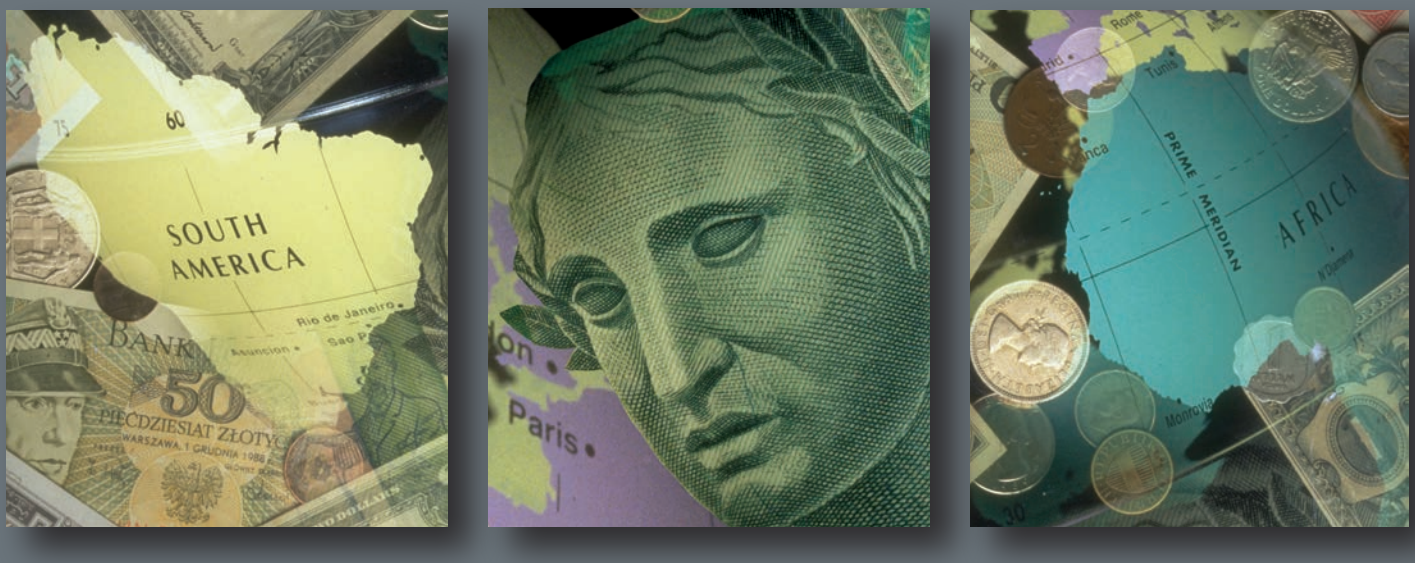

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The International Comparative Legal Guide to:

Lending and Secured Finance 2013

1st Edition

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EDITORIAL

Welcome to the first edition of *The International Comparative Legal Guide to: Lending and Secured Finance 2013*.

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 two main sections:

Six 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 the laws and regulations of lending and secured finance in 35 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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Chapter 1

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

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1. Introduction: The Rise of Cross-Border Lending

Introduction. Welcome to this inaugural issue of *The International Comparative Legal Guide to: Lending and Secured Finance*. Our contributing authors have worked to provide a quick guide to many of the most common issues that arise in cross-border lending transactions. We hope you find the overview chapters and the country chapters that follow useful and practical, and we encourage you to contact us with suggestions to improve future editions of the Guide.

Increase in Cross-Border Lending. Cross-border lending has increased dramatically over the last two decades in terms of volume of loans, number of transactions and number of market participants. According to Dealogic, global syndicated loans totaled approximately $3.4 trillion in 2012, an increase from $1.2 trillion in 2002. Global bilateral-lending has undergone a similar transformation. 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. For those 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. 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 price 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 can be 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, 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 for 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 lenders 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 3 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 of 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 that 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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Bingham's market-leading practices are focused on global financial services firms and Fortune 100 companies. We have approximately 1,000 lawyers in 14 offices in the US, Europe and Asia, including New York, London, Frankfurt, Beijing, Hong Kong and Tokyo. We also have a significant East Coast/West Coast presence in the United States. Bingham has represented lenders for over 100 years and is a leading law firm in the debt finance markets in the United States and globally. Our diverse practice covers a wide range of debt financings, including syndicated lending, leveraged and investment grade financings, cash flow and asset based financings, private note placements and multicurrency and cross-border financings.

Chapter 2

Fashions in European Leveraged Finance – Developments in European Funding Models

SJ Berwin LLP

Ian Borman

Introduction

This chapter is divided into two parts:

- part one looks at factors which have driven the development of loan products in Europe following the credit crunch; and
- part two examines some of the tensions that have arisen in the intercreditor market over the same period.

Drivers

There is a tension at the heart of European funding arrangements, which has been played out over many years. On the one hand, banks have client relationships, knowledge of upcoming transactions (through their M&A teams) and the ability to provide a range of services, including working capital, letters of credit and derivatives (in particular, interest rate hedging). On the other hand, their capital carries a regulatory cost and is (and was even before the credit crunch) relatively expensive when compared to funding available from pension funds and debt funds, the so-called "institutional investors".

Banks and institutional investors also have appetites for different products. Institutional investors are comfortable with gentler or no amortisation, some level of subordination, fixed-rate interest and a risk adjusted rate of return. Bank lenders, meanwhile, typically favour senior, amortising debt with a floating (albeit hedged) interest rate, a product that matches their funding costs and regulatory requirements. These differing appetites explain the existence of "alphabet loans", with A Loans and revolving facilities designed to match banks' capabilities and B, C, second lien and, to some extent, mezzanine facilities reflecting institutional creditors' preferences.

Fashions come and go regarding the availability of funding from these two groups. When institutional investors started to take an interest in debt finance [back in the early 2000s], B tranche and then C tranche loans were crafted as a vehicle for them. The European model of a subordinated high yield tranche alongside significant senior bank debt, which contrasts with the US minimal senior debt structure, was essentially a response to the availability of senior bank debt in Europe. The mezzanine market had, of course, already been in existence for decades. Second lien facilities, a US import, became popular with hedge funds and then with other "relative value" investors aiming to participate in loan markets. Ranking alongside senior debt prior to acceleration and after senior debt post acceleration, these facilities are often documented as the "D" tranche of a senior facility.

The "A" tranches, beloved by banks, shrank (and almost disappeared) as institutional investors' appetite for debt grew. When markets got tough, banks came on the scene again, cautiously lending amortising debt. The market went through several cycles of this in the run up to the credit crunch. Despite the ebb and flow of A loans, banks managed to keep control of the arrangement of finance packages, originating and distributing wherever possible to earn arrangement fees. They also packaged up debt in CLOs so as to allow institutions to easily trade in essentially illiquid assets, to achieve portfolio diversification and to benefit from expert asset management without having to buy into individual loans.

The credit crunch has seen a significant upheaval in the debt market. The key driver in 2012/13 is still the availability of credit to borrowers, but the key difference this time is that bank lending has recovered more slowly than in previous recessions. It's challenged by, in particular, a tough regulatory environment, especially as regards capital maintenance requirements. The traditional debt finance market is tied up in a net of regulation whilst the appetite of less-regulated institutional investors remains high. This dislocation has made space for new entrants and has allowed some of the institutional investors (both insurance companies and non-bank lenders) to become originators as well as funders/buyers of debt.

Previously, banks had a monopoly on deal-origination for a number of reasons. M&A capability and longstanding client relationships meant that, in larger deals, banks had the knowledge and contacts to set up transactions. In smaller deals, it was simply too expensive for non-banks to compete. The knowledge and experience of lending and credit analysis expertise also resided primarily in banks. Now, however, the pricing of smaller loans is particularly attractive to lenders of all types (though for how long remains to be seen). As a result, there has been a massive shift of people, knowledge and expertise away from banks to non-traditional lenders such as private equity firms, asset managers, insurance companies and other non-bank lenders.

Banks are responding to their challenges with an "originate and distribute" model (which arguably should always have been their primary function). However, they are threatened by the new environment and it remains to be seen if the new players in origination, non-traditional lenders, can capture significant market share, whilst avoiding bank-style regulation and capital costs. The "new originators" currently have many advantages - banks are struggling with increased bureaucracy whilst the new originators are, in comparison, relatively small-scale and lightly supervised. Non-traditional lenders can be far more nimble in offering terms (such as bespoke covenants and tailored repayment schedules) that meet borrower requirements. They can also close their deals more quickly.

Banks have aggressively reduced head count, particularly at the more senior level, and have had to rein back on remuneration

packages. The new originators have taken the opportunity to recruit highly talented and well-connected people, providing them with incentives that the banks no longer can. This has happened not only in the debt market but also in the M&A market, so that there is now a wealth of smaller, boutique investment banks which are not locked into their own debt franchises. If debt finance is needed, it does not necessarily have to come from the debt team sitting further down the corridor. To an extent this is, of course, healthy as it encourages competition and can result in a better deal for the borrower. Apart from the competitive threat posed by non-traditional lenders, banks also have to face competition from bond financing and unitranche financing, which can provide structural advantages for borrowers.

Another trigger of the flight from traditional lenders is the reputational damage suffered by banks. Not only have some of their financial products been poorly designed but questions have been raised about the sales techniques used to sell them. If they want to claw back their role as originators and arrangers, banks will have to focus on restoring their reputation, as well as their expertise and their deal-teams.

Tensions

For a long period starting from the 1980s, nothing much happened in the world of intercreditor negotiations. Intercreditor arrangements were structured by senior lenders who typically underwrote both the senior and mezzanine debt. Things began to change in the 2000s when transactions had larger mezzanine pieces and mezzanine lenders began to insist on more protection. In addition, senior secured bond holders were driving for a new deal themselves on intercreditor issues (of which more later).

Mezzanine lenders now routinely benefit from an improved range of protective covenants. Apart from the usual bones of contention (the amount of senior headroom and the restriction of senior market flex, to name just two), mezzanine lenders have, in particular, started to insist on a competitive sales process (or at least a fair valuation) for any asset disposal controlled by the senior lenders and restrictions on the automatic release of mezzanine claims. Arguably, in many jurisdictions, these protections track existing legal protections, but they also open up new areas in which mezzanine lenders can challenge restructurings.

The revised LMA standard form intercreditor agreement issued in September 2012 has incorporated some key items from the mezzanine lenders' wish-list including, amongst other things, the competitive sales process mentioned above. The public auctions and fair value opinions which now feature in the LMA intercreditor form can be expensive and time consuming, sometimes driving valuations down rather than up (or so senior lenders might argue). However, even if senior lenders push back on some of the new mezzanine-friendly terms in the LMA document, mezzanine negotiations at least start from a relatively developed precedent rather than a clean sheet of paper.

So what of the senior secured high yield bond investors? In the old days, high yield bonds usually ranked junior to bank debt in the financing package. Bonds were typically issued by a holding company and so were structurally subordinated to senior bank debt. Security granted to the bond holders (if any) ranked behind the banks' security and no payment on bonds was allowed until all the bank debt had been fully discharged.

That position began to change, however, when bank debt dried up in the credit crunch and companies turned to bonds for their financing. Not only was bond finance available but the terms of this type of financing (with "incurrence" rather than "maintenance" covenants) looked more attractive to borrowers than standard bank debt. Different breeds of bond have emerged in the capital markets senior secured bonds, which sit alongside "super senior" revolving credit facilities (the more traditional US structure), and "pari-bonds", where senior secured bonds rank equally with senior secured loans. There are, of course, other bond structures but these two varieties have become the main contenders in bond financing. The key difference between them is that, in super senior structures, the revolving credit facility has priority over the bond holders as regards enforcement proceeds. In a pari-bond structure, the bond holders and term loan providers rank equally as regards enforcement recoveries.

Bonds, of all types, are in fashion and bond trustees have, as a consequence, started to flex their muscles. In super senior structures, it is now usual for bond holders to control the taking of any enforcement action during a priority window of four to six months. However, they are not given an entirely free hand to do as they wish in this period amongst other restraints, they are typically asked to obtain a fair value opinion and to ensure that enforcement proceeds are paid in cash. Pari-bond holders have a rather harder fight on their intercreditor negotiations. Depending on the transaction, they may have to accept that enforcement is controlled by a two thirds vote of the term loan lenders until the loans have been paid down to a certain level. That said, more deals are now being structured on a more bond friendly basis, with enforcement being controlled by a simple majority of total debt (i.e. without distinction between bond and loan finance). Notwithstanding the imposition of "snooze and lose" provisions (allowing non-voting creditors to be ignored in some circumstances), enhanced voting rights are a key protection for bond holders.

Recent English cases such as IMO Car Wash [2009] have highlighted the vulnerability of mezzanine and other junior lenders. The case concerned (amongst other things) a dispute between senior and mezzanine creditors as to the valuation of the IMO business in the context of a proposed group restructuring. The senior creditors valued the group's assets at a level which meant that there would be insufficient proceeds to pay out the senior debt. The mezzanine creditors disputed that and claimed a higher value (i.e. one which indicated that there was a realistic possibility that some value would be left in IMO for the mezzanine lenders, even after discharge of the senior debt). The court found in favour of the senior creditors and preferred their valuation methodology. The mezzanine creditors were held to have no economic interest in the IMO Group, consequently their interests did not need to be taken into account when planning the restructuring of IMO. This dire outcome for the mezzanine creditors has focused the attention of junior capital providers on intercreditor protections. Valuation criteria, sales strategies and access to information have all become hot topics on intercreditor negotiations.

One way to avoid a protracted intercreditor debate is to forego a traditional, multi-layered capital structure altogether and to opt for a unitranche financing. Unitranche loans combine what would otherwise be first and second lien facilities into a single, secured loan facility with or without a super-senior revolving facility. This type of loan is structured as a single debt instrument. Unitranche facilities are popular with borrowers as they avoid intercreditor issues, typically have limited amortisation and often have covenant-lite aspects. Unitranche loans also feature a single, blended interest rate which applies to the senior and junior components of the loan. As unitranches are typically provided, initially, by a single lender, there is no need for the borrower to deal with multiple lenders prior to closing. As a result, it is usually much quicker and easier to put a unitranche facility in place than a multilayered financing.

The key drawback to unitranche facilities, so far as borrowers are concerned, is that they can attract a higher interest rate than other facilities. However, that cost may be outweighed by savings made as, on a unitranche, there is no need to document separate bond, senior and mezzanine facilities, or to pay separate arranger fees for different layers of finance. When it comes to capital structures, it is not difficult to see why unitranche is popular, at least when banks are offering conservative leverage on primary transactions.

In summary, the credit crunch continues to drive the proliferation of lending sources in Europe and the development of innovative lending structures. Banks now have an opportunity to re-engage with leveraged lending as the European economies improve. However, if they don't, they may lose the privileged (and profitable) position they have traditionally held in arranging and structuring debt in this market.

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Acquisition Financing in the United States: Outlook Improved

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Optimism for 2013 Mergers and Acquisitions in the United States

The 2013 outlook for mergers and acquisitions in the United States continues to grow more robust, which should result in more acquisition financings. Participants in acquisition financings should understand the marketplace for M&A activity as the relative volatility or stability of the market often impacts the terms of the financing and whether the terms are more favourable to lenders or borrowers.

Many factors led to cautious levels of 2012 M&A activity. These included steep mandatory tax increases and spending cuts to be imposed at year-end (the so-called "fiscal cliff"), sovereign debt crises in Greece, Portugal, Spain and Ireland and fear of contagion throughout Europe and its impact on the Euro, unstable U.S. and Asian financial markets, the U.S. presidential election, more aggressive U.S. antitrust oversight and continued lack of financial regulatory clarity from Congress. These and other factors resulted in sluggish M&A activity in both large public and middle-market deals.

There are reasons for optimism in 2013. Concerns about some of the 2012 issues have gone away: implementation of a partial, last-minute fix for the fiscal cliff; less fear of spreading sovereign debt crises in Europe; and conclusion of the presidential election. Continued recovery from the 2007 financial crisis and increased collateralised loan activity should result in continued increases in available liquidity. Many corporate balance sheets continue to be flush with cash and many 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. In addition, a recent survey by PricewaterhouseCoopers shows U.S. CEOs to be as bullish on M&A as they have been in years.

The end of 2012 saw a flurry of blockbuster M&A deals (e.g., a $20 billion purchase by Japan's Softbank of 70% of Sprint, an $8 billion purchase by IntercontinentalExchange of NYSE Euronext and a $4.23 billion purchase by a Chinese consortium of 80.1% of International Lease Finance Corp.). This momentum continued through the start of 2013 (e.g., a $28 billion purchase of Heinz by Berkshire Hathaway and 3G, a $24 billion leveraged buyout of Dell and a $16.7 billion acquisition by Comcast of GE's 49% ownership of NBCUniversal). There is definitely optimism that these deals are harbingers of a stronger 2013 for M&A.

As M&A activity increases, so will the need for acquisition financing. It is important to review the fundamentals of U.S. acquisition financing using secured loans and 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' obligation to fund the loans and the conditions precedent to such obligation. It is of particular importance to acquisition financing and the strength of a commitment letter 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. In acquisition financing, where the proceeds of the loans will be used by the borrower to pay the purchase price for the target company, 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 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 other bids and requiring the parties to work diligently towards closing. Further, many acquisition agreements do not give the buyer a right to terminate the agreement if its financing falls through (known as a "financing-out" provision). Accordingly, at the signing of the acquisition agreement, and as consideration for the seller's efforts and costs to close the acquisition, the seller 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 to show 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. Limiting the number of conditions precedent in a commitment letter, and being explicit as to the included conditions, is a key mechanism 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 have been met but the lenders' obligation to fund the loans have not. If, in that scenario, no financing-out clause is included in the acquisition agreement, 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 contemplated by 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. Many lists 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 the calculation of any financial covenants).

Some sponsors even require that the form of the loan agreement be consistent with "sponsor precedent". Requiring the lender to use the sponsor's most recent loan agreement as a model for the new financing limits the risk to the sponsor that the financing will be delayed or not close because the lender produces a draft loan agreement with off-market or unusual clauses.

Representations and Warranties

Loan agreements typically require that the representations and warranties included in the loan agreement be accurate as a condition to 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 to the lenders' funding obligations, only certain representations need to be accurate. Strong sponsors sometimes even negotiate the precise meaning of the term "accurate". The representations required to be accurate as a condition to the lenders' funding obligation in a typical SunGard clause include the following:

(i) 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 than the acquisition agreement.

(ii) Only certain representations with respect to the borrower set forth in the loan agreement must be accurate (the so-called "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 the 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.

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 within pre-agreed limits or make other pre-agreed changes to the structure of the loans. 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 requiring 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 require "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

Like in all secured financings, lenders in an acquisition financing need evidence that their liens on the borrower's assets are perfected and enforceable following the borrower's default under the loan agreement. 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.

Another aspect of a typical SunGard provision limits 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. 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 than 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.

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, sellers' focus on certainty of the financing have 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.

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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Chapter 4

Subscription Credit Facilities: Key Features, Documentation Issues and Credit Concerns

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A subscription loan or capital call lending facility is a loan facility provided to a private equity fund secured by the unfunded capital commitments of the fund's constituent partners or equity investors. These subscription loan facilities performed very well during the financial crisis, with notably few reported incidences of investor defaults. As a result, there continues to be both a strong demand for such facilities from private equity fund borrowers and a number of lending institutions willing to provide the necessary leverage to such funds. In 2012, there was a substantial increase in capital raised by private equity firms and all indicators point to investors continuing to have a desire for private equity. While there has been a mild tightening of spreads and pricing, the lack of transaction and investor defaults and the increase in investor equity has led to continued interest from funds and lenders.

Subscription loan facilities have been established for all types of private equity funds, including real estate, infrastructure, energy and buyout funds, and are generally used to bridge the time gap between a fund making an investment or needing capital for general working capital purposes and the fund either calling capital on its investors to pay for such investment or expense or accessing another source of capital that was unavailable at the time of such purchase or payment. Instead of immediately calling capital on its investors to make an investment or for other purposes, a fund will use the proceeds of a loan and will call capital on its investors at a later date to repay the related borrowing. Using leverage to bridge the gap enables a fund to make fewer capital calls on its investors, to avoid the need to call capital in advance of every investment or capital expenditure, to avoid issues with investors being late in funding capital contributions and to have longer term repayment options not linked to a particular investment or obligation.

Typically, loans and other obligations in a subscription loan facility are secured by a pledge by the fund (and, if applicable, the fund's general partner) of (i) the unfunded capital commitments of the fund's investors, (ii) the right of the fund to make capital calls upon such investors and to enforce the unfunded capital commitments against the investors, and (iii) the subscription accounts into which the capital contributions are funded. These loans may be funded either through a bank loan facility, or through a structured finance multiseller commercial paper conduit securitisation facility pursuant to which such conduit issues commercial paper notes to fund such loans. Generally, subscription loan facilities are committed facilities; however, certain facilities in the market are made by lenders on an uncommitted basis. The use of an uncommitted facility will depend on factors such as the creditworthiness of the fund sponsor, the make-up of the investor base, and the use of proceeds of the loan, including the composition of the underlying assets being purchased by the fund.

