for local and foreign lenders.

6.3 Will any income of a foreign lender become taxable in Venezuela solely because of a loan to or guarantee and/or grant of security from a company in Venezuela?

Income dervived from loans made to Venezuelan borrowers is subject to Venezuelan income tax at the rate of 4.95% (Article 52 of the Income Tax Act). The borrower is to withhold the tax when making the interest payments. If the guarantor or the owner of the security interest is a Venezuelan corporation, no Venezuelan tax will apply to the loan solely because of such circumstance.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are no significant costs associated with the execution of documentation related to a loan, guarantee or security interest, except that the registration of the security interest will entail the payment of registration fees based on a progressive tariff of up to 0.4% of the value of the security interest (Article 84 of the Public Registry and Notary Act).

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in Venezuela recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Venezuela enforce a contract that has a foreign governing law?

Venezuelan courts will recognise a foreign governing law if selected to be the governing law of a contract (Article 29 of the International Private Law Act). Venezuelan courts will enforce such a contract in Venezuela. However, there may be some exceptions for national interest contracts (Article 151 of the Constitution).

7.2 Will the courts in Venezuela recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Passing of a foreign judgment requires a procedure before the Supreme Court (*exequatur*), which excludes the examination of the merits (Articles 53 of the International Private Law Act and 850 of the Civil Procedure Code). Venezuela is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Venezuela, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Venezuela against the assets of the company?

A procedure for collection of amounts due may take approximately 2 years, depending on the defences and appeals that the defendant raises during the court procedures. An exequatur procedure for the passing of a foreign judgment may take between 1 and 2 years and the enforcement against assets of the defendant in Venezuela may take between 6 months and 1 year.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Venezuelan enforcement procedures will require a public auction (Articles 550 to 584 of the Civil Procedure Code). Notices to the Attorney General's Office will be required if there is a risk of an interruption to a public service (Article 99 of the Attorney General Organic Act). The existing exchange control is one of the major obstacles to effectively realise the proceeds of the security interest being enforced.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Venezuela or (b) foreclosure on collateral security?

This is not applicable. In non-commercial litigations the foreign plaintiff may be required to post a bond (Articles 36 of the Civil Code and 1102 of the Commercial Code).

7.6 Do the bankruptcy, reorganisation or similar laws in Venezuela provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

If the debtor has a positive network but has liquidity problems, it may apply for a moratorium (Article 898 of the Commercial Code). While in moratorium or in a bankruptcy procedure, the enforcement of rights against the debtor would be suspended, but the suspension would not apply to the enforcement of a security interest (Articles 905, 942 and 964 of the Commercial Code).

7.7 Will the courts in Venezuela recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. Venezuela is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The secured lender would be limited in its ability to collect from the bankruptcy assets, other than the collateral, if the collateral is not sufficient to satisfy its claims (Article 1047 of the Commercial Code). If the collateral is not sufficient to satisfy the debt, the bankruptcy effects will apply to the remaining debt; interest stops accruing on the bankruptcy declaration date (Articles 943 and 944 of the Commercial Code).

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

There are debts that are preferred by law (privileged creditors, Article 1867 of the Civil Code), some of which are ranked even above secured creditors. Security interest granted during the so-called suspicious period may be set aside. A suspicious period may be a period of up to 2 years and 10 days (Articles 936 and 945 of the Commercial Code). The suspicious period begins 10 days prior to the date on which the court establishes that the insolvency commenced. Payments on unmatured debt or in kind made during the suspicious period may be annulled (Article 945 of the Commercial Code).

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Banks, insurance companies and brokerage houses are excluded from bankruptcy and subject to a similar procedure carried by the

Superintendency of the Banking Sector Institutions (Articles 243, 250 and 260 of the Banking Sector Institutions Act), the Superintendency of Insurance (Articles 99, 102 and 108 of the Insurance Activity Act) or the National Securities Superintendency (Article 21 of the Securities Market Act), respectively.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No (Articles 1844 of the Civil Code and 542 of the Commercial Code), except for retention rights (Articles 122 and 148 of the Commercial Code) and the collection of credits given as collateral (Article 538 of the Commercial Code).