Eligible investors are frequently ascribed different advance rates based on their perceived creditworthiness

A lender's obligation to make a loan under a subscription loan facility is generally contingent upon the fund's compliance with an over-collateralisation or borrowing base test, which requires that the outstanding loans and other obligations under the facility not exceed the facility's borrowing base of eligible collateral.

The borrowing base for a subscription loan facility is typically derived by multiplying the unfunded capital commitments of the fund's investors who meet specified eligibility criteria by a specified percentage, known as the advance rate. Eligible investors are frequently ascribed different advance rates based on their perceived creditworthiness. For example, for many subscription loan facilities, an unrated investor will have a less favourable advance rate than a rated investor. In addition, the borrowing base will generally be reduced by certain investor concentration limits, which has the effect of limiting the lender's credit risk by increasing diversification and reducing its exposure to, among other things, obligor, country or unrated investor risk. As discussed in greater detail below, the borrowing base may be further reduced if certain investors are excused or excluded from participating in specified portfolio investments, or upon the formation by the fund or its general partner of certain alternative investment vehicles.

The failure of a fund to satisfy its borrowing base test will typically constitute a mandatory prepayment event, requiring the fund to prepay the outstanding loans in an amount sufficient to remedy the deficiency. It is important to note that while the borrowing base test may only take into account the unfunded capital commitments of eligible investors meeting specified criteria set forth in the facility documents, the lender's security interest will generally include the unfunded capital commitments of all investors in the fund, irrespective of their eligibility for inclusion in the borrowing base computation.

The documentation establishing a subscription credit facility generally includes a revolving credit agreement pursuant to which the loans are made to the fund, a pledge and security agreement pursuant to which the capital commitments and related rights and accounts are pledged to the lenders, and a control agreement with the account institution that maintains the subscription account into which the capital contributions are funded, pursuant to which the lenders' security interest in the subscription accounts are perfected, and the account institution agrees that after it is notified by the lenders that an event of default has occurred under the loan documentation, it will only follow the lenders' direction with respect to the disposition of all amounts remitted to the subscription accounts. In addition, lenders also may require that the investors

execute a so-called acknowledgment letter for the benefit of the lenders pursuant to which, among other things, the investors acknowledge the existence of the subscription loan facility and the pledge of the capital commitments, and confirm the amount of, and their obligations in respect of, their unfunded commitment.

The internal policies and credit criteria of various lenders have resulted in many differences in the terms and requirements for the subscription loan facilities in the market. These differences can be quite significant, particularly in respect of the criteria for determining eligible investors for the borrowing base, the nature of the events of default which could cause the termination of the lenders' commitment and the acceleration of all amounts due to lenders under the subscription loan facility.

Lenders have varied views regarding the requirement that investors execute investor acknowledgments and provide opinions of counsel

In addition, lenders have wide-ranging views regarding whether all investors, only eligible investors or no investors must provide executed investor acknowledgments and/or opinions of counsel. In addition, some lenders require that a borrower use commercially reasonable or good faith efforts to have such acknowledgments signed by the relevant investors. The requirement to have executed investor acknowledgments can also vary depending on the creditworthiness of the sponsor and/or the investor, and as a result of both the composition and concentration of investors. To the extent that similar provisions are included in the fund's underlying documentation and the lender receives a pledge of the fund's rights thereunder, a number of lenders take the position that obtaining a signed letter directly from the investor, while nice to have, is not essential to its credit determination. Lenders also vary on whether an investor providing an investor acknowledgment must provide a legal opinion or authority certificate regarding, among other things, its valid existence, power and authority, due authorisation, execution and enforceability of the investor acknowledgment and no violation of law or conflict with organisational documents. As with the investor acknowledgment, the obligation to provide an opinion or certificate can depend on the creditworthiness of the sponsor and/or the investor, and as a result of both the composition and concentration of investors. The opinion or certificate can provide comfort to credit analysis, but is not essential for the enforceability of the investor acknowledgment. In addition, a lender's credit analysis may be aided by the receipt of a comfort letter or keepwell agreement with respect to the investor from a parent, sponsor or related entity with a credit rating.

The establishment and structuring of a subscription loan facility requires a comprehensive legal due diligence review of the related fund's underlying documents

The capital commitments of the investors of a fund are contract rights arising from the limited partnership agreement, limited liability company agreement or similar constituent documents of the fund, as well as the subscription agreements executed by the fund's investors. As a result, the establishment and structuring of a subscription loan facility requires a comprehensive legal due diligence review of the related fund's underlying documents, including its constituent documents, investment management agreement, offering materials, subscription agreements and any relevant investor side letters. As a threshold matter, it is essential that these documents explicitly permit borrowing facilities and the ability to pledge the unfunded capital commitments of the fund's investors and the other collateral referred to above. For limited partnerships, the fund documents should also grant the fund's general partner the authority to enter into such facilities on the fund's behalf.

Other fund document provisions, the incorporation of which is of critical importance to a subscription loan facility lender, include:

- an irrevocable and unconditional obligation of the fund's investors to fund capital calls without any defence, counterclaim or offset;
- an agreement by the fund's investors to deliver to the lender an "investor acknowledgment" pursuant to which, among other things, such investors acknowledge the existence of the facility, the pledge of the fund's rights and remedies in respect of the unfunded capital commitments, including the right to receive all amounts in respect thereof, as well as opinions of counsel and certain essential financial information;
- if the fund utilises a master/feeder structure wherein the unfunded capital commitments are in the feeder funds, the feeder fund documentation must include express permission to pledge the unfunded capital commitments of the feeder fund investors to secure borrowings by the master fund; and
- a prohibition on transfer of any fund investor's interest in the fund without the consent of the fund (or the fund's general partner).

It is not uncommon for fund documents to contain an omnibus section which addresses many of the issues outlined above.

Issues that arise in the due diligence review of a fund's underlying documents can often be addressed in the loan documentation for the subscription loan facility. As noted previously, the borrowing base is typically computed solely by reference to "eligible" fund investors. As such, the loan documentation will often be tailored to restrict the ability of the fund (or its general partner) to consent to transfers of the interests of investors in the fund in order to maintain the quality of the collateral pool securing the loans. The loan documentation may also set forth negative covenants and other provisions relating to the use of proceeds of borrowings by the fund, existence and fundamental changes to the fund, limitations on distributions, amendments to the fund's organisational documents and limitations on the incurrence of additional indebtedness or liens.

In many cases, the fund's constituent documents will permit capital calls for new portfolio investments only during a specified investment period, after which capital calls can only be made for limited purposes, such as certain specified fund expenses or follow-on investments. If the fund documents do not expressly allow capital calls after the investment period for the purpose of repaying principal, interest, fees, expenses and other liabilities arising under the subscription loan facility, the loan documentation will have to be drafted to ensure that the final maturity date of the loans precedes the expiration of the investment period by a sufficient margin of time to enable at least two capital calls to be made for the repayment of all amounts owing under the subscription loan facility. Furthermore, if the fund documents provide for the early termination of the investment period upon the occurrence of certain acts or events, such as "key man events", covenant breaches or at the election of a requisite percentage of investors, the fund documents should be drafted such that either the permitted timing of the effectiveness of such termination ensures that the unfunded capital commitments will remain available for a sufficient period of time to satisfy the fund's obligations under the subscription loan facility in full or to clarify that even after a termination of the investment period capital calls may be made to pay all obligations owing under the subscription loan facility.

Other fund document provisions that may significantly impact the

structure and terms of a subscription loan facility include provisions:

- limiting the amount of loans or indebtedness that may be incurred by the fund to a percentage of the fund investors' aggregate unfunded capital commitments;
- restricting the purposes for which loan proceeds may be used;
- in connection with the timing, manner, mechanics and permitted uses of capital calls;
- limiting capital calls to be made on non-defaulting investors as a result of defaults by other investors;
- relating to the ability of the general partner or an investor in the fund to transfer or assign its interest; and
- limiting the tenor of loans, thereby effectively enabling short-term bridge financing, but prohibiting long-term substitutes for making capital calls, such as subscription loan facilities.

When evaluating fund documents in the context of a subscription loan facility, however, the devil is in the details

The issues outlined above are only a representative sample of threshold legal due diligence concerns. When evaluating fund documents in the context of a subscription loan facility, however, the devil is in the details. The discussion below is intended to address several less obvious, but no less important, fund document provisions that can significantly impact a lender's rights and remedies.

Fund documents will generally empower a fund or its general partner to determine (for legal, tax, regulatory or other reasons) that it is in the best interest of the fund or its investors to effect all or a portion of a portfolio investment through an alternative investment vehicle, or AIV. Should such a determination be made, fund investors will be required to contribute capital directly to the AIV to the same extent, for the same purposes, and on the same terms and conditions governing capital contributions to the fund. However, while capital contributions made to an AIV effectively reduce the unfunded capital commitments of the fund investors to the same extent as if such capital contributions were made to the fund itself, such capital calls are not made by the fund or its general partner and such capital contributions are typically funded not to the fund subscription account pledged for the benefit of a subscription facility lender, but to a separate account of the AIV. Such capital calls made by an AIV effectively diminish the lender's collateral while providing such lender with neither cash control over the contributed funds nor contractual control over the ability to make such capital calls.

The foregoing risk can be mitigated by careful drafting of the loan documentation. One approach is to prohibit the establishment of any AIV unless such AIV (i) is made a party to the loan documentation and pledges to the lender both the subscription account into which the proceeds of the capital calls will be remitted and its rights and remedies in respect of the unfunded capital commitments, and (ii) enters into a control agreement with the lender and the account institution that maintains the AIV's subscription account, pursuant to which the lender's security interest in such account is perfected, and the account institution agrees that it will only follow the lender's direction with respect to amounts maintained in such account should an event of default occur under the facility documents.

Alternatively, the parties to the loan documentation can agree to (i) prohibit the establishment by the fund (or, if applicable, its general partner) of any AIV unless the borrowing base test would be satisfied after deducting the aggregate maximum capital commitments of the investors of the fund which are also investors of the AIV from the borrowing base computation, and (ii) correspondingly reduce the borrowing base by such aggregate maximum capital commitments.

Fund documents may also permit an investor to exercise an "excuse right" in order to opt out of funding a capital call relating to a particular portfolio investment under certain discrete circumstances, including if participation in such investment would violate any applicable law, rule or regulation, or result in an ERISA "prohibited transaction". In addition, fund documents may also permit the fund or its general partner to excuse or exclude an investor from its obligation to fund capital calls relating to a particular portfolio investment under certain circumstances, such as if such investor's participation in such investment would cause the fund to violate any applicable law, rule or regulation, to incur significant increased tax liability or to cause an investor to invest in an asset which is contrary to such investor's policies. Typically in the context of a subscription loan facility, an investor who is excused or excluded from funding a capital call to acquire a portfolio investment cannot be called upon to fund a capital call to repay the loan utilised to fund the acquisition of such portfolio investment. As a consequence, these excuse and exclusion mechanisms effectively operate to reduce the unfunded capital commitments securing the facility, thereby causing the amount of the borrowing base available to repay facility obligations to be overstated.

Complicating matters even further, in many instances investors are notified of a prospective portfolio investment when a capital call is made to fund the acquisition of such investment, at which time such investors are afforded a specified period during which to exercise their excuse right. The terms of a subscription loan facility are at odds with this practice since capital calls are made not at the time a portfolio investment is acquired, but rather when the loan used to finance such portfolio investment is repaid.

Lenders must carefully review the excuse provisions to ensure that the circumstances for which an investor may be excused from funding a capital call are not overly broad

Lenders must carefully review the excuse provisions to ensure that the circumstances for which an investor may be excused from funding a capital call are not overly broad. In addition, the ability of an investor to exercise its excuse right should be conditioned upon the relevant investor providing the fund with certain verifying opinions and/or certifications. Ideally, sufficient advance notice of any portfolio investment should be given to investors such that the period of time in which an investor can exercise its excuse right shall expire prior to the date such investment is acquired. The facility loan documentation should account for excuse risk by reducing the borrowing base to reflect the exercise of any excuse rights, and prohibiting the fund from acquiring a portfolio investment if the resulting borrowing base reduction would cause a borrowing base test violation. It may also be advisable to build threshold limitations into the facility documentation to ensure that the portion of the aggregate unfunded capital commitments relating to excused investors remains at acceptable levels.

Fund documents may in some cases allow a fund to utilise all or a portion of the proceeds or distributions from a portfolio investment that would otherwise be distributed to fund investors to fund certain reserves, costs, expenses, fees and follow-on investments, and to treat such amounts as having been distributed to the fund investors and immediately recontributed to the fund as capital contributions.

These deemed capital call provisions reduce the unfunded capital commitments with no corresponding contributed cash being remitted to the lender-controlled subscription account. Such provisions can thus have the effect of decreasing the borrowing base without providing the lender the ability to take control over any related contributed cash.

It is imperative that a lender have both a perfected first priority security interest in fund investors' unfunded capital commitments and control over the subscription account into which the related capital contributions are funded

To address this risk, the loan documentation should limit the circumstances under which a fund can avail itself of the right to make deemed capital contributions. It is further advisable that the fund documentation provide that no such deemed capital contribution shall be effective until the related proceeds or distributions from the portfolio investments are remitted to an account which is pledged to the lender.

Since facility lenders rely upon the cash flow from capital calls of fund investors to retire subscription loan facility indebtedness, it is imperative that a lender have both a perfected first priority security interest in fund investors' unfunded capital commitments and control over the subscription account into which the related capital contributions are funded.

Fund documents will commonly allow for an investor's capital call obligations to be satisfied "in-kind", by securities or other assets valued at fair market value. Because such non-cash capital contributions are not funded to the pledged subscription account and are thus not readily available to repay outstanding loans, the loan documentation must be drafted to carefully limit the circumstances in which a fund has the discretion to accept in-kind capital contributions.

Fund documents typically contain a boilerplate provision to the effect that such documents are not intended (and shall not be deemed) to create or confer any rights for the benefit of any third party who is not a party thereto, and such third parties shall have no rights thereunder. Since a lender under a subscription loan facility is granted a security interest in the unfunded capital commitments of the fund investors, including the right to make capital calls and enforce remedies against breaching investors, provisions of this nature conflict with the fundamental premise of a subscription loan facility.

This inconsistency can be easily remedied by adding a carve out to the "no third party beneficiary" provision that clarifies that such provision does not apply to the lender's rights and interests contemplated by the other terms of the fund documents.

In order to maximise optionality, investment opportunities and tax treatment for investors, funds can be structured a multitude of ways, including a master/feeder structure, parallel funds, alternative investment vehicles, series limited partnerships, tax blockers, sidecar funds, multiple offshore jurisdictions and co-investment funds. Each of these structures may raise issues in the underlying fund documents which should be addressed in the loan documentation. For example, if the borrower is not an entity with direct capital commitments from investors, the entities that have such privity with the investors will need to be added to the loan documents in order to pledge their unfunded capital commitments to secure the loan or to guarantee the obligations of the borrower thereunder. In addition, if there are multiple borrower or pledging entities, the underlying fund documentation should include provisions clarifying that each entity is jointly and severally liable for the obligations of each other entity, that the entities have the ability to be cross-collateralised and that the capital commitment of an investor in one entity can be called upon in connection with the loan obligations of another entity notwithstanding if the entity in which it has a subscription participated in the investment purchased with such loan. To the extent that such cross-collateralisation and joint and several indemnification is not possible, separate borrowing base calculations would be required for each such entity based on its own separate collateral pool of unfunded capital commitments. Fund structures could also lead to documentation complications relating to ensuring lender control of cash flow and accounts at multiple points in the fund structure. There could also be added complexity as a result of structures utilising multiple jurisdictions, including perfection and security interest complications and added mechanics based on unique jurisdictional laws and requirements and mechanics for capital calls.

Investors will commonly negotiate special terms as a condition to their investment in a fund. As a result, funds will often enter into side letters with their investors that effectively override various provisions of the fund documents and/or confer upon the investor additional rights. Modifications to fund documents imposed by side letters that may have critical implications to subscription loan facility lenders include the following:

- provisions affording an investor additional rights to excuse itself from participating in a portfolio investment;
- provisions relating to an investor's express retention of sovereign immunity;
- provisions relating to an investor's right to cease making capital contributions or withdraw from the fund as a result of the fund or its general partner breaching placement agent disclosure representations and warranties;
- provisions that would require disputes relating to such investor's capital commitment to be subject to arbitration;
- provisions that affect the termination of an investor's commitment or the fund's investment period;
- provisions which may have the effect of reducing an investor's capital commitment; and
- provisions precluding a fund from pledging an investor's unfunded capital commitment.

In addition, if other investors are provided with "most favoured nation" clauses in their side letters, which provide the related investor with the benefit of any applicable favourable terms provided to any other investor, the effect of any problematic language in a given side letter may be greatly magnified.

Side letters must be carefully reviewed to determine if the terms provided to a particular investor should be addressed in the subscription loan facility documents, whether by excluding the unfunded capital commitment of the applicable investor from the borrowing base calculation or otherwise.

The popularity of subscription loan facilities is on the rise and showing no signs of slowing down. Due diligence in the context of establishing these facilities must be performed with great care, as the devil is in the details.

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Chapter 5

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 held not only by banks but also are 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 2012, total corporate lending in the United States exceeded $1.5 trillion. 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 $610 billion in 2012. 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 $665 billion.[1] 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 generally defined, middle market lending includes loans of up to $500 million that are made to companies with annual revenues of under $500 million. For these companies, the loan market is a primary source of funding. In 2012, the middle market represented approximately two or three percent of the overall syndicated lending market in the United States.[2]

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.

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 new regulatory challenges faced by the loan market in a post-financial crisis environment.

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.[3]

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.

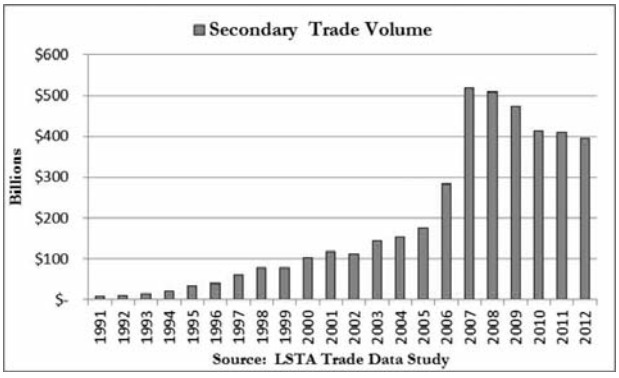
Although leveraged lending volume in the primary market had reached approximately $100 billion by 1995, trading activity was still relatively low, standing at approximately $40 billion.[4] The early bank loan trading desks at this time initially acted more as brokers than traders, simply brokering or 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.[5] 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, investor confidence had returned and leveraged (and trading) lending volumes quickly rebounded.

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. Unfortunately, secondary trading activity has been in steady decline since 2007 and, in 2012, it still was 20 percent lower than its 2007 peak at $400 billion. Although reduced trading activity is typically associated with a less liquid market, the investment tools put in place years earlier – an independent pricing service, ratings, and the standardisation of legal and market practices – have enabled the secondary loan trading market to be as liquid and transparent as 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.[6] 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.[7]

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.[8] 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. These forms were tested in the Global Financial Crisis after Lehman Brothers filed for bankruptcy in September 2008. Not surprisingly, as an active dealer in the loan market, Lehman Brothers had settled certain trades as participations using the form of LSTA participation agreement. Each participation agreement under which Lehman granted a participation interest to the buyer was reviewed, and it was determined that, provided parties adhered to the LSTA form, they were afforded sale accounting treatment and those participations and the related income streams were not treated as part of Lehman's estate.

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 its key demand stream, CLOs. CLOs represented 55 percent of the institutional loan market in 2012, 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 lacuna in the syndicated loan market – a hole not easily filled by banks in light of the federal regulators' proposed "Guidance on Leveraged Lending" published in 2012 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.

The 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. Although loans were excluded from the proprietary trading ban, unfortunately, the ban on owning or sponsoring hedge funds or private equity funds stands and could severely limit the formation of CLOs. The Rule's definition of "covered fund" captures CLOs and almost all asset backed securities. The net result is that the Volcker Rule could prevent banks from providing warehousing or making markets in the assets or the liabilities of CLOs that they structure. This could make structuring, supporting, or unwinding a CLO difficult indeed. The LSTA has requested an exemption for CLOs, making the legal argument that Dodd-Frank's rule of construction mandating that "nothing in the [Volcker Rule] limit or restrict the sale or securitization of loans" does not permit the regulators from prohibiting warehousing and market making in CLOs. The Volcker Rule is currently set to go effective July 21, 2014.

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 proposed risk retention rules 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 five percent of the notes of the CLOs (or five percent of the assets 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. 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. In the absence of a securitiser, the LSTA believes that CLOs should not be subject to Dodd-Frank's risk retention rules. Fortunately, CLOs would not be subject to risk retention until two years after the final rules are written (mid-2015 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 regulators' proposed Guidance on Leveraged Lending could materially impact banks' ability to underwrite and hold certain types of leveraged loans. First, the expanded definition of "leveraged finance" in the Guidance purports to include "fallen angels", companies which engage in an acquisition or recapitalisation transaction whose debt/EBITDA is greater than four times or senior debt/EBITDA is greater than three times, and loans to financial vehicles that themselves engage in leveraged finance. The adoption of this definition could vastly increase the size of many banks' leveraged loan portfolios. Second, the Guidance suggests that if a company cannot show the ability to amortise from free cash flow all its senior debt or half its total debt within five to seven years, the loan will likely be criticised. This suggests that the size of banks' "criticised" assets may increase dramatically. Third, the Guidance does not simply apply to loans held by banks but also loans arranged by banks. While banks await the issuance of the final Guidance, which is expected to be published in early 2013, the federal regulators' are reportedly already conducting their reviews based on the roadmap provided in the proposed Guidance.

Finally, FATCA, enacted in 2010, imposes a 30 percent withholding tax on U.S. source payments to any foreign financial institution ("FFI"), for example, a CLO, foreign bank, or fund, which does not sign an FFI Agreement with the IRS and agree to provide information on its U.S. accounts. Although further guidance from the IRS is expected, the final regulations implementing FATCA were published on January 17, 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 prior to the grandfathering deadline of January 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 2014 and withholding on principal payments and gross sale proceeds begins in 2017. Unfortunately for the loan market, FATCA poses additional specific problems for pre-FATCA CLOs, and the LSTA has requested the IRS to provide further clarification to the transitional relief intended for pre-2012 CLOs set forth in the final regulations.

Conclusion

Today's loan market certainly looks much different from that 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 "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.

2 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.

3 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.

4 Thomson Reuters Loan Pricing Corporation.

5 Thomson Reuters Loan Pricing Corporation.

6 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).

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

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

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Prior to joining the LSTA, Bridget practiced at Milbank, New York, and at Simmons & Simmons, London, and completed a judicial clerkship for The Honorable Justice Beaumont of the Federal Court of Australia.

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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 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 490 in 2012, including banks, non-bank institutional investors, law firms, ratings agencies and service providers from 46 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.

Most recently, and as a product of the LMA's strategy to broaden its mandate, 2012 has seen the launch of a commercial real estate finance document, a facility agreement for developing markets and a pre-export finance facility agreement. This represents a major step change for the Association following many years of focusing mainly on corporate documentation. It is envisaged that further derivations of these agreements will be developed in the near term.

Back within the leveraged corporate market, work is currently underway on the development of an intercreditor agreement and super senior revolving credit facility for use in conjunction with a high yield bond.

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).

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 the last 18 months, the LMA has actively lobbied regulators in the UK, EU and US on various proposals potentially impacting the loan market. In late 2011, a response was submitted to the Internal Revenue Service in the US regarding certain provisions under the Foreign Account Tax Compliance Act ("FATCA"). In early 2012, concerns were raised by the LMA to the European Commission relating to the drafting and interpretation of the Capital Requirements Directive IV. In May 2012, the LMA responded to the European Commission's consultation on shadow banking. In July last year, and following months of lobbying, confirmation was received 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. In September 2012, the LMA submitted a response to the Wheatley Review on LIBOR. In October 2012, following consultation with a working party consisting of both bank and non-bank members, the LMA responded 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.

The LMA expects to continue to play a leading role in the dialogue with regulators going forward, from Basel III to risk retention and Collateralised Loan Obligations, and 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 and New York.

In September 2012, 800 delegates attended the LMA's 5th annual Syndicated Loans Conference in London, the largest loan market event in EMEA. In total over 13,000 delegates have attended LMA events across EMEA in the last 4 years.

In 2005, the inaugural LMA Certificate Course was held in London.

Consistently oversubscribed, the course is now entering its 8th year and will be run four times in 2013. 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 9,000 copies of The Loan Book have been distributed to date since publication. The first in a series of market guides, Regulation and the Loan Market, published late last year, also met with considerable interest from the membership.

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 in 2010 and 2011 but 2012 has proven to be another challenging year for the loan market across EMEA, overall issuance of *ca*. $770BN some 33% down on 2011 (source: Dealogic). Global economic uncertainty, from the Eurozone sovereign debt crisis and the US "fiscal cliff" to slowing growth in China, has undoubtedly stymied corporate investment in 2012. Also, European banks have continued a process of retrenchment, some restricting lending to home or core markets, a funding gap plugged to a certain extent by US banks increasing their overall EMEA market share.

The Way Forward

Results from a survey of LMA members at the end of last year suggest that difficult market conditions for the syndicated loan market seen across EMEA in 2012 are likely to persist at least in the short term. Unsurprisingly it was the view of the majority of survey respondents that regulation is likely to represent the biggest single influencing factor in 2013.

In early January of 2013, the Basel Committee issued a revised LCR proposal following endorsement by its governing body, the Group of Central Bank Governors and Heads of Supervision. The revised parameters loosen eligibility criteria for liquid assets (to be held to cover outflows over 30 days in a stress scenario) and allow greater time for banks to build up their liquidity buffer (originally 2015, now in a phased period from 2015 to 2019). Viewed as a positive development for bank lending, the continued difficult market conditions predicted by the LMA membership may well be eased as a result. We can certainly be left in no doubt, as the survey predicts, that the influence of regulation in the coming year will be key.

Panellists at a December 2012 seminar held by the LMA in London pointed to policy intervention and specifically the Outright Monetary Transactions programme announced by the ECB as being potentially the most significant driver of confidence into 2013. Panellists expressed cautious optimism for renewed corporate activity, perhaps opening the door to increased M&A related lending volume.

Other trends will also determine the focus of the LMA's work into 2013 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. Non-bank lending will inevitably increase in importance and the LMA will seek to investigate ways of attracting a broader investor base for the loan product. 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.

The LMA's principal objective some 16 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.

Chapter 7

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 two current forces that have proved to be disruptive in the local financial market: (i) inflation; and (ii) foreign exchange restrictions limiting the ability of local residents and non-Argentine residents to acquire foreign currency. In a nutshell, current interest rates in connection with secured financing in Pesos (but also in dollars) are priced at a rate which is, in some periods, even lower than inflation. In other words, inflation has trumped interest rates in terms of percentage and, therefore, interest rates have proven to even be negative.

In light of this, 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 recent issues of 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 on which the lender is entitled to request payment of principal and interest in foreign currency, local currency at an specific exchange rate, or in kind.

Finally, since the re-enactment of foreign exchange restriction in 2001, most of the financings received by local companies are trade-related financings, which proceeds 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 a 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 2011, Energía Argentina S.A. issued securities through two financial trusts, for the amounts of US$690,000,000 and US$350,000,000.
- In 2011, NASA Trust launched the second bond offering, raising US$407,000,000, for the financing of the Atucha II nuclear power plant.
- In 2012, Exal Argentina S.A. and Exal Packaging S.A., together with other members of the Exal Group as borrowers, executed a loan secured agreement with Fifth Third Bank as lender and agent, and Equity Trust Company Argentina as Argentine collateral agent, for the amount of US$250,000,000.
- In July 2012, Synthon Argentina (and other subsidiaries) secured a US$123,700,000 revolving loan facility granted by ABN AMRO Bank, Rabobank, Deutsche Bank Netherland and ING Bank to Synthon International Holding.
- In October 2008, Banco Supervielle launched a financial trust worth US$87,700,000. The trustee was Equity Trust Company (Argentina) and the funds came from loans granted by Cordial Compañía Financiera, who acted as trustor and administrator.

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 a proper benefit or consideration. Otherwise, it may be considered that the granting of the guarantee derives no benefit for the securing company and, hence, the transaction could be challenged by other creditors.

Besides, the by-laws of the securing company should include the prerogative to grant borrowings to third parties or its main activity should be financing.

These requirements should be strictly construed 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 object, nor receives a consideration or benefit, the guarantee may be deemed out of the scope of the securing company's corporate

purpose (*ultra vires*) transaction and, consequently, may be declared void.

Besides, pursuant to Argentine law, directors must act loyally towards the company and its shareholders, which includes the responsibility to perform their duties with the diligence of a "good businessman" and in the interest of the company. Any failure to comply with these standards results in their 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 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 is 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 transaction is previously approved by the Board of Directors or the shareholders' meeting, as applicable. 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.

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 (please 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 may demonstrate the corporate aim, as explained in question 2.1, Argentine law does not provide limitations on the amount of a guarantee, but 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 the 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 the compliance of 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 enabled to purchase foreign currency for repatriation purposes, provided that certain specific requirements are complied with.

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 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 the access to the FX Market to purchase 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 guarantees over specific assets.

The "personal" guarantees are granted by a person different from the debtor, who commits 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 the asset-backed guarantees, does not create a lien or a privilege in favour of the creditor.

The 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 the personal guarantee, it grants the creditor 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, disregarding if the guarantor sells or transfers his property, and the right to execute the guarantee and receive the corresponding payment with preference to 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. 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, trademarks, among others. 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 a separate estate from the estates of the trustee and the trustor. If the property given in trust is registered with a public registry, the relevant registry will record the properties 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 in 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 impediment that the

trustee be a controlled or controlling entity to 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 amount 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, 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.

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.

1) "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.

2) "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.

3) "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 perfection of the registration of a fixed pledge involves the filing of the petition to the Pledge Registry of the jurisdiction where 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 execution date if the petition to register the pledge is filed before the corresponding Registry within 24 hours from 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 is perfected upon delivery of the amounts pledged to the pledgee.

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, the 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 applicable law to the contract (see question 7.1), but the content, conditions and real effects of the security over the shares must be ruled by Argentine law.

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 where 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 between 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; or (c) 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 enabled to deduct interests (for income tax purposes) as long as the expenses were incurred to generate taxable income.

The Argentine Tax Authority has challenged the deduction of interests 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, who might calculate the due amount of principal and interest, calculate financial ratios, inform the compliance or defaults of the debtor's obligations under the agreement, and keep and guard 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 the 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 enforce the security if the debtor fails to comply with the agreement and apply 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 must be 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 (please refer to 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 countries not deemed to be a low tax jurisdiction or in a jurisdiction that has entered into agreements of exchange of information with Argentina and, besides, 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% –deriving, therefore, 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 paying 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 on each jurisdiction.

For tax purposes, the activity of lending money is presumed to be done on a habitual basis, even if done once, and subject to Turnover Tax. The amount of returned capital is excluded from the taxable base. Thus, only the total amount of interests 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 effects 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 in an Argentine bank account of the borrower 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 exempted 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, and those interest payments are subject to a withholding tax lower than 35%, thin capitalisation rules will apply. 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 or even a related party if the interest is subject to a 35% income withholding tax.

Also, if the lender is located in a low tax jurisdiction (regardless if 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.

There are certain exclusions from the thin capitalisation rules. Among them, the thin capitalisation rules do not apply to interest related to indebtedness included within Section 93 c) 2) of the Income Tax Law, which provides that cross-border interest payments that do not qualify under Section 93 c) 1), are presumed to derive 100% of net income for the foreign beneficiary and, therefore, applying the general withholding rate of 35% would be effectively subject to a 35% withholding.

The Income Tax Law regulatory decree extends the scope of the thin capitalisation rules by stating an additional requirement for the exclusion: interest must not only be included within Section 93 c) 2), but also be **effectively** subject to a 35% withholding.

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 judgment of foreign courts, if it refers to monetary transactions, subject to the compliance of 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 to 6 years to obtain and enforce a final judgment. The render 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.

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 where 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 them.

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 to an international contract to submit to a foreign jurisdiction in matters which are 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 enabled to perform isolated acts in Argentina but 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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Diego A. Chighizola became a partner in 2012. He has been with the firm since 2001 and has experience in banking and finance, capital markets, corporate and real estate structuring and financing. From 2004 to 2005, he was a foreign associate at Cleary, Gottlieb, Steen & Hamilton (New York office). He graduated from the Universidad Católica Argentina in 2001 with a degree in law, *cum laude*, and obtained an LL.M. from the Columbia University School of Law in 2004 and a Master in Finance from CEMA University in 2007. He is a member of the Bar of the City of Buenos Aires and of the New York State Bar. He has lectured on various real estate post-graduate courses.

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Founded in 1923, Marval, O'Farrell & Mairal is a full-service law firm that has been providing sophisticated, high-quality advice to leading local and international companies, organisations and financial institutions for 90 years. It is the largest law firm in Argentina, comprising over 300 members, and has wide experience of international business issues and the complexities of cross-border and multi-layered transactions.

Marval, O'Farrell & Mairal specialises in: public law; agribusiness; banking and finance; capital markets; commercial and competition law; corporate law; dispute resolution and arbitration; foreign investments; entertainment and media; environmental law; insolvency and restructuring; insurance law; intellectual property; Internet and information technology; labour law; litigation; maritime and air law; Mercosur; M&As; natural resources; patents; project finance; real estate and construction law; tax and customs law; telecommunications and broadcasting; trademarks; and utilities and energy law.

The firm and its professionals are ranked at the top of major legal publications and have been awarded with major prestigious awards, including "Argentina Client Service Award 2012" from Chambers and Partners, "Argentina's Law Firm of the Year 2012" from IFLR and Who's Who Legal, "IP Law Firm of the Year 2012" for Argentina from Managing Intellectual Property, and "International Law Office Client Choice Award 2012 for Argentina".

Australia

Clayton Utz

David Fagan

1 Overview

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

2012 was marked by the escalation of the Eurozone debt crisis, weak US economic growth and a slowdown in China. For the Australian lending market, this translated into limited demand for new money, exacerbated by low consumer and business confidence. However, loan volumes proved relatively resilient, largely due to refinancings.

While loan markets remained the key source of debt financing, borrowers also sought to access debt capital markets to diversify funding sources, lengthen tenors and secure competitive pricing - in particular, the hybrid, USPP, AUD Medium Term Note and AUD Bond markets.

Significant legal/regulatory developments in 2012 included:

(a) the *Personal Property Securities Act* 2009 (Cth) (the "***PPS Act***") (see section 3);

(b) the *Foreign Account Tax Compliant Act* (an American legislative initiative designed to target tax evasion by US citizens in respect of offshore assets and accounts); and

(c) the release by the Australian Prudential Regulation Authority ("**APRA**") of the final version of the Basel III capital reform package.

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

Significant transactions in 2012 included:

(a) the USD $8.5 billion project financing of the Australia Pacific LNG Pty Limited coal seam methane to LNG project. It is the largest ever project financing completed in Australia and encompasses significant gas extraction and gathering facilities, a 360 km main gas transmission pipeline and a liquefaction plant, together with associated processing, storage and export infrastructure;

(b) the AUD $1.2 billion refinancing of the Abbot Point Coal Terminal in Queensland, which was sold in 2011 by the government of that state; and

(c) the joint acquisition by Sumitomo Corporation and the Kansai Electric Power Company of the Bluewaters I and Bluewaters II coal-fired power stations in Western Australia and assumption of nearly AUD $1 billion in project finance debt.

Clayton Utz had roles in all 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 2001* (Cth) 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.

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.

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 previously have been regarded as "security" - for example, retention of title arrangements.

The PPS Act establishes a national register (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.

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.

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. 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 for the registration with the PPS Register of a security interest over an asset that constitutes "personal property".

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 is currently payable in the State of New South Wales. Although previously slated to be abolished in 2012, currently it is expected that mortgage duty will be abolished in respect of advances of money made on or after 1 July 2013.

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?

Section 260A *Corporations Act* provides that: *"a company may financially assist a person to acquire shares (or units of shares) in [that] company or a holding company of [that] company only if*

(a) giving the assistance does not materially prejudice the

interests of [that] company or its shareholders or [that] company's ability to pay its creditors; or

(b) the assistance is approved by shareholders under section 260B; 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.

(a) Shares of the company

See response to question 4.1.

(b) Shares of any company which directly or indirectly owns shares in the company

See response to question 4.1.

(c) Shares in a sister subsidiary

See response to question 4.1.

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 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:

- the government and certain government authorities and agencies in the specified country; and
- 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 apply to 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?

No, 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 banks 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 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.

Judgments obtained in specific foreign courts, including English courts, are 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 2001* (Cth) and the *Personal Property Securities Act 2009* (Cth) (**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. 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 *Commercial Arbitration Acts*, which are being progressively adopted in each Australian State jurisdiction, 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 into line with the UNCITRAL Model Law which 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 preferences 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 4 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 6 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 publically 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 and waiver of immunity 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 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 acts 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 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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David Fagan is a highly experienced banking and major projects lawyer with over 30 years' experience in commercial practice where he has acted for a variety of major banks and corporate clients. David was previously the firm's Chief Executive Partner from May 2001 to 30 June 2010.
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He has also acted in a number of insolvency matters, most recently advising Hilco Trading on the acquisition of the secured debt and securities held in respect of the Allans Music Group and subsequent debt for equity swap.

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 a 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; or (c) 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 section 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 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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Jeremy's practice focuses on corporate finance, mergers and acquisitions, corporate reorganisations and restructurings, banking and international real estate finance, structured finance, as well as regulatory and legislative compliance.
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.

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MJM attorneys are regularly listed in international guides to legal practitioners in Bermuda, including Chambers Global – The World's Leading Lawyers, PLC – Which Lawyer?, and IFLR1000.

Bolivia

Criales, Urcullo & Antezana - Abogados

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1 Overview

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

In 2012, the international scene favourable to Bolivia continued, despite the slowdown in major economies and the extension of the European crisis. The prices of gas exports reached record levels as well as the volumes of gas, which also increased.

The situation was completely different in the case of mining. The average prices of the minerals produced and exported from Bolivia entered the third quarter of 2011 to a sustained downward trend. All prices fell in the first half of 2012 when compared to the same period of 2011.

In agriculture, the international prices of food and beverages in 2012 have been below the levels reached in 2011. However, at the end of the semester and the beginning of the second half of the year, these prices have started to rise significantly, driven by reports on the situation in the Midwest of the United States, which is experiencing the worst drought in the last 50 years. This caused the price of corn, soybeans and wheat to increase sharply at the end of the semester. Recently, soy and corn prices have reached historical prices.

In recent years, the Bolivian financial system experienced several changes, ranging from the economy to the development and consideration of a new banking law. The most significant part of this new law is that the State intends to have greater participation in the financial system, through the Central Bank of Bolivia, which will be the regulator of interest rates, so that the State will be able to provide greater public access to the banking system. On the other hand, this law intends to allow banks to change some of their policies towards their customers, such as customer reward points, for those who never went into arrears, or those who have several credit operations, have expanded their businesses, are involved in new ventures, or are contributing to the development of their community.

A key aspect of the life cycle of a business is access to credit, which is directly related to financial intermediation. In most countries, banks do not grant credits without guarantees that make sure that borrowers are creditworthy and that their money will be recovered if a failure occurs. Consequently, entrepreneurs with promising business opportunities will not get credit if a bank does not have enough information about the value of the property and the borrower's credit history, or if the legal system does not protect the rights of the creditor.

In this sense, the central credit information, credit bureaus and laws that protect the rights of the creditors, are mechanisms that facilitate the access to credit and grant support processes. These mechanisms operate better together. Sharing information allows creditors to distinguish the good customers from the bad, while the laws to enforce their rights are necessary in case of default.

However, we have sometimes seen that information sharing mechanisms, by themselves, can offer only limited legal protection. It is worth noting that institutions that share information allow debtors to build reputational collateral.

These mechanisms work well if they establish property rights for both creditors and debtors, and thus being mutually beneficial. The guarantees (collateral) and insolvency regulation establishes the rights of creditors to recover their loans.

Additionally, a fair regulation helps debtors by allowing them to use their property as collateral for financing. Furthermore, the central credit information is a valuable resource for building databases that enable financial institutions to build customer ratings so that they can distinguish the best customers, i.e., those with better credit history, and grant interest rates that commensurate with their level of risk.

With this background, Bolivian market trends have been to grant credit to support the sectors that have been affected, such as mining, but there have also been important developments for the sectors of agribusiness and trade (both formal and informal), for which new credit policies in financial institutions are being developed so that they allow medium and large companies access to new credit and SME. These operations also provide new financing alternatives, which makes the market competitive and attractive.

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

In recent years in Bolivia, there have been major credit operations in two sectors of the economy, with public and private funding from two sources: one of these sources is the General Treasury of the Nation (TGN), which has strategic enterprises that belong to the State such as YPFB Corporation, Empresa Nacional de Electricidad (ENDE), Papelbol (a company responsible for the manufacture of paper), Cartonbol (a company dedicated to the manufacture of cardboard), and Lacteosbol (a company responsible for the production of milk and derivatives); and the other source is loans to sectors, such as carriers, to allow them to change their means of transportation.

The private sector of the Administrative Society for Investment Funds (called "*Sociedad Administradora de Fondos de Inversion*" in Spanish) (SAFI) has supported the agricultural sector of soy and

quinoa. The quinoa sector has had more support in the last 12 months. On the other hand, Bolivian Stock Exchange telecommunication companies (TIGO), cement companies (FANCESA), oilseed and agribusiness companies (IASA, IOL), for example, have been financed through the issuance of bonds and promissory notes trade in the stock market. Additionally, there is a mechanism for SMEs as negotiating table notes issued by the SMEs themselves.