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Venezuela?

Yes, provided that it is a commercial transaction and the exception of the national interest contract (Article 151 of the Constitution) does not apply.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Venezuela?

Yes, subject to the same conditions as set out in question 9.1.

10 Other Matters

10.1 Are there any eligibility requirements in Venezuela for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Venezuela need to be licensed or authorised in Venezuela or in their jurisdiction of incorporation?

There are no eligibility requirements for lenders. However, the nature of the lender may be relevant for the purposes of determining the applicable tax regime (e.g. the 4.95% tax rate applies to foreign financial institutions). There is no need for the lenders to be licensed or authorised to do business in Venezuela. They do not need to be a licensed bank in the jurisdiction of incorporation.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Venezuela?

Special considerations must be given to the existing exchange control.

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Zambia

Nchima Nchito SC

Nchito & Nchito

Ngosa Mulenga Simachela

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Zambia?

On 2nd April 2012, the Central Bank (the Bank of Zambia) introduced a policy rate to influence monetary and credit conditions in the economy. This rate allows the Central Bank to signal an increase or decrease in the price of credit in Zambia. Following this reform, the standard practice of quoting the price of loans and similar credit products by all commercial banks and financial institutions is the BOZ Policy Rate, plus a margin. The margin is set by commercial banks on the basis of their risk premium assessments and enables borrowers to understand the basis upon which lenders price their credit products. The policy rate for February 2014 is 9.75%.

1.2 What are some significant lending transactions that have taken place in Zambia in recent years?

In May 2011, the Zambia National Building Society was able to source ninety eight million dollars for the redevelopment of Society House, a multi storey building located in the Central Business District of Lusaka which was gutted by fire in 1997. This funding was provided by the National Pension Scheme Authority. This transaction signalled the dawn of the implementation of a key piece of legislation, namely the Private Public Partnership Act of 2009.

On 13th September 2012, Zambia issued its inaugural ten-year bond issue in the sum of US$750 million. This was issued to secure resources for the government's infrastructure development programmes. On its first day of trading it became sub-Saharan Africa's most successful bond launch, with bids worth more than 15 times the amount on offer. This was a vote of confidence in the country's economy.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, it can.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

There are none. The security may be enforced against the guaranteeing company in accordance with the provisions of the guarantee.

2.3 Is lack of corporate power an issue?

No. According to section 22 of the Companies Act, once a company is incorporated, it has all the powers of a natural person. There are no restrictions, other than any specified in the company's articles of association.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

None are required for the issuance of guarantees.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no such limitations imposed on the amount of a guarantee but it is prudent that lenders consider the means and worth of the company giving the guarantee.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Externalisation of monies on private external debt is monitored by the Bank of Zambia. The law provides that an external debt must be registered with the Central Bank and all outflows, which include payments of principal and interest, are monitored.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Any asset can be used to secure lending obligations. Of interest, local law recognises growing crops and stock-in trade as security for lending obligations.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

A general security agreement can take the form of a floating charge of all present and future assets of a company. Under a floating charge, the borrower is at liberty to deal with its assets in the normal course of business until a specific event, such as default on a loan, triggers crystallisation. A company can also create a fixed charge in relation to specific assets and this restricts dealings with the assets without the permission of the holder of the charge. It does not require a specific event to crystallise.

A floating charge is carried out by way of a debenture which the company executes. The document is then registered at the Companies Registry within 21 days of creation. If it affects land, it must also be registered at the Lands and Deeds Registry within 30 days. A fixed charge is created in the same way. Filing fees are payable on both types of charges.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes it can. Collateral over land is taken by way of a mortgage. A mortgage is prepared and executed by the borrower and then registered at the Lands and Deeds Registry. This is after the lender has taken the necessary precautions such as verification of the title and location of the property. Collateral security over plant, machinery and equipment can be taken by way of a fixed charge which can also be registered in the Miscellaneous Registry at the Lands and Deeds Registry.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, security can be taken over receivables. This can be done under a floating charge as described in question 3.2 above. There is no legal requirement for debtors to be notified of the security since security documents such as charges need to be registered and therefore the public and anyone dealing with the company is taken to have constructive notice.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes it can. Cash deposited in bank accounts can be taken as security as part of a floating charge, as described in question 3.2 above.