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 belong to the same category (e.g. electricity); however, the companies that belong to a business group but with different items cannot guarantee loans to any of its members. On the other hand, the companies that 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 falls on the people who have approved the transaction, but in general there are responsibilities on directors, since the operation is guaranteed with the goods of the companies.

However, if a company, through its directors, ensures an operation and these directors do not have the authority to perform this act, they are responsible as well through 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 serious problem because there are certain powers which enable people to carry out these activities and the business of the company. People who act without power are liable to penalties which are provided by law, and 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, this application must have the appropriate support, such as a financial analysis of the company that demonstrates 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 the shareholders in order to issue bonds.

For the granting of guarantees, these must be fully sanitised and free from all liens. If the security has a lien, the creditor requires the permission for the property to be given as security to another creditor again.

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

This 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; those which take too long may depend on the case (please see the answers to section 8).

3 Collateral Security

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

In Bolivia, lending obligations can be secured by a mortgage.

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. The procedure for each operation 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, then the annotation has to do with the appropriate authorities to keep track that 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 in cases of breach of property ownership, which can 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 type of collateralisation.

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 in which there must be plenty of cash to cover

the monthly loan instalments; if the account contains no money, the bank has the power to debit the money from other accounts that the company has in 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 is the case in other countries. What is usually done is that the shareholders of the company must agree to be guarantors of the credit operations of the company and guarantee the loan with their shares.

Shares in Bolivia have to be issued with certificates registered in the books of the company's shareholders.

Within a loan agreement in force, a jurisdiction may be established for the resolution of disputes and enforcement of a security, which allows it to be resolved under the laws of another country. This is not a usual practice in Bolivia, but it is allowed, depending on the terms of the agreement between the parties.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, security can be taken over inventory. For collateral that may be on goods in process, and finished or raw materials, the debtor must request that the warrant company storing raw material is the bank, who has the power and control over the raw material and that each time the company needs to make use of its raw material, it has to apply for the bank's authorisation to serve and produce the raw material. This means that the bank has control over the production of the debtor 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, in Bolivia that is punishable by law and regulated by the Supervisory Authority of the Financial System (ASFI).

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 by 1,000 on the loan amount for warranty registration in the office of real rights; further legal costs are around USD 150 and the cost of registration at the Commercial Register in Bolivia 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 registration of a guarantee, on average, 30 to 45 days are required; the number of days that the notary process takes, which may vary from 10 to 15 days, then has to be added on top of this period. Thus, 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?

For the creation of a security, no kind of consent is needed.

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 the guarantee is given by the number of loans that were requested under that line, taking into account that the line of credit has a limit and that limit defines how many loans can be requested and if the warranty covers all borrowing on that line.

The priority is given mainly by the order in which the loans were requested; if the guarantee is executed, the amount collected will cover first the oldest operations, and then operations that were the last to be requested.

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 powers of attorney enabling them to pursue the prosecution of enforcement of the security. These powers must be registered in the Commercial Register of Bolivia, which is responsible for validating them.

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

Bolivian law does not provide for any of the three alternatives, as the financial market and does not perform such operations.

(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 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 the role of a trustee as long as it is a financial institution, authorised by the Financial System Authority (ASFI);

the trustee may have the ability to require documentation, such as the enforcement of security to manage the portfolios of banks and borrowers, which has 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. But that doesn't mean 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 the Lender B can record the loan and has 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 for this, the only thing that sets the tax law is that, if a borrower is foreign, payments made by the debtor for interest are taxed by a rate of 12.5% on the amount of interest, if the loan agreement was signed in Bolivia. But if there is a loan agreement not signed in Bolivia, the rate of 12.5% applies to the total amount that includes the principal and interest, as it is considered a remittance abroad.

The debtor plays an 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 if, in that legislation and in the contract, consequences exist for lenders, such adverse consequences apply in Bolivia.

On the contrary, if the loan is done under the Bolivian legislation, there will be no consequences because Bolivia does not have the experience and jurisprudence in these 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 from these contracts are to be complied with in Bolivia (i.e., that they are available under Bolivian jurisdiction); and, second, that the foreign law which is under the contract 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 recognise foreign judgments as long as there are treaties signed with the country concerned. Following the principle of reciprocity, 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. If a foreign judgment is 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 the other party has 10 days to answer. With or without that answer, and after the 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 known the case at first instance in Bolivia.

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?

Filing a suit for non-payment can be made as soon as the deadline

that the parties have agreed to has expired. Generally, it will be possible to act by the way of an executive process, which is pretty 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, in addition to issuing an 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 that will take 10 additional days). In case the loan agreement included a waiver clause to 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 it to be enforceable, and, once this happens, the court will execute the judgment within the time established on it 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, it always requires a public auction, which involves a procedure that might take over a month to be realised.

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 benefits related to the loan are met in Bolivia, there is no restriction for the lender to file a lawsuit against the borrower for 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 awards without needing to re-examine their merits.

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 considering that 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, which 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 employees' claims are always taken as preferential creditor's rights in 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 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 an enforcement is a process that is 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, as 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?

We are not aware of the answer to this question.

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, that 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 or from circulating papers, written or printed, that contain the terms to suppose that have 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 financial institutions that are legally authorised.

Among the requirements for the establishment of a financial institution in Bolivia, the requirements for founders and for obtaining the operating licence are the following:

A) For example, for founders:

1. The capability, legally declared, to engage in commerce.
2. Those without an indictment or conviction for committing crimes.
3. Law-abiding debtors to the financial system that do not have loans or running off loans.

B) For example, to obtain an operating licence:

1. Study of economic and financial feasibility.
2. Draft articles of incorporation and bylaws of a corporation.
3. Certified Personal History, for individuals, issued by the competent authority.
4. 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 chapter.

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He has worked for more than 8 years in the Bolivian financial sector managing loan portfolios that exceeded $20 million, he has also participated in several specialised seminars relating to banking, insurance and the stock exchange. His last work being in the area of managing securities investment funds close to $45 million.
Carlos joined Criales, Urcullo & Antezana in June 2012 as an associate to participate in expansion projects of the company, advising on matters of administration and finance. Currently, he has a new challenge in his career: finishing his third race which is law in order to complement his training.

Brazil

Levy & Salomão Advogados

Luiz Roberto de Assis

1 Overview

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

Long-term financings in Brazil are funded almost exclusively by State-owned financial institutions (BNDES, Banco do Brasil and Caixa Econômica Federal). Brazilian financial institutions of the private sector, in turn, concentrate their lending activities typically on short and mid-term loans and financings to individuals or corporate entities, or to the on-lending of governmental lines of credit.

Foreign loans tend to benefit from lower interest rates if compared to the domestic rates; however, the overvaluation of the Brazilian currency and a financial tax of 6% on the principal of short-term loans (currently up to 360 days) remitted to Brazil make international financings less attractive.

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

Some significant transaction are:

The financing of the large hydropower projects Belo Monte, Jirau and Santo Antonio.

The financing of civil works and infrastructure in connection with the 2014 World Cup and the 2016 Olympic Games.

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?

Yes. Directors may be held liable if they cause the company to engage in transactions that do not benefit the company.

The disregard of legal entity doctrine can be applied, thus causing the shareholders and/or managers to be liable for the company's obligation, if they cause the company to engage in transactions that do not fall within the company's purposes.

If the guarantor is declared bankrupt, guarantees or security granted within a two-year period before the bankruptcy for no consideration to the guaranteeing/securing company are deemed as void in the bankruptcy proceeding.

2.3 Is lack of corporate power an issue?

Yes. Agreements are not binding on the company if executed by individuals that are not duly empowered to act on behalf of the company.

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

No governmental consent is required, except in the case of companies that operate in certain regulated sectors.

Shareholder and/or board approvals may be required depending on the terms of the guarantor's organisational documents.

If the guarantee is issued outside Brazil, (i) the guarantee must have its signatures authenticated by a public notary in the place of signing, (ii) the notary's signature must be authenticated at the nearest Brazilian Consulate, and (iii) the guarantee must be filed (along with a sworn translation, if the guarantee is not in Portuguese) with a Registrar of Deeds and Documents in order to be enforceable in Brazil.

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

There is no net worth limitation. As for solvency, please refer to the last part of question 2.2.

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

The Central Bank of Brazil may impose restrictions on the remittance of funds outside Brazil, but currently no restrictions exist for remittance of proceeds from enforcement of a guarantee.

3 Collateral Security

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

The types of collateral are a pledge (*penhor*), mortgage (*hipoteca*) and fiduciary transfer (*alienação fiduciária em garantia*). A fiduciary transfer may not be suitable to secure obligations in favour of non-Brazilian entities in certain cases.

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 single agreement can cover several kinds of assets, but the assets over which security is to be created must be specified in the agreement. It is not possible to create security over assets in general without specifying them.

The procedures for the different kinds of assets are described below.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, it can.

Security over real property and plant can be taken either by mortgage or by fiduciary transfer. Security over machinery and equipment can be taken either by pledge or by fiduciary transfer.

Mortgage over property with an individual value of approximately US$10,000 or higher must be taken by a public deed made by a notary. Fiduciary transfer and pledge can be taken by a private instrument.

Basically, the public or private security instrument must describe the parties thereto, the secured obligation and the assets over which security is created. If the instrument is executed outside Brazil, it must comply with the requirements described in question 2.4 above.

The public deed and the private instrument must be filed with the Real Estate Public Registry of the places in which the assets are located as a condition for perfection of the lien.

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 by a private instrument of pledge or fiduciary transfer. Basically, such instrument must describe the parties, the secured obligation and the assets over which security is created. If executed outside Brazil, it must comply with the requirements described in question 2.4 above. Whether executed in Brazil or abroad, the instrument must be filed with a Registry of Deeds and Documents in the places in which the Brazilian parties are located as a perfection condition of the lien.

The debtors must be notified in order for the security to be enforceable against them.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. The procedure is the same as described in question 3.4, including the need for a notice to the depository bank.

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?

Yes. In practice there are no shares in certificated form. Brazilian conflict of law rules require a Brazilian law governed document.

The procedure is the same as described in question 3.4 above. Additionally, in the case of Brazilian corporations, the lien must be recorded in the company's books or in the books of the financial institution in which the shares are recorded in book-entry form, as applicable.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes. The procedure is the same as described in question 3.3 for security over machinery and equipment.

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?

There are fees for notarisation of signatures, consularisation, sworn translation (if the security document is not in Portuguese) and registration. For public deeds, there are notary fees. The amount of fees is determined by the relevant Brazilian State, except fees for (i) notarisation outside Brazil, which are determined by the relevant jurisdiction, and (ii) consularisation, which are determined by the Brazilian Foreign Affairs Ministry.

Registration fees are related to the amount of the secured obligation, subject to a cap.

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 security with the Registry of Real Estate can be significantly expensive and time-consuming. In the State of São Paulo, for example, fees for a single registration can be as high as *ca*. US$56,000.

Registration with the Registry of Deeds and Documents is less bureaucratic and less expensive. In the State of São Paulo, for example, the cap for a single registration is *ca*. US$6,000.

The fees are multiplied by the number of places in which the document must be filed.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Generally speaking, no. There may be exceptions depending on the

particular case, e.g. security over shares of companies in regulated sectors may be subject to authorisation of the relevant authority.

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)?

The legalisation requirements have been described above.

As a general rule, contracts executed in Brazil must be witnessed by two witnesses in order to be entitled to a more expedite foreclosure proceeding.

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 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.

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?

Yes. However, please note that whilst an agent or trustee can act on behalf of the lenders to enforce the loan, the guarantees and security (provided that the supporting documentation grants the agent or trustee sufficient powers to so act), the guarantee and security must be created in favour of the lenders themselves, not in favour of the agent or trustee.

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?

This is not applicable in Brazil.

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?

The assignment or transfer agreement must comply with applicable requirements for its enforceability in Brazil, which in the case of foreign documents are notarisation, consularisation, translation and registration.

If Lender A and/or Lender B are outside Brazil, the transfer must comply with applicable foreign exchange regulation, including registration with the Central Bank of Brazil.

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, these transactions may be subject to withholding income 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?

Foreign lenders may be entitled to reductions on the withholding income tax rate (such as the exemption on interest paid to non-resident investors according to Law No. 12,431, of June 24, 2011).

Taxes are not levied in Brazil for the purposes of effectiveness or registration of transactions. Taxes are mostly levied on income. Certain taxes are also levied on financial transactions (e.g., on foreign exchange transactions, or on transactions related to the holding of securities).

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?

Yes. Payment of interest, fees and other charges made by a Brazilian payor (either as principal obligor or as guarantor) to a foreign lender may be subject to Brazilian withholding 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.?

Yes. Registration costs can be significant – please refer to question 3.10 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.

Brazilian companies borrowing funds from abroad may be subject in certain circumstances to thin capitalisation and transfer pricing

rules – for instance, when funds are borrowed from a foreign related party or from a company located in a tax haven jurisdiction.

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?

A foreign governing law shall be recognised by Brazilian courts, and Brazilian courts shall enforce a contract that has a foreign governing law, provided that (i) such law is the applicable law pursuant to Brazilian conflict of law rules, and (ii) the foreign governing law is not against Brazilian national sovereignty, public policy or morality.

Regarding (i), pursuant to Brazilian conflict of law rules, the governing law of obligations is the law of the jurisdiction in which the obligation has been created. In the case of contractual obligation, this is typically the law of the place of signing.

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?

The foreign judgment will be enforceable in Brazil without re-examination of the merits if previously recognised by the Brazilian Superior Court of Justice, such recognition only occurring if: (a) the judgment fulfills all formalities required for its enforceability under the laws of the country where the same was issued; (b) the service of process instituted against a Brazilian resident party is effected in accordance with Brazilian law; (c) the judgment was issued by a competent court after due service of process upon the parties to the action; (d) the judgment is not subject to appeal; (e) the judgment was authenticated by a Brazilian consulate in the country where the same was issued and is accompanied by a sworn translation of the same into Portuguese; and (f) the judgment is not against Brazilian national sovereignty, public policy or morality.

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?

(a) An ordinary proceeding in a Brazilian State court, including obtaining and enforcing a judgment, takes typically from three (3) to six (6) years on average. This period may vary drastically depending on various factors, including the State in which the proceeding is conducted (the estimate made herein considers a proceeding in the courts of the State of São Paulo) and the applicable proceeding.

If, however, the credit is based on a contract or other instrument that fulfils the requirements for a fast-tracking proceeding (*processo de execução*), the creditor does not need to obtain a judgment before enforcing its rights. If this is the case, the enforcement can take between one (1) and six (6) months on average. Again, this period varies according to the Brazilian State and other factors.

(b) The recognition of a foreign judgment before the Brazilian Superior Court of Justice (question 7.2 above) takes typically from one (1) to two (2) years on average. After that, the creditor is entitled to a fast-tracking enforcement proceeding (*processo de execução*) as described in the second part of question 7.3(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?

Generally speaking, certain Brazilian judges tend to construe the law in a manner that is more favourable to the borrower, particularly if the lender is a financial institution or a foreign entity. This state of mind, in addition to the various remedies available to the parties under Brazilian process laws, can turn the enforcement proceeding into a long journey.

A public auction is required for foreclosure of real estate, but a private auction is possible in relation to movable assets if so agreed in the security instrument. The seizure of assets that are not in the physical possession of the lender or its representative, however, is permitted only through a judicial proceeding. Regulatory consents may be required in certain regulated activities.

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 plaintiff who is incorporated or resides outside Brazil and who does not own real property in Brazil must present guarantees (such as a deposit in a judicial escrow account or a performance bond) to the satisfaction of the court to guarantee the payment of the defendant's legal fees and court expenses, with a few exceptions, which include the fast track procedure mentioned in question 7.3(a) above.

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. Bankruptcy of the borrower or third party security provider stays the enforcement of individual claims, including individual enforcement of collateral security. The enforcement of claims against an entity under bankruptcy proceeding is conducted exclusively by the bankruptcy court, and creditors are paid according to their statutory ranking and the cash availability. Exception is made to certain types of collateral which are not subject to the stay order and can be enforced by the creditor even during the bankruptcy procedure.

7.7 Will the courts in Brazil recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. In case of a foreign arbitral award, enforcement is subject to previous recognition by the Brazilian Superior Court of Justice, such recognition only occurring if the conditions described in question 7.2 are fulfilled. A foreign arbitral award is defined as an arbitral award issued outside Brazil, regardless of the seat of arbitration and applicable law.

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.

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. Secured credits are subordinated in a bankruptcy proceeding to: (i) certain so-called "out-of bankruptcy credits", such as costs and expenses incurred during the bankruptcy proceeding and advances made by creditors to the bankruptcy estate; and (ii) labour credits limited to 150 minimum wages or approximately US$50,000 per employee, and credits arising out of on-the-job accidents.

In addition, in limited cases, creditors have clawback rights in relation to monies or assets delivered to the debtor before the bankruptcy proceeding. These include creditors under export foreign exchange advances.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

As a general rule, the following entities are not subject to bankruptcy: (i) companies controlled by the Brazilian Federal government, by State governments or by Municipalities; (ii) financial institutions and other institutions subject to regulation by the Central Bank of Brazil (e.g. brokerage and dealership houses); (iii) private pension entities; (iv) insurance companies; (v) entities that operate private health plans; and (vi) special purpose companies dedicated to securitisation of real estate credits.

These entities are subject to non-judicial liquidation according to specific statutes, and some of them are subject to bankruptcy under certain circumstances only.

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. The taking of physical possession of assets from the borrower or third party security provider in an enforcement is permitted only in a court 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 Brazil?

Yes, except if the proceeding relates to (i) real estate located in Brazil, or (ii) succession *causa mortis* with regard to assets of the deceased's estate located in Brazil, in which cases Brazilian courts shall have exclusive jurisdiction.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Brazil?

Yes, it is.

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?

Lenders do not need to be a bank or other licensed or authorised entity.

However, a lender must be a licensed Brazilian financial institution in order to grant loans on a financial basis, i.e. (i) with funds raised from third parties, (ii) regularly, and (iii) with profit purposes.

Additionally, loans granted by lenders that are not financial institutions are subject to interest limitation imposed by Brazilian anti-usury laws.

The need for a financial licence and the interest limitation referred to in the preceding paragraphs do not apply to foreign-law governed loans granted by lenders outside Brazil.

There are no requirements in Brazil for the agent or security agent. Please refer to question 5.1 regarding the agents' role.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Brazil?

Loans granted by foreign lenders must be registered with the Central Bank of Brazil, such registration being a condition precedent for any remittance of principal, interest or other charges abroad. The Central Bank may refuse registration if the loan costs exceed then prevailing international market standards for loans of a similar nature.

Note

The information above is a general overview and not an exhaustive explanation on the matters discussed therein. Brazilian courts often decide based on non-statutory equity principles or extensive construction of rules and case-law, so actual court decisions different from the answers above cannot be excluded. The information above or any part thereof shall NOT be construed as legal advice with regard to any subject matter. Legal advice may be obtained from our firm's attorneys only in the context of an attorney-client relationship.

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Luiz Assis' practice is focused upon the structuring and negotiation of international lending and financial transactions. He has participated in innumerable foreign financing transactions involving capital markets financing (bonds, notes, commercial paper), syndicated loans, and structured finance. He has also negotiated many international aircraft leases and export finance contracts.

Further to his work in international lending and finance, Mr. Assis is also involved in banking and foreign exchange regulation and foreign investment matters. He also represents clients in administrative proceedings before the Central Bank of Brazil and the Appeals Council of the National Financial System.

Before joining Levy & Salomão Advogados, Mr. Assis worked for ten years in the legal department of Deutsche Bank, including at its headquarters in Germany.

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LEVY & SALOMÃO
ADVOGADOS

Levy & Salomão Advogados is a full-service business law firm that was founded in 1989 to serve the needs of both Brazilian and foreign corporate clients. Our offices are located in São Paulo, Rio de Janeiro and Brasília.

Our lawyers are known for their strong analytical skills, their creativity in devising legal solutions, and their team-based approach to serving clients. Levy & Salomão attorneys combine solid academic backgrounds with substantial experience not only in the practice of law, but also in finance, capital markets, international business and accounting, and in government.

The firm's banking and finance practice expertise includes structuring domestic and international lending agreements, including: syndicated loans and trade finance facilities; participating in debt renegotiations; advising on financial system and foreign exchange regulation; providing legal advice on foreign investment in Brazil and Brazilian investment abroad; aircraft leasing; and representing clients before the Brazilian Central Bank and the National Financial System Appeals Council.

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. Amendments to the key corporate legislation, the BVI Business Companies Act, 2004 (the "**Act**"), which came into effect in October 2012, 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 mandatory grace/notice periods having now 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, in *Cukurova Finance International Limited and Cukurova Holdings A.S (Appellants) v Alfa Telecom Turkey Ltd (Respondent)* [2013] UKPC 2.

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 & gas and mining sectors, in development finance 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 member's 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.

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 of the asset. 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 New York or English law governed document, and, 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, and the Act 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 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, and save that 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 in 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; (c) or 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 applicable 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 comply 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.

If enforcement in the British Virgin Islands is sought against a company which is not a British Virgin Islands company, then unless the judgment is from a jurisdiction in respect of which the British Virgin Islands provides for the statutory reciprocal enforcement of judgments, the British Virgin islands court rules do not currently appear to allow service of the enforcement proceedings on the company outside the British Virgin Islands.

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.

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 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.

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.

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.

As a result of recent amendments, 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). Previously, the relevant debt-to-equity ratio for the purposes of the thin capitalisation rules was two to one. This change is effective for taxation years after 2012.

In addition, the proposed amendments (i) extend the thin capitalisation rules to partnerships in which a Canadian resident corporation is a member, and (ii) deem any interest expenses that are disallowed under the thin capitalisation rules to be a dividend paid to the lender, for non-resident withholding tax purposes, and potentially subject to withholding tax. Both of these changes generally have effect retroactive to March 29, 2012, subject to special apportionment rules in respect of disallowed interest arising in 2012.

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 three months.

Procedural and substantive law differs by province, but the timing described above is similar in 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, 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, a reasonable apprehension of bias on the part of the arbitrator, or an award outside the jurisdiction 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. 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 the secured creditor: (i) took possession of the collateral before the filing; or (ii) delivered its BIA enforcement notice more than 10 days prior to the filing of the NOI.

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 priority of the DIP charge, directors' charge and the expense 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?

Federally-incorporated banks, insurance companies and trust corporations are excluded from the BIA and CCAA and are governed by the *Winding-up and Restructuring Act* (Canada). The BIA also excludes railways, savings banks, loan companies and building societies.

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 seperate 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?

Depending on the facts specific to each transaction and each lender there may be other relevant considerations. 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.

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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?

The Companies Law (2012 Revision) of the Cayman Islands was recently amended to strengthen the Cayman Islands' reputation as an innovative jurisdiction committed to developing its legislation to meet the needs of the global financial services industry.

The amended law has introduced a number of enhancements, including:

- **Merger and consolidation provisions**. The changes make the existing regime significantly more straightforward to use and also introduce additional flexibility to enable it to be used in a wider range of transactions. The principal revisions include the simplification of shareholder authorisation procedures and enabling a Cayman Islands company to merge and consolidate into foreign companies.
- **Introduction of treasury shares**. Cayman Islands companies now have greater flexibility with regard to their share capital as, upon a repurchase, redemption or surrender of shares, the directors can now determine whether or not to cancel those shares or keep them as treasury shares. Treasury shares can subsequently be cancelled or sold by the company without regard to capital maintenance rules.
- **Introduction of paperless share transfers**. A Cayman Islands company with shares listed on one of a very wide range of global stock exchanges will now be able to record and transfer the listed shares in accordance with the rules of that exchange and its electronic settlement systems.
- **Ability to surrender fully paid shares**. A Cayman Islands company can now permit the surrender of fully paid shares for no consideration (subject to any restriction in the company's articles of association).
- **Execution of documents**. To address the practical difficulties arising out of *R (on the application of Mercury Tax Group and another) v HMRC [2008] EWHC 2721* (the Mercury case), which led to an increase in the formalities involved in the execution of documents (in particular, deeds), the amended law introduces a number of helpful clarifications which allow for increased flexibility in relation to the execution of documents.
- **Branch registers**. An exempted company may now cause to be kept a branch register in any country or territory of such category or categories of members as the company may determine from time-to-time.

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 (2012 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 (2012 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 it is: (i) 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.

3.6 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 director's 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 (2012 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 director's duties, it is recommended that the company also obtain a shareholder's 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 (2012 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 (2012 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; or (c) 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?

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 with 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, the matter is straightforward and uncontested as 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 (2012 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 (2012 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 (2012 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 (2012 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 (2012 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

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1 Overview

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

A recent trend has been the soaring price of real estate, with the Chinese government seeking to manage the property market through the implementation of various policies. As a result, banking regulators have imposed strict restrictions on real estate financing. Financial institutions are restricted from financing purchases of third residential property and from financing more than 40% of the total purchase price of any second residential property. Banks are also restricted from providing loans for real estate projects where the developer has not obtained the required permits (such as land planning permits and construction permits) and real estate developers are not permitted to borrow funds from foreign lenders.

A related development to soften the impact of these measures has been the emergence of trust loans and the tolerance of a 'shadow banking' market. Much has been written on this elsewhere.

Another significant development is the renewed support for securitisation and asset based lending. Securitisation was first introduced in China in 2005, when the Pilot Administrative Measures on Credit Assets Securitization were issued by the People's Bank of China (PBOC). Securitisation was suspended at the end of 2008 due to the global financial crisis (GFC) but on 26 February 2013, the China Securities Regulatory Commission (CSRC) issued a consultation paper on the Administrative Measures on Securities Firms' Securitization Business. It is expected that there will be increased opportunities in securitisation and asset based lending in the future.

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

Since the GFC, the Chinese government has made substantial investment in various sectors, in particular infrastructure (for example, high-speed railways, airports, toll roads) and in energy (such as wind farms and in the nuclear power sector). Banks will continue to play a pivotal role in financing these investments until domestic bond markets mature.

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.

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 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 the 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 restrictions apply 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 applies. 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 June 1, 2007), when a bankruptcy proceeding is commenced (i.e. the court has accepted the petition to "bankrupt" a company), 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) There are no publically available company searches or winding up searches in China. Companies are registered with the AIC and corporate information is filed with the AIC. The AIC head office and some local AIC branches have set up online systems to search basic corporate information (such as incorporation date, company number, legal repetitive, registered place). However, many local AIC branches do not have such an online system - thus, searches against a company must be done by physically visiting the AIC where the company is registered.

(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 (the Foreign Investment Catalogue), which lists which industries are encouraged, restricted or prohibited for foreign investors, and this must be complied with.

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Costa Rica

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1 Overview

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

In terms of lending and secured finance, there have been several significant developments in Costa Rica in the last few months. In terms of secured finance, certainly trust agreements have begun to become a trend in Costa Rica. As we explain in question 3.2 below, this type of security has played a significant role in certain types of complex financing deals due to its flexibility, ease of execution and lower costs to establish. As a result, more and more entities have acquired a preference towards the use of trust to secure loans. Nevertheless, recent changes to the Costa Rican Code of Commerce have limited this type of security only to financial entities that are subject to supervision by the Costa Rica Supervising Body SUGEF.

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

In recent years, some of the most significant lending transactions that have taken place in Costa Rica have been several private public partnerships in concession infrastructure projects such as: the San José – Caldera Highway; the most recent expansion and construction of the Liberia International Airport Daniel Oduber; and the construction of the new International Airport Juan Santamaría.

In addition, several credit lines as well as syndicated loans by foreign lenders to local financial institutions have recently taken place in the last few months.

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 undertake such act or contract in the company's corporate statue or by-laws. Notwithstanding the above, and assuming that the corporate statue 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 duly authorised 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 credited, then the guarantee will not be properly recorded. The corporate powers for legal representatives are governed pursuant with 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 statue or by-laws. If there are no registered limitations to the corporate statue 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 statue 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.

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 of the 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 (also referred to as the "Trustor") to a designated third party identified as a Trustee. The Trustee shall hold the title of the assets 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 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 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.

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 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, waiver of previous proceedings in case of an auction, 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; waiver of previous proceedings in case of an auction; 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, 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 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 (whose have 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 regards, 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 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 Costa Rica 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, which are 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?

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 Costa Rica 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.

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 those 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, such as 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 in an 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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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 has become 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 number of refinancing transactions through which banks have restructured the 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 has been the loan facility, in the amount of EUR 1,000,000,000, to a Czech energy holding company by a syndicate of Czech and international banks. This has also been 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, so no consideration must 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, or with less than adequate consideration, tax authorities could consider the guarantee as a gift to the party on whose behalf it is issued and assess a gift tax on the transaction and/or increase the taxable income of the benefiting party by an amount that would, in their view, constitute an arm's-length guarantee fee.

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 restrictions will not normally be opposable to third parties acting in good faith.

However, in certain cases, the law requires the shareholders' consent before a company can issue a guarantee and the lack of the consent 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 the general meeting of its shareholders. This requirement does not apply to guarantees issued by a company as a security for the obligations of a party controlled by it.

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 if the guarantee lead 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 not. 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.

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 a 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 or book-entered. A pledge over certificated bearer (*au porteur*) shares is perfected by the hand-over of the share certificates to the pledgee or a third-party custodian. The perfection of a pledge over certificated registered (*au nom*) shares requires a pledge endorsement in addition to the hand-over.

A pledge over book-entered shares is perfected by its registration with the Czech central securities depository. 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. For procedures, 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 a security for its obligations, as well as for obligations of other parties (certain restrictions as to consideration and internal approval requirements may apply in the same extent as to guarantees – see the answers to the questions under 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 fee is *ca*. EUR 32 at minimum and is charged only for 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 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 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 (which is granted in administrative proceedings regulated by law).

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, up to a certain amount, and 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 and pledges over real estate that is 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; or (c) 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 the 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?

No, Czech law does not know the concept of a trustee and requires that each collateral security is created in favour of the beneficiary of the secured obligation and that said beneficiary must be a party to the relevant pledge agreement.

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. In such a case, the security agent can 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% withholding tax. The withholding tax does not apply (or applies at a reduced rate) to interest payable to beneficiaries resident for tax purposes in jurisdictions which have entered into a double taxation treaty with the Czech Republic reducing the withholding tax. 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 interest secured by a guarantee or security, 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 a 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 other Member States 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 receivables 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. the 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 (however, additional time may be needed for the translation of the relevant documents).

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?

With just a few exceptions, a collateral security cannot be enforced directly by the creditor. The secured creditor can satisfy its claim from the collateral only through a public auction or in a court ordered auction.

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 the 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 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 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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1 Overview

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

The availability of credit from traditional lenders in the UK continues to be restrained, although there has been an increase in primary buyout activity, a situation that exists across European markets. Also, there is a significant amount of refinancing required over the next 18 months. Existing borrowers are looking for an early refinancing of their facilities (e.g. via a forward start facility) to reduce refinancing risk.

As a result of this limited credit availability (particularly for midsize transactions), borrowers are seeking alternative sources of financing. In part, this gap in the market is being filled by non-traditional lenders offering credit based on differentiated structures.

Lenders such as Haymarket, Bluebay, GE/Ares and Axa have been active in the market with the chief structural development amongst this new wave being the unitranche loan. Borrowers see the benefit of the ability to borrow underwritten debt without needing to organise a club or syndicate. Non-traditional lenders typically are not bound by such rigid credit requirements and can also give borrowers more flexible terms, for example through reduced amortisation, more flexible financial covenants or by allowing borrowers to retain cash within the business to fund acquisitions. On the downside, borrowers can be nervous about how non-traditional lenders will behave in difficult circumstances and non-traditional lenders typically cannot provide working capital and hedging facilities, with traditional lenders providing these elements usually on a super senior basis.

For larger transactions, the high yield market, especially for issuers who have scale of borrowing and market profile to access the US market, has been very strong. However, this market is challenged each time a new Euro crisis arises. The medium term effect of the Cypriot crisis has yet to be worked out.

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

In the large cap market, there has been significant activity in high yield bond issuance, though much of it has been refinancing of existing issuers. Given the reduction in transactions and the reduced possibility of exits with high returns, 2012 has seen the re-emergence of high yield bond recapitalisations, which have been absent from the market for some time. Notable examples of high yield funded dividend recapitalisations were by RAC, IMS Health and Iglo Birds Eye.

In the mid market, alternative methods of structuring and the rise of non-traditional lenders has seen a growing number of unitranche financings. A notable recent example of this was the financing of the acquisition of Novus Leisure Limited by Haymarket Financial, where the secured acquisition debt was arranged and funded within a week and set a precedent for super senior intercreditor arrangements.

Finally, as banks seek to free up their balance sheets and remove non-core assets in order to increase their capital reserves, the market in loan portfolio disposals and asset disposals continues apace with a growing number of funds targeting this activity.

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 – as long as there is sufficient corporate benefit, for instance if the guarantee forms part of a package of cross guarantees provided by group companies. Note that co-guarantors will (usually) have a right of contribution in relation to each other if one of them pays all, or more than its due share, of the total guaranteed debt.

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?

Corporate benefit is an issue under section 172 of the Companies Act 2006, which requires a director to act in a 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. If a company's directors approve the grant of a guarantee, which is of little or no commercial benefit to the company, then a question arises as to whether they are in breach of section 172. Where a parent company guarantees the obligations of a subsidiary, it can be relatively easy to show corporate benefit; i.e. if the guarantee boosts the subsidiary's financial stability and its value to its parent. It can be harder to demonstrate benefit where the guarantee relates to a sister company's or parent company's debt. In that situation, it may be prudent to require the members (shareholders) of the guarantor to sanction the grant of the guarantee by way of a members' resolution (see question 2.4 below) and/or to agree to pay guarantee fees.

Corporate benefit can also be relevant under the Insolvency Act 1986. A transaction (including a guarantee) can be set aside as a

"transaction at an undervalue" under that Act if certain criteria are met. However, a court will not make an order to set aside if it is satisfied that the company entered into the transaction in good faith for the purpose of its business and had reasonable grounds for believing the transaction would be to its benefit.

2.3 Is lack of corporate power an issue?

The Companies Act 2006 provides that, unless a company's articles of association specifically restrict the company's objects, its objects (powers) will be unrestricted. Companies can, therefore, enter into any lawful transaction unless their articles expressly limit that ability. However, there may be restrictions in the articles and for any company formed prior to 1 October 2009, any restriction on that company's powers contained in its memorandum of association will be treated as forming part of its articles. Such a restriction will continue to apply unless removed by way of a members' resolution. It is therefore still important to check a company's memorandum and articles of association to see if they impose any restriction on its powers.

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

No governmental consents, filings or registrations need to be obtained or made in connection with the grant of a guarantee. The directors of the company giving the guarantee should approve the terms and execution of the guarantee by way of board resolution. If there is any question of lack of corporate benefit or a potential breach of directors' duties, it may be sensible to obtain a members' resolution which also approves the terms and execution of the guarantee.

Note that one key formality regarding guarantees is that they must be made in writing (Statute of Frauds Act 1677).

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

There is no legal requirement that a guarantee be capped in amount due to net worth or solvency issues. However, an 'all monies' guarantee is more likely to raise issues regarding a potential breach of directors' duties or lack of benefit (see question 2.2 above) than a guarantee which is capped in amount or limited by reference to debt arising under one particular transaction.

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

There are no exchange control issues in England which 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?

All classes of property are potentially available as security, including real estate, chattels, shares, cash, accounts receivables, rights arising under contracts 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?

Security can be granted by way of an "omnibus" security agreement, such as a debenture, which covers a wide range of assets or by way of separate security agreements for each type of asset.

The main types of security under English law are mortgages (equitable and legal), charges (fixed and floating), pledges and liens. Mortgages and charges are the most frequently used form of security. It is also possible to grant an assignment of rights by way of security (this is not a separate type of security, but a form of mortgage). A debenture will include a range of mortgages, charges and assignments depending on the nature of the security assets.

It is possible, in theory, to create security orally (unless it relates to land) but, in practice, security is always documented. There is no prescribed procedure or form of document which has to be used, but see question 3.3 below regarding registration.

If the secured lender wishes to implement a legal assignment of rights by way of security, then section 136 of the Law of Property Act 1925 sets out a procedure. A legal assignment must be in writing signed by the assignor and any counterparties to the relevant underlying contract must be notified of the assignment in writing. If the requirements of section 136 are not met, the assignment will be an equitable (rather than a legal) assignment and the assignee will not have the right to sue the relevant third party in its own name.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Security is usually taken over real estate by way of legal mortgage (or by an assignment in the case of a leasehold interest) and by way of fixed charge over plant, machinery and equipment. Plant and machinery fixed to land are deemed to be part of that land. Once the security documentation has been executed, the security must be registered. Under the Companies Act 2006, a company must register details of any security it grants (subject to some exceptions) at Companies House within 21 days of the date of creation of the security. Failure to register results in the security becoming void against an insolvency officer appointed in respect of the chargor and against any creditor. Separate registrations regarding security over land will be required at the Land Registry or at the Land Charges Department. Note that security over intellectual property may also be subject to separate registration procedures (for example, at the Trade Marks Registry).

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 usually taken either by way of assignment or fixed charge (which requires the secured lender to control both the receivables and the account into which they are paid when collected) or by way of a floating charge. If the benefit of the receivables is assigned to the lender, then, in order to achieve a legal assignment under section 136 of the Law of Property Act 1925, notice in writing of the assignment must be served on the account debtors (see question 3.2 above). As it may be impractical to serve notice or to impose a high degree of control on this asset class, a floating charge is sometimes used as an alternative form of security. The formalities for creating floating security are fewer but

floating charges rank behind fixed charges in terms of priority and the proceeds of floating charge enforcement are subject to certain other prior ranking claims.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Security over cash deposited in a bank account is usually taken by way of a fixed or floating charge. It is extremely difficult to achieve a fixed charge over cash unless the relevant bank account is controlled by the secured lender (the leading case on this is the Spectrum Plus case of 2005). Although English law is not entirely clear on the point, it is thought that every withdrawal from the account must be expressly sanctioned by the secured lender if the charge is to be treated as "fixed" – it is not sufficient merely to serve notice of charge on the account holding bank. Due to the practical difficulties with controlling an account in this way, some lenders will instead accept floating security over cash and the disadvantages which are inherent with this type of security (see question 3.4 above).

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?

Security over shares in an English company is usually taken either by way of legal mortgage or by way of charge over the shares (an equitable mortgage). The governing law of the mortgage would be English law.

Choosing the type of security will depend on whether the secured lender wants legal title to the shares to be transferred to it from day one or, as is more usual, is happy for the chargor to retain legal title until an Event of Default occurs (an equitable mortgage).

A legal mortgage of shares involves the transfer of the relevant shares to the lender from the outset, subject to an agreement for their re-transfer once the secured debt is repaid. The lender will be registered in the company's register of members as a member (shareholder) of the company, and not just as a mortgagee. As a result, the transfer will operate as an absolute transfer and will give the lender all the rights of a company member. While the lender is registered as a member, it will receive all dividends and any other money or assets paid in relation to the shares and will be entitled to vote as a member.

With an equitable mortgage of shares, the mortgagor remains as a registered member and retains legal title to the shares. The mortgagor will be required to lodge its share certificates and stock transfer forms with the lender, on the basis that the stock transfer forms can be completed by the lender (in favour of itself or a nominee) if an Event of Default occurs. Voting rights and the right to receive dividends typically also remain with the mortgagor until an Event of Default occurs.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security can be taken over inventory or stock by a fixed charge but more usually it is created by way of a floating charge. Inventory is a circulating set of assets which it is often impractical for a secured lender to control; a fixed charge requires control and so is, usually, inappropriate.

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 its own obligations as a borrower or guarantor and can also secure the obligations of other persons. When a company grants security in relation to the liabilities of persons other than itself, this is referred to as "third party security". The same issues regarding corporate benefit and directors' duties apply as are discussed in 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?

A fee of £13 is payable to Companies House as regards the registration of security by a company – the fee does not vary according to the class of asset or type of security. A separate registration is required for each security document.

Additional fees are also payable, for registration, to the Land Registry or Land Charges Department as regards security over land. These fees are registration fees and will not usually be significant in the context of the overall transaction. No stamp duty is payable on the registration of security.

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 with Companies House requires the completion of a simple form and must be undertaken within 21 days of the creation of the security. The 21-day period includes bank holidays and weekends and does not stop running if the Companies House registrar identifies a defect and returns the registration form for correction.

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, as well as at Companies House.

Whilst each individual registration will not usually be expensive or difficult to prepare, carrying out a large number of registrations on a complex transaction can be time consuming and will have an impact on costs.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Depending on the particular transaction, various regulatory consents may be required to create security in certain cases. For example, licences granted to companies by Ofgem (the gas and electricity regulator in England and Wales) or the Financial Services Authority may affect the granting of any mortgage, charge or other form of security over that company's 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 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)?

Some of the key documentation issues are as follows:

- a security document must be executed as a deed if it is to comprise a legal mortgage over land and if various statutory powers are to be implied;
- an agreement to create a legal mortgage must be in writing, incorporate all the expressly agreed terms and be signed by all the parties; and
- where a deed is required, the relevant execution formalities are set out in the Companies Act 2006 (which now allows a single director, with a witness, to execute a deed on behalf of a company and also permits deed execution by two directors or a director and the company secretary).

Note that virtual completions, conducted by email, are subject to a special execution protocol following the Mercury case.

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 private company is not subject to any statutory restrictions as regards the giving of financial assistance for the purposes of the acquisition of shares in it or another private company.