3.6 Can collateral security be taken over shares in companies incorporated in Zambia? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes collateral security can be taken over shares in companies incorporated in Zambia. Shares are personal property and can be pledged. A shareholder in Zambia will typically be issued with a share certificate which is evidence of his title to the shares. According to section 69 of the Companies Act, a company can issue share warrants with respect to fully paid up shares. Such warrant will state that the bearer is entitled to the shares therein specified and presentation of such share warrants is evidence of ownership of those shares.

For companies on the Lusaka Stock Exchange, shares can be held in an electronic format at the central share depository. The position of the law in Zambia is that parties to a contract are free to choose what law will govern their agreement and, as such, agreements can validly be granted under a New York or English law governed document.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes such security can be taken. This can be done by way of a floating charge, as explained in question 3.2 above.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes it can do so in both circumstances.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The registration fees are to be paid to the Lands and Deeds Registry and the Companies Registry when the documents are lodged there. The registration fee is 1% of the amount secured, with a ceiling of four thousand kwacha (which is equivalent to US$690) at the Lands and Deeds Registry and two thousand kwacha (equivalent to US$345) at the Companies Registry.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

As explained above, the registration fees are only 1% and the amount is capped, unlike most jurisdictions. The time lines for registration vary from 7 to 21 days.

3.11 Are any regulatory or similar consent required with respect to the creation of security?

No consents are required.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Priority of securities is determined by the date of creation and/or the registration of the security document. The type of borrowings secured is not material. The Companies Act also spells out preferential debtors such as taxes and rates.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Generally there are no particular requirements, save that security documents are typically are executed under seal.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Yes there are. Section 82 of the Companies Act generally prohibits a company from giving financial assistance directly to a person acquiring or proposing to acquire any shares in that company or any of its subsidiaries, unless the financial assistance relates to the acquisition of shares in the company or its holding company and the giving of the assistance is an incidental part of some larger purpose of the company and the assistance is given in good faith in the interests of the company.

(b) Shares of any company which directly or indirectly owns shares in the company

Section 83 of the Companies Act allows a private company to give financial assistance for the acquisition of shares in its holding company, as long as the holding company is not a company incorporated outside Zambia or a public company.

(c) Shares in a sister subsidiary

There are no prohibitions in the Companies Act.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Zambia recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes. Security agents are often used for this purpose.

5.2 If an agent or trustee is not recognised in Zambia, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

5.3 Assume a loan is made to a company organised under the laws of Zambia and guaranteed by a guarantor organised under the laws of Zambia. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

There are none, as long as the loan is properly assigned and the registrations at the Companies Registry and Deeds Registry are altered to reflect this. The enforceability will be as if lender B had made the initial disbursement.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

There is a requirement to withhold tax from interest payable to domestic or foreign lenders. This includes the interest component of enforcing the guarantee.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no incentives available save for the double taxation treaties with various countries, pursuant to which taxes payable by foreign entities in Zambia are reduced.

6.3 Will any income of a foreign lender become taxable in Zambia solely because of a loan to or guarantee and/or grant of security from a company in Zambia?

Yes, all income and/or profits earned within the Republic of Zambia are taxable. A foreign lender will typically earn interest as his profit on the transaction and this is taxable.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

These costs have been outlined in question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

There are no adverse consequences.

7 Judicial Enforcement

7.1 Will the courts in Zambia recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Zambia enforce a contract that has a foreign governing law?

The Courts in Zambia will recognise the law of another jurisdiction as the governing law of a contract. Its enforcement may depend on the particular circumstances as the Supreme Court of Zambia has held that the host state may claim jurisdiction depending on the facts in any given case. There is a general rule, however, that an action brought in defiance of an agreement to submit to a foreign jurisdiction will be stayed.

7.2 Will the courts in Zambia recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

In order for a foreign judgment to be enforced it must be registered under the Foreign Judgment (Reciprocal Enforcement) Act. The registration procedure does not re-examine the merits of the case but the process must be commenced within six years of the judgment.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Zambia, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Zambia against the assets of the company?