A public company may not give financial assistance (including by way of guarantees or security) directly or indirectly for the purposes of the acquisition of shares in that public company, before or at the same time as the acquisition, unless certain exceptions apply (section 678 Companies Act 2006). Section 678 applies not just to public companies but also to their subsidiaries. Section 678(3) prohibits the giving of financial assistance after the acquisition of shares.

(b) Shares of any company which directly or indirectly owns shares in the company

It is also unlawful for a UK public company to give financial assistance for the purpose of the acquisition of shares in its private or public holding company unless certain exceptions apply (section 679 Companies Act 2006). The prohibition extends to any post acquisition assistance.

Note that civil and criminal penalties apply for breach of sections 678 and 679. The penalties include the relevant guarantee or security being void.

(c) Shares in a sister subsidiary

There are no statutory restrictions on 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 English law 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 recognises the role of a security trustee, as long as the finance documents provide for the relevant trust mechanics and the trust is properly constituted. The use of an express trust is key to syndicated lending under English law. Security is granted to a bank acting as "security trustee" which then holds the security on trust for the syndicate members. The trust benefits not just syndicate members on "day one" but all lenders who, from time-to-time, become part of the syndicate via a loan transfer. There is no need to execute separate security documentation each time syndicate membership changes.

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?

This is not applicable. Please also see question 5.1.

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?

There are no special requirements under English law to make the loan and guarantee enforceable by Lender B, provided the novation/transfer mechanics in the relevant English law facility agreement have been adhered to.

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 UK imposes a withholding tax at the basic rate of income tax (currently 20%) on any payment of yearly interest arising in the UK. Consequently, a UK company paying yearly interest on a debt security will generally have an obligation to deduct 20% of such interest payment and account for this withheld amount to the UK tax authorities.

Under Section 874 Income Tax Act 2007, where yearly interest arising in the UK is paid: (i) by a company; or (ii) on behalf of a partnership of which a company is a member; or (iii) by any person to another person whose usual place of abode is outside the United Kingdom, there is an obligation on the person by or through whom the payment is made to deduct an amount representing tax at the basic rate from such payment and to account for it to the UK tax authorities, namely HM Revenue & Customs (HMRC). Currently the basic rate of tax is 20%, which means that on a payment of

£100,000 of interest, £20,000 has to be deducted and accounted for to HMRC.

This obligation to withhold does not apply where the interest is paid to a company within the charge to UK corporation tax i.e. UK banks or companies or UK branches of foreign banks. In addition, often where a non-UK bank is lending, it will be entitled to take advantage of the terms of a double tax treaty under which it is exempted (wholly or partially) from UK tax on interest on loans made to UK borrowers (a "treaty lender"). However, the fact that a non-resident bank is entitled to exemption from UK tax under a double tax treaty does not automatically allow payment to be made gross by the borrower. Payment can only be made gross safely once the borrower has received permission from HMRC to make gross payment. Until such permission is received, there is an obligation to deduct tax from the payment of interest. Historically it has taken up to 6 months for this clearance to be granted, although HMRC claims that the average is nearer 6 weeks.

Where the DTTP Scheme for overseas corporate lenders applies, it is possible to significantly speed up the process of obtaining clearances to pay interest gross to non-resident corporate lenders. In summary, if a treaty lender is a passport lender and wishes to use the treaty passport scheme, the lender will include its passport number in the transfer certificate if an interest in the loan is assigned to it or in the schedule in the loan agreement if it is the original lender. The borrower must notify HMRC within 30 working days of the 'Passported' loan being made (or assigned to the new lender) using a Form DTTP2, which can be downloaded from HMRC's web site. HMRC anticipates that the DTTP2 notification details will enable it to issue a direction to pay the interest gross within 3 weeks.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no UK tax incentives provided preferentially or specifically to foreign investors or creditors. Transfers of shares in UK companies may require stamp duty to be paid before the transfer can be registered.

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?

In general terms, a bank or company is not subject to UK tax solely as a result of such activities unless the withholding referred to in question 6.1 applies to a payment of 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.?

We would not anticipate any other significant costs arising in England purely as a result of a loan/guarantee/security document being executed – stamp duties and notarial fees are not chargeable under English law in these circumstances.

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 banks are not connected with the borrower, in principle there are no adverse consequences if the lenders are organised in another jurisdiction.

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?

The courts in England determine the governing law of a contract in accordance with the Rome I Regulation (Regulation (EC) No 593/2008). The Regulation respects the autonomy of parties to choose the governing law of their contracts and the English court will enforce a contract that has a foreign governing law in accordance with its terms, the governing law and any mandatory rules of law applied in accordance with the Regulation.

7.2 Will the courts in England 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?

There is no reciprocal agreement or convention applying between England and the United States of America in respect of the enforcement of court judgments, and New York judgments will be enforced in England in accordance with the common law. Under the common law, an *in personam* judgment may be enforced provided it is for a debt or definite sum of money and it is final and conclusive. A claim is brought on the judgment and the English 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 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?

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, resistance to enforcement). Assuming the defendant is in England, the matter is straightforward and uncontested, it is possible to obtain default or summary judgment at an early stage and there is no resistance to enforcement, it may be possible to complete the process in 6 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 2-3 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?

There is no specific requirement for a public auction. Administrators and liquidators owe duties to the body of creditors of a borrower, not just to the secured lender, and they will seek to recover market value for assets to protect all creditors. Receivers owe their primary duty to the secured lender and will seek to recover sufficient funds to repay the lender; they also have a limited duty to the borrower to recover the best price reasonably obtainable on a sale of charged property. There may be requirements for regulatory consent in respect of certain types of borrower (for example, if an entity is regulated by the Financial Services Authority ("FSA") there is a requirement to obtain consent from the FSA prior to the appointment of administrators).

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?

(a) Foreign lenders may file a suit in England provided they can establish that the English court has jurisdiction.

(b) Other than as described in (a) above, there are no special restrictions on foreign lenders.

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?

Certain types of formal insolvency proceeding involve a moratorium (administration; compulsory liquidation; company voluntary arrangements ("CVAs") of small companies). The enforcement of fixed charge security is restricted on administration without the consent of the administrator or leave of the court, but fixed charge security may be enforced in compulsory liquidation. Certain types of "financial collateral" are not subject to the administration moratorium (broadly, "financial collateral" involves security where the lender holds the secured assets – e.g. shares or a bank deposit – or there is an agreement that title to those assets is transferred to the lender). CVAs do not bind secured or preferential creditors. Schemes of Arrangement may bind secured creditors but are relatively infrequent and are subject to court approval and the agreement of a majority in number and 75% in value of each class of creditors.

7.7 Will the courts in England recognise and enforce an arbitral award given against the company without re-examination of the merits?

Arbitral awards may be recognised and enforced in England in accordance with the New York Convention or the Arbitration Act 1996. Under neither process does the court typically have jurisdiction to re-examine the merits. This is subject to the following caveats:

- a respondent to an award may have the right to appeal a point of law, but this step must be taken within a short period of the award and may be excluded by the parties; and
- if a respondent resists enforcement of an award on public policy grounds, or seeks to have an award set aside for serious irregularity relating to fraud, the court may conduct a limited enquiry into the facts that raise the public policy or fraud issue. Courts are reluctant to consider issues that have already been considered by the arbitrator unless new facts have emerged since the 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?

There are five types of insolvency proceedings under English law: administration; receivership/administrative receivership; liquidation; company voluntary arrangement (CVA); and scheme of arrangement. From a lender's perspective, administration and administrative receivership are the most sought after remedies.

Out of court, an administrator can be appointed by the holder of a "qualifying" floating charge (one where the charge relates to the whole or substantially the whole of the company's assets) if the company has triggered an event of default under the financing documentation. This may be the case even if the company is solvent. Once appointed, the administrator owes his duties to all creditors, not only to the secured lender. His primary objective is to rescue the company as a going concern.

Administrative receivership is a self help remedy for secured lenders. The administrative receiver has to be appointed over the whole of the company's assets by, or on behalf of, the holders of any of the company's charges which, as created, were floating charges. The ability to appoint an administrative receiver has been curtailed by the Enterprise Act 2002. Only lenders holding security created before 15 September 2003 are able to appoint an administrative receiver, subject to certain exceptions. The administrative receiver's primary duty is to the secured lender who appointed him, but he is also an agent of 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?

Following the formal insolvency of a company, the administrator or liquidator may challenge transactions entered into by the company before the start of the relevant insolvency procedure. The period when such transactions are vulnerable to being challenged is known as a "hardening period". Such transactions include transactions at an undervalue, preferences, extortionate credit transactions, avoidance of floating charges and transactions defrauding creditors. The hardening period ranges from two years (transaction at an undervalue) to six months (preference).

Employees are the principal preferential creditors following the introduction of the Enterprise Act 2002. In order of priority, the party secured by way of mortgage or fixed charge will rank ahead of the preferential creditors, because preferential creditors are paid from the proceeds of floating charges, which rank behind fixed charge creditors.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Entities incorporated in England and Wales are generally not excluded from bankruptcy proceedings in England and Wales.

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?

Please see question 8.1.

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, a party's submission to a foreign jurisdiction may be legally binding and enforceable, provided the conditions for recognition of judgments are fulfilled. Judgments of courts of EU and EFTA Member States, where the court took jurisdiction relying on a contractual submission to that court, will be enforced in England and Wales pursuant to the Judgments Regulation (EC Reg 44/2001) and the Lugano Convention. Judgments of courts of some non-EU states (mainly Commonwealth members) with which reciprocal conventions exist, will be enforced by an analogous process of registration under the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933. Judgments of courts of all other states where the jurisdiction was based upon submission will usually be enforced through new English proceedings. Typical exceptions to these regimes include: judgments obtained following fundamental procedural irregularities; proceedings brought in breach of arbitration and similar clauses, in breach of statutory or international convention obligations; or where the judgment is based upon fraud, is contrary to English public policy or natural justice, or is contrary to the Protection of Trading Interests Act 1980 (e.g. for multiple damages).

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of England?

Please see the response to question 9.1.

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?

There are no eligibility requirements for a lender to a company under English law (i.e. there is no requirement, as regards the making of a loan, that a lender be a bank or other financial institution or have any particular type of corporate status, although there may be withholding tax consequences depending on status). English law regulates the taking of deposits rather than the making of loans. In relation to individuals, consumer protection legislation applies.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in England?

The above questions and answers cover most of the key legal considerations for secured financings governed by English law.

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• Haymarket in financing the acquisition of Novus Leisure.
• Graphite Capital in connection with the £130 million acquisition of U Pol Limited.
• HIG as regards an investor bridge financing borrowed in connection with the acquisition of Fibercore.
• Bowmark Capital in connection with the funding of various acquisitions (including Glenside Care, Las Iguanas, Care Fertility and Leaders Lettings).
• Terra Firma on their £276 million acquisition of The Garden Centre Group.
• Landsbanki Islands in connection with various leveraged buyouts, refinancings and restructurings (including Iceland Foods, Wyndeham Press and Whittards of Chelsea).
• Arion Bank in connection with Bakkovör Group and its high yield bond issue.
• The Royal Bank of Scotland, Santander, Lloyds Banking Group and Allied Irish Bank on the £147.4 million refinancing by CareTech Holdings PL.
• Bank of Ireland and Barclays on their financing of The Engine Group.
• The Royal Bank of Scotland in connection with the provision of development finance to a start up care home business backed by Patron Capital.
• The Royal Bank of Scotland and HSBC in connection with the provision of a development facility to develop care homes for lease to Care UK.

SJ Berwin's aim is to provide outstanding legal advice in a dynamic environment. We take pride in our ability to devise innovative and commercial solutions to complex problems, helping our clients achieve their business goals through original and practical thinking. We are a client focused, entrepreneurial firm that, from its inception in 1982, has grown organically to over 500 lawyers and 150 partners, with 11 offices in Europe, the Middle East and East Asia.

We advise on financing for leveraged buy outs, public bids and recapitalisations and on general corporate lending. We also specialise in real estate finance and funds finance. With financings becoming ever more complex, often with sophisticated intercreditor arrangements, our team services all requirements regarding super senior, senior, unitranche, second lien, mezzanine, junior and PIK debt, as well as interim and bridge financing. We also advise on restructuring and are at the forefront of innovative financing techniques.

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 2012 in France. This is largely due to the availability of new sources of financing originating in particular from capital markets. 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 on a large scale throughout 2012 and bond financings are now a common feature in the French financing market.

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 and Lafarge a €1.850 billion financing.

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).

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 (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, however, not 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 which 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 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 proportional to its income and assets.

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 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*). 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 types 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 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 in favour of a credit institution (*établissement de credit*) 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 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. 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.

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 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; or (c) 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 with 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 has been 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 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 *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*) that 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 2 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*) or a *fiducie* agreement).

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 French law provisions, a French court can set aside an arbitral award only if:

- the arbitral award has been rendered in the absence of an arbitration clause or on the basis of a null and void or expired arbitration clause;
- the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed;
- the arbitral tribunal violated the mission conferred on him, for instance, by granting relief that was not claimed for by the parties or by otherwise going beyond the scope of his appointment;
- 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 with 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.

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 has to be separately expressed in order for it to be equally binding and enforceable.

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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Germany

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1 Overview

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

One of the significant developments in the lending market in Germany is the increased role which debt funds are about to play. As banks tend to restrict lending activities, more and more debt funds are offering senior and mezzanine facilities in the corporate, private equity and real estate lending market. One driving factor behind this development can be seen in the increased appetite of insurance companies, due to regulatory capital requirements and pressure on asset performance, to invest in secured loans either directly or via a fund vehicle.

Although club deals continue to play a significant role, the market has also seen some large cap underwritings. Some deals in the LBO market have been financed by equity only with a view to refinance them by debt afterwards.

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

In 2012, over 30 LBO financing transactions took place in Germany. Recent deals include the acquisition of (or by) Fresenius AG (healthcare), Schaeffler AG (automotive), Techem AG (metering), BSN Medical GmbH (healthcare) and BARTEC GmbH (industrial).

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)?

Stock corpoartion (*Akteingesellschaft*)

A German stock corporation is prohibited from granting a guarantee or other type of security for borrowings of its parent or sister companies (i.e. up-stream security), unless there is either a control agreement or profit and loss transfer agreement in place or if the distribution is covered by claim for full consideration or restitution towards the parent (shareholder). The claim against the shareholder must be enforceable and fully collectable. A stock corporation is not restricted in relation to guarantees for borrowings of its subsidiaries.

Limited liability company

The granting of guarantees or collateral security by a limited liability company or a limited partnership is, in general permissible, subject to certain rules regarding the preservation of the company's share capital. Capital maintenance rules provide that the share capital of the company may not be repaid to the shareholders. The granting of a guarantee for the borrowings of the parent or sister companies (i.e. up-stream security) qualifies, under certain circumstances, as a prohibited repayment of share capital. A breach of such rules can result in the criminal and/or personal liability of the managing directors. For this reason, it is common practice to limit and restrict the enforcement of the security in the security agreement.

The capital maintenance rules do not apply (i) if the guarantor and its parent entered into a control agreement or profit and loss transfer agreement, or (ii) if the granting of the guarantee is covered by a claim for full imbursement against the shareholder. The reimbursement claim against the shareholder must be enforceable and fully collectable, which is often not the case if the lenders have to enforce a guarantee issued by a subsidiary of the borrower.

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?

Please see the answer to question 2.1.

2.3 Is lack of corporate power an issue?

Lack of corporate power is not an issue for a German corporation in relation to the granting of a guarantee.

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. It is usual practice that shareholders' approval (by a shareholders' resolution) is obtained by the lenders, even if such consent is not necessary under German company law or the company's articles of association.

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

No such limitations are imposed under German law.

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

There are no exchange controls or similar obstacles to enforcement in place under German law.

3 Collateral Security

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

A standard security package for a lending transaction includes – if available from the borrower or a third party – security over shares, receivables, movables, real estate (land), bank accounts and intellectual property. The legal form of the security interest depends on the nature of the assets. German law distinguishes between accessory and non-accessory security interests. The distinction is important with respect to the question who becomes the legal holder of the security (each secured party or the security agent) and how the security interest can be transferred to new lenders upon a syndication of the secured loans.

The main feature of accessory security is that the existence of such a security interest depends on the existence of the secured claim. It ceases to exist if the secured claim ceases to exist (e.g. as a result of the payment of all secured claims). Only the holder of the secured claims can become the holder of the security. The transfer of accessory security is affected by an assignment of the secured claims. Examples of accessory security interests include pledges and mortgages.

Non-accessory security interests are independent from the secured obligation. They can be held by a security agent on behalf of the lenders. The non-accessory security remains in existence even if the secured claims have been fully satisfied. Non-accessory security interests are mainly created by a transfer of title (ownership for security purposes). Such security must be released (typically be a retransfer of title) upon repayment of the loans. Security over receivables and movables is usually created by a non-accessory title 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?

The type of security agreement which is required under German law depends on the nature of the security interests. For example, security over receivables is created by way of a security assignment, a land charge requires a land charge deed and security over shares in a limited liability company is taken by a notarised pledge agreement. There is no general security agreement which covers the various types of security interests.

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 taken by way of a land charge (*Grundschuld*) or a mortgage (*Hypothek*). As the mortgage is an accessory right (see above under question 3.1), it is market practice to take land charges and mortgages are rarely used. A land charge requires a land charge deed which must be registered in the land register of the relevant local court. Registration might take several weeks up to a couple of months. The land charge can – but does not have to – be certified by a certificate issued by the land registry (*Buchgrundschuld*). In addition to the land charge deed, the parties enter into a security purposes agreement. The chargor usually submits to immediate foreclosure in the land charge deed. If this is the case, the land charge deed must be notarised.

The land charge covers the land and buildings (such as a plant), the building insurance, as well as movable items which serve the purpose of the land or building (accessories).

Collateral security over movable property such as machinery and equipment is created by way of a security transfer agreement. No requirements as to the form of the agreement exist, but the assets which are the subject of the security transfer must be clearly identified by the parties. This is often achieved by attaching to the security agreement a list of the assets or a map of the building in which the movables are located. Security transfers of movables do not have to be registered.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Collateral security over receivables can be taken by way of a security assignment. For the assignment to be valid, notification of the debtors is generally not required. In some instances (e.g. claims under an insurance contract) consent of the debtor is required. The assignor is usually given the authority to collect the assigned claims until a default under the loan agreement has occurred. The third party debtor can discharge the assigned claim by making payment to the assignor if he has not been notified of the assignment.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

It is common practice to take collateral security over bank accounts by a pledge of the rights and claims against the account holding bank. The account holding bank must be notified of the pledge. It is also common practice that the account holding bank waives the claims under its own pledge over the account against the pledgor (with the exception of fees and costs).

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 German company such as a stock corporation (*Aktiengesellschaft*) or a limited liability company (*Gesellschaft mit beschränkter Haftung, GmbH*) as well as interests in a limited partnership (*Kommanditgesellschaft*) can be pledged in favour of the lenders. The pledge over shares in a GmbH must be notarised. Unless the facility agreement is also notarised (which is usually not the case), it is not possible to make reference in the notarised share pledge agreement to terms which are defined in the facility agreement. Restrictions regarding the transfer or pledge of shares set out in the articles of association, such as consent requirements, have to be complied with. Registration of the pledge is not required. Since the claim of the shareholder for payment of the profit is also pledged, notification of the company is required for this pledge to be valid. The parties usually authorise the notary to notify the company of the pledges. Whereas shares in a stock corporation are usually not certified, shares in a GmbH are not.

Pledges over shares in a stock corporation do not need to be

notarised, but certain requirements as to the obtaining of actual or indirect possession of share certificates (if there are any) need to be met. This can be achieved, *inter alia*, by way of an assignment of the claims for delivery of share certificates against a deposit bank. For registered shares with transfer restrictions, the consent of the company has to be obtained.

A pledge over partnership interest requires the consent of all partners, which can be given in the partnership agreement or by special consent declarations. If, as in the case of a limited partnership with a GmbH as general partner (GmbH & Co. KG), the partnership agreement provides that the partnership interest can only be assigned together with the shares in the general partner (i.e. the GmbH), the pledge agreement must be notarised. Otherwise, no particular form is required.

It is controversial among legal authors and German courts whether or not German conflicts of law rules allow the valid creation of a pledge over shares under a New York or English law governed document. However, it is the prudent view to use a German law governed document and to comply in particular with German formality requirements (e.g. notarisation).

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over inventory can be taken in the same manner as security over machinery and equipment (see above under 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)?

The restrictions which apply to up-stream guarantees or up-stream security (see above under question 2.1) also apply to security interests which have been granted to secure guarantees for the obligations of other borrowers and/or guarantors of obligators 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?

Notary fees (for share pledge and land charges) and court fees (for land charges) are calculated in accordance with a statutory fee scale and amount to a fraction with the market value of the shares or the nominal amount of the land charge, respectively. No stamp duties apply for the creation of security in Germany.

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 land charges in the land register might take a couple of weeks to several months, depending on the workload of the local court involved.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No regulatory 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?

The transfer of accessory security (pledges over shares and bank accounts, see above under section 1) for a revolving facility which has not been fully utilised needs to be addressed in the security agreement by the creation of pledge for future pledgees or in the facility agreement by a parallel debt concept.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Notarisation of share pledges requires that the parties (pledgor and pledgees, i.e. all lenders and the security agent) are physically present at the time the notary reads the text of the notarial agreement to them. In order to comply with this requirement, the parties usually authorise, by way of a power of attorney, their lawyers or other persons to represent them for purposes of the notarisation.

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

Stock corpoartion (*Akteingesellschaft*)

A German stock corporation is prohibited from granting financial assistance for the acquisition of its own shares and such a transaction would be void. In addition, the granting of security for a debt of a shareholder is regarded as a repayment of share capital, which is only allowed if there is either a control agreement or profit and loss transfer agreement in place or if the distribution is covered by a claim for full consideration or restitution towards the shareholder.

Limited liability company (*Gesellschaft mit beschränkter Haftung*)

The granting of financial assistance by a limited liability company or a limited partnership is, in general, permissible, subject to certain rules regarding the preservation of the company's share capital. Capital maintenance rules provide that the share capital of the company may not be repaid to the shareholders. The granting of security for the obligations of its shareholders is regarded, under certain circumstances such as a net assets test, as a prohibited repayment of share capital. A breach of such rules can result in the criminal and/or personal liability of the managing directors. For this reason, it is common practice to limit and restrict the enforcement of the security in the security agreement.

(b) Shares of any company which directly or indirectly owns shares in the company

The restrictions set out above also apply if shares of any company which directly or indirectly owns shares in the company are acquired.

(c) Shares in a sister subsidiary

The restrictions set out above also apply if shares of a sister subsidiary are acquired.

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?

German law recognises the role of an agent who acts in the name and on behalf of the lenders. If the security agent holds non-accessory security which is located in Germany as trustee, the security agent has to enforce the security in its own name. In either event, the security agent can apply the proceeds from the enforcement of the collateral to the claims of all lenders if this is agreed upon in the security trust agreement or otherwise.

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?

Under German law, the agent can enforce the rights of the lenders acting as agent in their name and on their behalf (see above under question 5.1).

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?

No, there are no special requirements necessary.

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, in general, no withholding tax from either interest payable on loans to domestic or foreign lenders or the proceeds of a claim under a guarantee or the proceeds of enforcing security in Germany.

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 neither tax incentives nor taxes payable other than those set out under question 6.3 below.

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?

If a loan is secured by real estate or similar rights located in Germany or ships registered in Germany, the lender in relation to the interest paid on such loan becomes subject to German income tax. Typically, a double tax treaty prevents Germany from imposing tax in these cases as well. However, the foreign lender has to file a German income tax statement for purposes of German income tax on interest on a loan secured by German real estate or ships.

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.?

Notary fees for share pledges depend on the market value of the shares and notary fees, and court fees for land charges depend on the amount of the land charge. Both types of fees can be significant. They are usually borne or reimbursed 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.

There are no such adverse 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?

In general, German courts will recognise a foreign governing law, unless none of the parties have any connection to the jurisdiction which governs the agreement. German courts will also enforce such a contract.

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?

Courts in Germany recognise and enforce a judgment given against a company in New York courts or English courts without re-examination of the merits, unless certain rules of public order are violated.

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?

This might take from several months to a couple of years, depending, *inter alia*, on the amount at issue and whether or not the company objects to the claims which are brought by the lenders.

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?

Pledges over shares, as well as land chargers, can only be enforced, unless the pledgor agrees to a private sale after the secured obligations have become due and payable, by a public auction. The public auction has to be conducted in a certain form and certain notification requirements (which can be shortened to a week) have to be complied with.

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?

In some circumstances, foreign lenders may have to provide security for the payment of the costs of legal proceedings in court. Otherwise, there are no restrictions.

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?

If insolvency proceedings over the borrower are opened, the creditors of the debtor are barred from enforcement of their claims in court proceedings. Whereas the holders of pledges can enforce the pledges themselves, the right of collection of receivables which have been assigned to the security agent as well as the right to sell and transfer movables under a security transfer agreement passes to the insolvency administrator upon the opening of insolvency proceedings. The insolvency administrator is obligated to distribute the enforcement proceeds (subject to a deduction of up to 9% of the proceeds) to the holder of the security.

7.7 Will the courts in Germany recognise and enforce an arbitral award given against the company without re-examination of the merits?

In general, courts in Germany recognise and enforce arbitral awards without re-examination of the merits.

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?

Collateral security will be recognised in insolvency proceedings subject to certain hardening periods (see question 8.2 below) and enforcement restrictions relating to security assignments of receivables and security transfers of movables (see 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?

An insolvency administrator may challenge any collateral security that has been granted during a certain hardening period. As a general rule, the insolvency administrator may only challenge the granting of collateral security for which the grantor of such security receives adequate consideration in return (i.e. the credit facilities) if the lenders know that the borrower provides security in order to intentionally harm its other creditors.

In addition, any transfer or granting of rights and any payments made up to ten years prior to the application for the commencement of insolvency proceedings can be challenged by the insolvency administrator, if the grantor of the security acted with the intention to prejudice its creditors and the lender knows of such intention (which knowledge is assumed if the lender had knowledge of the inability of the security provider pay its debt when due and the prejudicial effects of the granting of security on the other creditors). The insolvency administrator may also challenge security which has been granted within three months prior to the filing of the insolvency application, if the security provider was unable to pay and the secured creditor knew or should have known of this inability or if the secured party had no claim to receive the particular security which has been granted.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Municipalities and most other public entities are excluded from insolvency 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?

There are no other processes available to a creditor in Germany. However, the enforcement of security interests such as pledges over bank accounts, security assignments of receivables or security transfers of movables do not require the involvement of the courts.

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?

The submission to a foreign jurisdiction is, subject to certain limitations, legally binding and enforceable under the laws of Germany.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Germany?

Sovereign immunity can, in general, be waived by German public entities depending on applicable statutory restrictions.

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?

A person who conducts the lending business in Germany has to hold a German banking licence under German banking supervisory laws, unless such activities are covered by a EU passport or are purely conducted on a cross-border basis. In order to qualify as cross-border business conducted outside of Germany, certain requirements set by the German banking supervisory authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) have to be met.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Germany?

A credit facility agreement which is governed by German law has to comply with certain statutory limitations, such as the prohibition to agree on default interest on late interest payments or prepayment fees for early repayment of the loan. In such event, a careful drafting of the credit facility agreement is required.

In addition, German law provides for a claim to release security if the value of the assets which can be realised upon enforcement of the security interest exceeds the amount of secured claims by 10%.

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1 Overview

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

Greece is undergoing the most profound economic crisis of its modern history, which has deprived the Greek lending market of access to international financing and therefore resulted to significant liquidity problems, evident from the negative credit expansion to the private sector within 2012. Under the conditions of such a suffocative environment, the Greek banking sector is being deeply restructured through its recapitalisation, as well as through mergers and acquisitions, which are expected to leave the market with two to three major private players, able to successfully face current and future challenges; at the same time, foreign lenders are either unwinding their Greek positions or requesting additional securities in order to maintain such positions.

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

Within 2011-2012, Greek banks have commonly proceeded with refinancing existing loans on a syndicated basis. On such a basis, the most significant lending transactions have been OTE's €900 million revolving credit facility, ELPE's €400 million bond loan, Intralot's (Group's UK subsidiary) €300 million senior unsecured facility, as well as the bond loans issued by OPAP S.A. for €290 million, Motor Oil S.A. for €150 million and S&B Industrial Minerals S.A. for €110 million. Finally, a €335 million syndicated local facility has been agreed in October 2012, as part of the financial structure of the acquisition by Dufry of Folli Follie's travel retail business.

In this chapter and unless otherwise indicated, any reference to:

- lenders, means credit institutions and borrowers/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 the 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.

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 aforementioned, the provision of a 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 a 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.

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). From a tax perspective, though, thin capitalisation issues may arise.

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), 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 non-appealable court decision; a prenotation of mortgage is always established by virtue of a 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; they 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); executed between the creditor and the collateral provider; and 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, that 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?

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 Directive EC 2002/47 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.

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 at 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 with 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, and lawyer's fees are assessed progressively based on the security value (1% up to €44,000, 0.5% for more than €44,001, etc., whereas they are limited to 35% of the progressive rate calculated as above in case of internal legal counsels; as of 01.01.2014, lawyers' fees are not statutorily required for). In the case of prenotation of mortgage, court costs do not exceed the amount of €500. Registration costs for both securities amount to 8.3‰ on the security value, in case of land registries, or 9.3‰ 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 minimised 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 (per issuer and type of share) to the Dematerialized Securities System costs €120. 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 do not involve a significant amount of time. Limited Land Registries are slow in processing registrations of deeds or court decisions to their public books. As to expenses, refer to our answer in 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 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 provides 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, 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, when made to domestic lenders, whereas it is subject to a 40% (33% as of 01.01.13) withholding tax, when made to foreign lenders (see our answer to question 6.2 for applicable lower rates). A 10% (15% as of 01.01.13) 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?

Interest payable on credit facilities made to foreign lenders is subject to the lower rate provided by:

(a) local tax legislation (i.e. 40% or 33%, as per our answer to question 6.1 above);

(b) if applicable, the tax treaty that Greece has signed with the State, of which the foreign lender is a tax resident; and

(c) if applicable, the EU Interest and Royalties Directive (2003/49), which has been implemented in Greece by law 3312/2005 and precludes any taxation on interest payments to associated EU companies (under a transitional regime, Greece may levy a withholding tax on interest at 5% between 01.07.2009 and 30.06.2013); this reduction or exemption applies provided that the recipient is an associated company, as per the provisions of the Directive.

In addition, non-resident companies without a permanent establishment in Greece are exempt from any withholding tax on interest from bond loans issued by resident companies. Finally, interest on loans from foreign sources granted by foreigners and secured by Greek ships is exempt from (withholding) income tax.

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, and therefore their income does not become taxable in Greece (other than the withholding tax considerations mentioned herein above) solely because of the granting of a loan to a Greek company or a guarantee and/or grant of security there from.

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 under question 3.9 hereinabove.

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 consequences to a company that is 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 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, as well as enforce, a contract that has 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 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); 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; and 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 under question 7.4), given that legal defences (other than to payment) are available to the obligor(s) during the enforcement procedure as a consequence of the latter's excessive typical requirements, heavily depending at the end of the procedure on the existence or not of 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 a seizure of the property for the realisation of an auction thereof. 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: limited enforcement expenses are first covered; then 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; then, a maximum of 1/3 of the balance goes to creditors with general privileges (mainly State claims from taxes), whereas the 2/3 thereof satisfy the claims of special privileges (i.e. those having a security over the auctioned asset).

The above mandatory auction is avoided in case of: 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 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 do 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, whereas 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 will usually impose a temporary moratorium on individual prosecutions (i.e. lender's prohibition of 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, dismissal compensations, employment claims of the last 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) 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?

Under Greek law, 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); or 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 December 31, 2012.

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KPP Law (Kerameus, Papademetriou, Papadopoulos Law Offices) consists of Greek lawyers with advanced levels of education and considerable professional experience.

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Our aim is to provide our clients with valuable and practicable legal services of the highest level, striking the right balance between protecting and promoting their wider business and/or personal interests.

Our lawyers are proficient in Greek, English, French, German, Italian, Danish and Spanish.

Chapter 22

Hong Kong

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1 Overview

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

Overall, there was a significant decline in lending activity in 2012 compared to the previous year as the loan and bond markets in Hong Kong were adversely affected by the Eurozone crisis. Hong Kong lenders are also facing increased competition with a number of Mainland banks opening branches in Hong Kong.

In July 2012, the Legislative Council in Hong Kong passed the New Companies Ordinance, which is expected to come into force in 2014. The New Ordinance will have several implications for financing transactions, including amendments to the current requirements in respect of the registration of charges, financial assistance, loans to directors and administrative matters.

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

Significant lending transactions in 2012 included IFC Development Corp Finance's US$1.3 billion term loan from a syndicate including, among others, Bank of China and China Construction Bank Corp and Noble Group's US$2.4 billion term loan and revolving credit facility provided by a syndicate of over 60 lenders. Also of significance, the first RMB syndicated loan in Hong Kong closed in December 2010 in a transaction between Hang Seng Bank and China Automation Group.

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 157H of the Companies Ordinance (Cap. 32) ("**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 express restriction contained in its articles of association or memorandum.

Whilst it therefore remains best practice to check the guarantor's constitution for a restriction on giving guarantees, since the enactment of section 5B(3) of the CO in 1997, an act done by a company is not invalid by reason only that it contravenes such a restriction. Persons dealing with a company in good faith are also not taken to have constructive notice of a relevant constitutional restriction.

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 guaranteeing company 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 used in respect of each type of asset as the perfection requirements among different types of assets could vary. In addition to entering into a security agreement, depending on the nature of the collateral, further registration formalities may need to be complied with for purposes of maintaining priority and perfection if, for example, a security interest is created over land in Hong Kong (registration with the Land Registry is required), a ship is registered under the flag of Hong Kong (registration with the Marine Department is required) or a trade mark is registered in Hong Kong (registration with the Intellectual Property Department is required). Failure to comply with registration formalities may result in a loss of priority over claims from subsequent secured creditors with respect to the assets.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Land and Plants

Security can be taken over land (which, as defined in the CPO, includes any permanent fixtures attached 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 can be created by depositing the title deeds of a property with the lender. If the equitable mortgage is executed as a deed, the lender will have much of the same powers and protections as 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 of the LRO).

If the mortgagor is 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 XI of the CO (Cap. 32)), particulars of the security interest must be registered with the Companies Registry within five weeks from the date of its creation (section 80 of the CO) in order for the security interest to become perfected.

Machinery and Equipment

Security can be taken over machinery and equipment which generally are movable properties not permanently attached to land and therefore are not considered as land as defined under 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 properties to discharge the debt in the event of a default by the chargor (the collateral provider). A charge merely creates an encumbrance on the charged property. No ownership right or possession over the charged property is transferred. Thus, the chargor may retain ownership over the machinery and equipment but the lender, as the chargee, will have the right to take enforcement actions to appropriate the charged properties to discharge the debt should the chargor default on its payment obligations. Although a charge does not operate to transfer ownership in the properties to the

chargee, a charge document will usually be entered into to grant the chargee with a power of attorney to compel a transfer of ownership in the event of a default by the chargor.

Charges may be fixed or floating. Under a fixed charge, the encumbrance is attached onto the specifically identified charged properties immediately upon the creation of the fixed charge (or, in the case of a fixed charge over future collateral, immediately upon the collateral coming into existence as the chargor's assets), and the chargor no longer has the right 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 undefined and unascertained collateral assets within a category of assets that will crystallise into a fixed charge upon the occurrence of a specified event whereby the charge will attach to the specific collateral assets then constituting the charged properties. Prior to crystallisation of a floating charge, the chargor, as owner, retains control over the charged machinery and equipment and has the right to deal with, use and dispose of the properties 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 put upon a charge, whether a court would regard it as a floating or a fixed charge depends upon the chargor's rights and freedom to deal with the charged property.

Although a chargor would generally prefer a floating charge over the charged properties due to the rights and freedom that the chargor will continue to have in dealing with the charged properties, a fixed charge is generally preferred by a secured party as a floating charge has various disadvantages for the secured party. In the case of a liquidation of the chargor, a fixed charge ranks above the liquidator's expenses and certain statutorily preferred claims, such as certain claims of employees. A floating charge ranks below such claims and expenses.

In addition, a person who acquires an interest in charged properties which are subject to an uncrystallised floating charge will generally acquire the interest in the properties free of the charge. The rights of a chargee under a fixed charge will only be defeated by a third-party buyer of the charged properties who acquires them in good faith without notice of the fixed charge. If the fixed charge has been registered, the purchaser of the charged properties will be deemed to have knowledge of the charge.

In the event of a liquidation of the chargor, section 267 of the CO 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.

Security can alternatively be created over machinery and equipment by way of a legal or equitable mortgage. Legal title to the collateral would be held by the lender (mortgagee) in a legal mortgage, subject to a condition requiring the lender to transfer title back to the borrower (mortgagor) upon the full performance or redemption of the secured obligations (e.g. when the debt is discharged). The mortgage may be an equitable mortgage where there is an intention to create a mortgage but title does not pass. It is also possible to create a security interest by way of a pledge, which requires a constructive or actual transfer of possession of the collateral, or a lien, which involves the retention of possession of the collateral to secure a debt such as unpaid servicing fees of the collateral assets. A lien may be created either by express agreement or by law.

The registration requirement under section 80 of the CO (see above) is applicable when 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 XI of the CO) grants security in the form of a Hong Kong law governed charge or mortgage in favour of the lenders over its machinery and equipment. Failure to comply with registration formalities may result in a loss of priority over the claims of subsequent purchasers of, or secured creditors with respect to, 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 can be taken over receivables. If receivables are governed by Hong Kong law, requirements as to perfection of security interests over the receivables 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.

Receivables may be assigned by way of security to a secured party together with a condition for reassignment of the receivables upon the full performance or redemption of the secured obligations (e.g. when the debt is 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 matters to be assigned are 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 are enforceable in the name of the assignor and 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 assignments are 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 has not been given to the obligor or has been given to the obligor subsequent to the perfection of the later assignment, except in the event where the assignee of the later assignment has 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. As described in question 3.3 above, a charge may be fixed or floating. A charge provides the secured party (or chargee) the right to appropriate the charged properties to discharge the debt in the event of a default by the chargor (the collateral provider). A charge merely creates an encumbrance on the charged property. No ownership right over the charged property is transferred.

Security interests over receivables of a Hong Kong company are

required to be registered with the Companies Registry (Part III of the CO). However, the registration requirement does not extend to: (i) security interests created over properties in Hong Kong of a non-Hong Kong company not registered with the Companies Registry; or (ii) security interests over properties which were not located in Hong Kong (including foreign law governed receivables) at the time when the security interests were created (section 91 of the CO). This registration requirement is also applicable to security interests over Hong Kong law governed receivables of a non-Hong Kong company (that maintains a place of business in Hong Kong) registered with the Companies Registry under Part XI of the CO (see section 91 of the CO). The particulars of the security interest, together with the instrument which creates the security interest, are required to be registered with the Companies Registry within five weeks following the date of the creation of the security interest (Part III of the CO) where registration is relevant. Failure to comply with registration formalities may result in a loss of priority over the claims from subsequent purchasers of, or secured creditors with respect to, the assets.

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 and the deposits held in the account situated in Hong Kong by way of a fixed or floating charge (see question 3.3 above for details about the features of a charge). A fixed charge is generally preferred by a secured party as a floating charge has various disadvantages for the secured party. For example, in the case of a liquidation of the chargor, a fixed charge ranks above the liquidator's expenses and certain statutorily preferred claims, such as certain claims of employees. A floating charge ranks below such claims and expenses. The chargee of a fixed charge should have sufficient control over the bank account and the proceeds in the account, otherwise a Hong Kong court may deem the charge to be a floating charge instead. Hong Kong courts will generally recognise security governed by foreign-law over a Hong Kong bank account, but perfection requirements under Hong Kong law will nevertheless have to be complied with.

The registration requirement under section 80 of the CO (see question 3.3 above) is applicable when 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 XI of the CO) creates a charge in favour of the lenders over a Hong Kong bank account. Failure to comply with registration formalities may result in a loss of priority over the claims of subsequent purchasers of, or secured creditors with respect to, the assets.

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. The mortgagor may alternatively create a security interest over the shares by way of a charge or equitable mortgage whereby the mortgagor remains as 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 the 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. 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 nevertheless have to be satisfied 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 and is 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 revolving nature of this category of assets (see the response to question 3.3 above for a detailed discussion about charges and mortgages). New inventories may automatically become the subject of a floating charge. Upon the occurrence of an enforcement event, the floating charge crystallises by becoming a fixed charge that attaches to the specific inventories then constituting the charged properties. A floating charge must be perfected by registration at the Companies Registry, where applicable (see the responses to questions 3.3 and 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 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 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**") will be required. It is common practice to seek a comfort letter from the OFTA where 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 would ideally 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 and real estate, 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, the document must make clear on its face that it is intended to be a deed and the formalities for the execution of a deed must be observed.

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 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 47A(2) of the CO). The term "financial assistance" is a broadly defined term that includes a guarantee, security, indemnity and loan, among others. 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, there are certain exceptions that apply where the person providing the financial assistance is an unlisted Hong Kong company. Under the CO, an unlisted company is not prohibited from giving financial assistance for the purpose of acquiring shares in the company or, if it is a subsidiary of another unlisted Hong Kong company, in that other company if certain requirements relating to net assets, solvency and applicable shareholders' approval are met.

(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 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 violation 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 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

Hong Kong recently introduced a special Buyer's Stamp Duty of 15% of prices of real estate properties for buyers who are companies and foreign individuals who are not permanent residents of Hong Kong.

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 profits tax 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 the 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 are 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 4 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 2 months 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 4 to 6 months (but could take 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 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. There is, however, no general requirement for a public auction.