In the situation described in (a) above, an action can be commenced immediately after the default occurs. Once the court process is served on the defaulting company, the lender can obtain a default judgment if there is no defence within fourteen (14) days. A copy of the judgment must be delivered to the company and execution can then take place seven days after service of the document.

In the situation described in (b) above, a person in whose favour the judgment is will apply for registration of the judgment. This does not require notice to be given to the judgment debtor. Upon receipt of this application, the judge at his discretion will appoint a time for the judgment debtor to apply to set aside the registration. If no application is made within the time given, the judgment may be executed. The time frame is typically fourteen to forty-two days.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There is a legal requirement for holders of security to obtain the best market price for any assets sold to enforce a security. It does not have to be an auction but where the sale of an asset is challenged, the holder of the security must show that he obtained the best price possible in the circumstances. There are no regulatory consents required.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Zambia or (b) foreclosure on collateral security?

There no restrictions on foreign lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes. In a mortgage action the court will give the mortgagor a time frame ranging from 30 to 60 days to settle all amounts due, failing which the mortgagee will be at liberty to dispose of the property to realise all amounts due.

7.7 Will the courts in Zambia recognise and enforce an arbitral award given against the company without re-examination of the merits?

The courts will recognise and enforce an arbitral award under the New York Convention. The merits will not be examined but recognition may be refused on the grounds that it deals with a dispute not capable of being settled by arbitration under local law or its recognition would be against public policy.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Bankruptcy proceedings in respect of companies are called liquidations or winding up proceedings. When a company is placed into liquidation, no court proceedings may be brought against it without the permission of the court. This will affect the lender's right to sue for amounts due to it. Appointment of a liquidator crystallises all floating charges over the company's assets. The liquidator or receiver will use the proceeds from the sale of assets of a company to pay all amounts outstanding in order of priority. Such priority is determined by the date of registration of the security. Depending on the ranking of its security and the assets available, a lender may not recover all amounts due to it. A lender over a fixed charge will have recourse to the specific charged asset to recover amounts outstanding.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes, section 346 (1) and (2) of the Companies Act provides that in the event of insolvency, costs of the insolvency, taxes, statutory deductions and employee benefits shall take priority

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Any company that is incorporated under the Companies Act can be liquidated. Generally entities that are created by statute cannot be wound up under the Companies Act.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes. The agreement between the parties may provide that the creditor appoints a receiver/manager over the assets of a company. The agreement may also provide that when an event of default occurs the lender may seize the assets, particularly in fixed charges without recourse to court. A mortgagee under a legal mortgage is also entitled to exercise the power of sale in the mortgage deed without recourse to court.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Zambia?

Yes it is, as the parties' freedom of contract is given pre-eminence.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Zambia?

Yes it is.

10 Other Matters

10.1 Are there any eligibility requirements in Zambia for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Zambia need to be licensed or authorised in Zambia or in their jurisdiction of incorporation?

If the lender operates outside Zambia there are no local eligibility requirements. Subject to compliance with the laws of its jurisdiction, a foreign lender does not need to be licenced or authorised in order to lend to a company in Zambia. It is important to note that the foreign lender cannot establish a representative office in Zambia unless it obtains a licence from the Central Bank to do so. If it has operations in Zambia it will have to be licenced under the Banking and Financial Services Act as a financial institution or under the Money-Lenders Act.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Zambia?

Foreign lenders must comply with the local law on remittance of foreign exchange out of the country and ensure that the borrowers have registered the foreign loan with the Bank of Zambia.

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Nchito & Nchito is a full service law firm based in Lusaka, the capital city of Zambia. It was formerly part of MNB Legal Practitioners (a firm formed in 1999 through an amalgamation of three law firms that existed previously) and acquired its current name on 1st October 2011 when MNB restructured and the Lusaka and Kitwe offices became separate firms.

The firm is engaged in providing services in diverse areas of the law including convenyancing, commercial transactions, civil and criminal litigation - including debt collection and enforcement of securities, insolvency, company secretarial work, arbitration, banking securities, corporate finance and related work. The major focus of the firm's litigation is commercial and employment related litigation.

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