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 the 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. A new Arbitration Ordinance based largely on the UNCITRAL Model law was recently adopted in Hong Kong (it became effective on 1 June 2011).

The Arbitration Ordinance (Cap. 609) ("**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 the 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 of the CO, 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 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 of the CO, 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 in 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 of the CO, 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 of the CO 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 of the CO, 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 XI of the CO are also considered "unregistered" for the purposes of winding-up.

The winding-up provisions of the CO 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, in the event that the party that is 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 on foot 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?

A recent decision of the Hong Kong Court of Final Appeal (in *Democratic Republic of the Congo & Ors. v. FG Hemisphere Associates LLC* [2011] 5 HKC confirmed 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 in 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 at primarily 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 the MLO, section 24, 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 of the 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 that the court would consider include, without limitation, the debtor's age, experience, business capacity, market rates for similar transactions and the degree of risks 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 of the 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 a 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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Hungary

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1 Overview

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

The lending activity of the banks have been reduced to a substantial extent both in the household and the business segment. Securing financing has remained difficult. Banks require more covenants and securities in the loan documentation. The market has seen more restructuring and work-out related activities recently. The availability of fresh money has become much more difficult as banks face increasing risks and administrative and tax burdens. In addition to the bank tax, the government has introduced a new transaction levy that covers all transfers and transactions of banks in Hungary. The new laws also made it more difficult for municipalities to take credits and established a special rescue scheme to debts of municipalities. The EUR/CHF denominated loans still cause significant problems to the entire lending sector as, in parallel with the worsening of the FX denominated portfolios, the laws in relation to the early repayment scheme and other rescue schemes created significant losses to the financial institutions. Furthermore, a significant number of litigation cases have been initiated recently challenging the validity of FX denominated contracts. All in all, the trends set out above created an insecure and difficult environment for lending activities.

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

Two financing deals in relation to the sale of the real estate (office) portfolio of the TriGránit group and Aviva to Heitman at the end of 2011, are two of the significant lending transactions that have taken place in Hungary. The value of both acquisitions exceeded EUR 100 million.

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 grant corporate guarantees. However, there are certain restrictions in relation to the potential abuse of limited liability which 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?

Yes, there may be concerns. Guarantees (whether in the form of suretyship or independent guarantee) require a guarantee agreement underlying the guarantee. As guarantees provided by companies (i.e. not by banks) are not regulated under the Civil Code, there is no expressed statutory requirement to provide any compensation or fee to the guarantor for the grant of corporate guarantees. However, both from a tax point of view (e.g. transfer pricing, gifts) and from a corporate law point of view, an adequate benefit needs to be demonstrated between the guarantor and the entity which is guaranteed. It is easier to demonstrate and prove such an interest if the guarantor and the entity guaranteed qualify as an "acknowledged group of undertakings" under the Companies Act.

Directors have to act in the interest of the company in which they have been appointed. If the company grants a guarantee, directors have to be able to demonstrate that the company received appropriate benefit through the provision of the guarantee. Furthermore, the shareholders receiving a guarantee from their company may face challenges as to the abuse of the limited liability position of the company. This means that, in practice, despite the fact that the guarantee is not linked to any underlying agreement, there must be a legal relationship or interest between the guarantor and the guaranteed entity which provides the basis for the issuance of the guarantee.

The lack of appropriate interest and legal relationship underlying the guarantee may also be challenged in the case of insolvency proceedings.

2.3 Is lack of corporate power an issue?

There is no statutory requirement to receive corporate approval in relation to the provision of a corporate guarantee unless the guarantee is provided to the shareholder of a limited liability company. However, the constitutional documents of the company in question may provide otherwise and require the approval of certain corporate bodies and/or organs. The need for such approval would make the guarantee invalid *per se*.

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

A governmental licence is not required for corporate guarantees unless such guarantees are provided as financial services. As to

shareholder approval or other corporate approvals, the constitutional documents of the company in question may establish additional requirements (see question 2.3 above).

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

No, there are no special limitations imposed. At the general level, the director and/or the shareholders having more than a 75 per cent. share in the company may be challenged in an insolvency situation if they were negligent in undertaking guarantees for an amount which was clearly not coverable by the guaranteeing company.

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

No, there are no exchange controls or similar obstacles. Such limitations can be introduced in the case of a financial crisis of the national economy.

3 Collateral Security

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

There is a wide range of securities available under Hungarian law. There are personal securities (e.g. guarantees, suretyship, sub-ordination undertakings, security assignments) and *in rem* securities (e.g. liens, charges, deposits). The collaterals can be real estates, securities (bonds, shares, etc.) or other moveables, and certain rights (including intellectual property rights or rights relating to 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?

A floating charge is available under Hungarian law. In the case of floating charges, the assets of the company can be charged at the general level and turn into actual charges on each asset at the time of the crystallisation. Until crystallisation, all assets of the company as a whole serve as the basis of the security. If an asset is sold in the ordinary course of business, the floating charge ceases to exist on the asset sold, whereas if an asset is bought by the company, it will automatically be charged under the framework of the floating charge. A floating charge can be established by way of an agreement drawn up in a notarial deed and has to be recorded in the registry of charges held by the Chamber of Notaries Public. In the case of other types of securities, the asset charged has to be specifically determined.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, all of these types of assets can be charged as collateral. The procedures for how these assets can be charged are different; however, in each case the establishment of the charge over the assets requires the registration in a public register. In the case of real property, a private deed countersigned by an attorney-at-law or a notarial deed should be used for the establishment of the charge (whether a mortgage, framework pledges or pledges independent from the underlying obligations) and the charge itself needs to get registered at the land registry. In the case of moveables and rights, the establishment of the charge in question requires a notarial deed and the registry of charges held by the Chamber of Notaries Public has to be used for registration, while in the case of special assets (e.g. business quota of companies, patents, trademarks, ships, airplanes) special registries have to be used for registration.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, pledges can be taken over receivables. The establishment of the collateral requires an agreement in writing. If the receivable in question is recorded in an official registry, the security has to be registered into that register. The debtor has to be notified as to the establishment of the pledge.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A security pledge or a simple pledge can be used over a bank account or the balance of a bank account. The agreement needs to be in writing and the bank keeping the account has to get notified as to the pledge. The instruction in relation to the bank account may be subject to the approval of the pledger.

3.6 Can collateral security be taken over shares in companies incorporated in Hungary? 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, both the business quotas of limited liability companies and the shares of companies limited by shares can be taken as collateral. In the case of business quotas, the pledge has to be registered in the company register. In the case of printed shares, the pledge needs to be stamped on the share certificate and the endorsement relating to the pledge needs to be indicated on the share certificate. In the case of electronic (dematerialised) shares, the pledge needs to be registered (credited) at the securities account of the pledgee.

The security in relation to the shareholdings in a Hungarian company has to comply with Hungarian law. In theory, the security agreement can be governed by New York or English law; however, the establishment of an *in rem* collateral security must comply with the imperative or, in the case New York law, the mandatory provisions of Hungarian law. In practice, the security agreement is usually governed by Hungarian law so that the enforcement of the collateral is easier.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over inventory can be taken in the form of: (i) a floating charge (see question 3.2 above); or (ii) a pledge over the moveables in the inventory (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)?

Yes, a company can grant a security interest in relation to its obligations both as a borrower and as a guarantor. In the case of granting a security interest as a guarantor, the rules relating to the liability of the management and the ban on the use of continuous detrimental business policies need to be taken into account.

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 of the notary public depends on the deal value and can span from 4 to 0.25 per cent.; in addition to this fee, a flat fee of maximum 40 per cent. of the service charge and other types of expenses can be charged. If the security is taken as a unilateral undertaking, the service charge is half of the above. The registration of charges in relation to real properties is approximately EUR 40, and the registration of pledges over business quotas is approximately EUR 60. In certain cases, the establishment of collateral may require additional charges or 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?

The expenses relating to the establishment of the notarial deed cover the registration into the registry of charges in relation to moveables held by the Chamber of Notaries Public. The registration takes place at the same time when the notarial deed is drawn up. Different registration fees apply in the case of the registration into specific registers. The average registration time in the case of land registry (real property) and the court of registration (business quota) is in the range of 8-20 days depending on the number of applications at the time of the registration.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Generally, no regulatory consent is required. In the case of public registers (e.g. land registry, trade mark register, patent register, registry of charges), the registration is needed for the establishment of the collateral in question. In certain industries (e.g. energy), however, regulatory consent may be necessary.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

The general rule is that the collaterals are linked to the main obligation, i.e. they cease as at the cancellation of the main debt. However, framework pledges or special provisions of the revolving facility agreement can maintain the collaterals throughout the period of the term of the entire facility.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

In the case of real property, the collateral agreement has to be drawn up as a private deed countersigned by an attorney-at-law or as a notarial deed. Attorneys-at-law have to represent the applicant in front of the court of registration or the land 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 company limited by shares are prohibited to provide security (e.g. in the form of collateral security or guarantee) in relation to the acquisition of its shares and to participate in such acquisitions in any other way.

(b) Shares of any company which directly or indirectly owns shares in the company

The financial assistance in relation to indirect acquisition of shares in companies limited by shares may be caught by the prohibition of financial assistance.

(c) Shares in a sister subsidiary

No financial assistance issue arises in the case of sister companies (i.e. companies which are not directly or indirectly affiliated).

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Hungary 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 role of an agent acting on behalf of the lenders can be established under the collateral agreement. A trust is currently not acknowledged under Hungarian law. However, the new Civil Code will introduce trusts as from the autumn of 2014, which may change the market standards in this respect.

5.2 If an agent or trustee is not recognised in Hungary, 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 alternative, or (in many cases) supporting, mechanisms are the setting of the joint and several beneficiary rights of the lender, the assignment of the claims and/or the power of attorney given to one lender. The parties of the facility agreement can agree on the joint and several beneficiary rights of the lenders within the meaning of the Civil Code (i.e. that any of the lenders can enforce the entire claim against the debtor). In this case, the relationship of the lenders must be regulated amongst themselves. It is also possible to agree on the assignment of the claims to one lender from the others for a consideration that depends on the amount of the claim

actually enforced. Furthermore, a power of attorney given to one lender to the others can also serve as the basis for the agency.

5.3 Assume a loan is made to a company organised under the laws of Hungary and guaranteed by a guarantor organised under the laws of Hungary. 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 contractual position is not transferable under the current Civil Code but will be possible under the new Civil Code from the autumn of 2014. Currently, all rights and obligations established under a contract have to be transferred. The transfer of the obligations is subject to the approval of, while the transfer of the rights is subject to the notification of, the other contracting party. Unless the guarantee agreement sets out that it is personal to the parties, the transfer of the loan transfers the underlying collateral security. If the collateral is registered, the assignment of the collateral also needs to be registered in the relevant 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?

No withholding tax applies to the interests and proceeds of claims set out above in Hungary.

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 established under Hungarian law for foreign lenders. No withholding tax applies, while other potential tax implications need to be investigated on a case-by-case basis under the relevant international tax treaties.

6.3 Will any income of a foreign lender become taxable in Hungary solely because of a loan to or guarantee and/or grant of security from a company in Hungary?

The main rule is that the income by a foreign lender is not taxable unless it qualifies as having a permanent establishment or bilateral tax treaties provides otherwise.

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 other than those set out 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 special adverse consequences applicable to lenders only because of their nationality.

7 Judicial Enforcement

7.1 Will the courts in Hungary recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Hungary enforce a contract that has a foreign governing law?

Under certain circumstances, the choice of foreign law is generally acceptable in relation to contractual relationships but not to *in rem* rights and obligations. The choice of foreign law cannot violate imperative rules of Hungarian law and cannot be a sham agreement. If any of the parties is a foreign company, it will make the need for the choice of foreign law stronger.

7.2 Will the courts in Hungary 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?

If the foreign decision is made by an English court (i.e. a court of another Member State of the EU), it has to be enforceable in Hungary in the same way as Hungarian court decisions. If the agreement establishes the jurisdiction of New York courts, the decisions made by New York courts will be generally accepted and enforced by Hungarian courts irrespective of the fact whether there is any reciprocity between the US and Hungary. In the absence of a contract, however, reciprocity would be required. In such cases, the reciprocity is established on the basis of the statement of the Ministry of Justice. In each case, the disputes relating to the title of real property (and some other matters) may be reserved for the exclusive competence and jurisdiction of Hungarian 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 Hungary, 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 Hungary against the assets of the company?

The lender can choose between electronic collection orders and the commencement of a lawsuit. The collection order can be issued within 3-5 days but will transform into a lawsuit if the debtor raises an objection against the order. The lawsuit takes approximately 4-12 months at the first instance and another 3-11 months at the second instance. The duration depends largely on the complexity of the case and the behaviour of the defendant. The order in relation to the enforcement of a foreign judgment takes approximately 1-4 months and the duration of the actual enforcement depends on the nature and the status of the assets of the debtor.

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 main rule is that collateral security can be enforced in the framework of a judicial enforcement. However, in the case of certain types of collaterals (e.g. pledges), the parties agree in advance on the limit of prices and to appoint a licenced entity to make an auction, a public tender or any other way determined in the contract.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Hungary or (b) foreclosure on collateral security?

Foreign lenders have the same position as domestic lenders with the exception that they need to translate the documents into Hungarian and use the Hungarian language in the procedures. Lenders outside the EU may be required to pay a litigation deposit upon the request of the defendant.

7.6 Do the bankruptcy, reorganisation or similar laws in Hungary provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

In the case of a bankruptcy procedure, the debtor receives a moratorium: during the moratorium, no payment or claim (including the enforcement of the collaterals) can take place. In the case of liquidation, collaterals cannot be enforced (save for security deposits) but they need to be reported as a claim to the liquidator.

7.7 Will the courts in Hungary recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes, courts recognise and enforce arbitral awards, as Hungary is member to the New York Convention in relation to the enforcement of arbitral awards. Please note that, from 2012, the establishment of arbitration clauses in contracts with state-owned companies or governmental agencies has been banned.

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?

Following the commencement of the bankruptcy (liquidation) procedure, the collateral securities (except for security deposits) transform into claims that need to be reported to the liquidator. These claims can be enforced during the bankruptcy procedure. The claims based on pledges (collaterals) are in the second creditor's group following the costs of the bankruptcy (including taxes). Secured creditors are preferred to get compensation from the assets up to the amount of the collateral. Unsecured creditors fall into the last category of creditors and can get paid only before the intra-group 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?

Yes, acts with the insolvent entity in relation to a security preferring one creditor over the other in an unlawful way may be challenged by the liquidator if such acts occurred within a certain period before the commencement of the liquidation procedure (e.g. three years, one year, three months).

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

There are special rules applicable to banks, insurance companies, public bodies, and 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?

If the parties agree in advance on the limit of prices and to appoint a licenced entity to make an auction, a public tender or any other way determined in the contract, the assets can be seized for sale. In other cases, the assets can be seized as a security measure in the framework of an enforcement procedure or (in certain cases) as a preliminary measure in the litigation case.

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 Hungary?

Yes, save for disputes in relation to real properties located in Hungary and that the foreign jurisdiction is only acknowledged without submission if there is reciprocity between the state of jurisdiction and Hungary.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Hungary?

Yes, the Hungarian state can waive its immunity and no immunity applies in private law matters.

10 Other Matters

10.1 Are there any eligibility requirements in Hungary 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 Hungary need to be licensed or authorised in Hungary or in their jurisdiction of incorporation?

Any systematic and for-profit lending activity or ancillary financial services is subject to the licence of the Hungarian Financial Supervisory Authority or (in the case of cross-border passports or financial branches) of the licence of the home jurisdiction and the notification to the HFSA. Lending between affiliated entities is not covered by the licensing requirement.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Hungary?

There are many specific legal aspects of Hungarian law that needs to be considered. Primarily, the technical details in relation to the enforcement of assets located in Hungary should be taken into account (e.g. in the case of collateral security agreements).

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LENDVAI

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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 past year. In spite of the financial crisis in the West, Indian banks stood unaffected and showed an undisturbed growth over the year. The interest rates in India have been rising.

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 borrowed by Indian banks were from banks in Europe. The Indian banks proposed to borrow at cheaper rates from outside India and then lend at higher rates to the Indian borrowers. This enabled Indian banks to earn margin profits.

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 372A 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, which ever 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 to give a guarantee in accordance with the provisions of Section 372A, if there exists 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.

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 resolve as to 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 295(5) provides that all persons who are knowingly parties to contravention of sub section (1) and (3) shall be liable jointly and

severally to the lending company for the repayment of the loan or for making good the sum which the lending company may have been called upon to pay in virtue of the guarantee given or the security provided by such company.

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.

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 done 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 over immovable properties.
(b) Hypothecation over 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 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?

Documents creating security are definitely necessary. Most securities are evidenced by proper documentation. However, under the Transfer of Property Act, depositing the original title deeds of the property with the mortgagee can also create a charge by way of mortgage.

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 if evidenced by a written document 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 secured 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. Also if a notice is not provided, the debtor will be validly discharged if he makes the payment to the assignee.

The procedure would be entering into the hypothecation or the deed of assignment as the case may be and thereafter registering the charge with the CERSAI (a registering authority) in case of hypothecation and assignments for perfection of the security. 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 a 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.

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 collaterals. 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 Depositary 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?

Inventory is constantly moving and changing in view of sales and purchases. The most common method of using the 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 also require 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 remain 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 that approving the affixing of the common seal is mentioned in the Articles of Association or under the resolution. Most security documents are executed in one original and one counterpart.

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

Can be accepted but would need to be supported by additional security.

(b) Shares of any company which directly or indirectly owns shares in the company

Same as above.

(c) Shares in a sister subsidiary

Same as above.

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, in India the appointment of a security trustee is recognised. The security trustee holds the security for one or multiple lenders. Each time a lender changes, the security trustee executes a deed of accusation 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, since this concept is new, generally, in consortium and syndicated lendings, 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?

Yes, 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, 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.

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 the foreign law was chosen by mutual agreement by parties, provided that the parties resided in different countries, and provided that 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 under whom they or any of them claim 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 of up to five years to be decided. However, not every case can fall into 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 SARFEASI 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 SARFEASI 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 fourths in value of the amount outstanding as on that date.

(iii) Appointment by the board of directors of a trustee under Section 13(4)(c) of the SARFEASI Act who is deemed to be an agent of the Borrower.

(iv) The SARFEASI 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 borrowings guidelines issued by the Reserve Bank of India or with the approval of the Reserve Bank of India and, 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 from filing suits in the Indian Courts for the enforcement of security, except that it is important that the security, when created, was permissible under FEMA, valid and enforceable and all consents, wherever necessary for creation of the security under FEMA, were 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 for the award to 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 bankruptcies 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 were 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 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 under liquidation, the law provides priority for repayment of the following:

(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 share holders; and

(vii) equity share holders.

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 formed under the Banking Companies (Acquisitions and Transfer of Undertakings) Act and these banks are 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 an enforcement?

As mentioned earlier, under the SARFEASI Act, a lender has a right to enforce the security without approaching a Court. However, only lenders qualifying under the SARFEASI Act can exercise such rights and foreign lenders would not qualify for such action under the SARFEASI 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. where 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 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 Dealers Association and it was also the first firm to document a securitisation transaction in India. It aces the field of structured finance and derivative 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.

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 Indonesian 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 Nos. 13/20/PBI/2011 (Regulation 20) and 13/22/PBI/2011 (Regulation 22) came into force on 2 January 2012. They aim to both: (i) stabilise exchange rate volatility caused by instability in the supply of foreign currency to the domestic market; and (ii) create a reporting system that will enable the collection of important financial data. Under Regulation 20, all drawdowns 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. Drawdowns under loan agreements signed before 2 January 2012 will not be subject to the new Regulations, but if the principal amount of the loan is subsequently increased, any increase will be subject to Regulation 20.

Export proceeds and the effect on security

Regulation 20 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 dated before 2 January 2012, export proceeds need not be received through a Foreign Exchange Bank until 2 January 2013. Further confirmation from Bank Indonesia is required to confirm the timing of the subsequent sweep and the legality of this practical solution generally.

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

There are plenty of significant transactions in Indonesia in recent years, among others, the issuance of bonds by the Indonesian state-owned company energy giant PT Pertamina (Persero) in 2012 worth US$ 2.5 billion and this was considered the largest Asian debt issue in the US market.

The US$ 2.5 billion senior unsecured bond offering was made in two tranches – a US$ 1.25 ten-year bond bearing a 4.875 percent coupon rate and a US$ 1.25 billion 30-year bond with 6 percent coupon. The offering was at least three times oversubscribed. Earlier reports indicated that Pertamina initially expected to raise more than US$ 2 billion from the offering. In this deal, **ABNR** acted as Indonesian counsel to Pertamina together with a reputable US law firm as their international counsel.

The demand for the offering continued a trend of high demand among investors for long-term Asian debt. Another example is the US$ 500 million tranche of 30-year bonds offered by the Chinese National Offshore Oil Company (CNOOC) which was close to 20 times oversubscribed, with investor orders in the range of US$ 9.8 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)?

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 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 a 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?

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 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 follow:

- Immovable assets, i.e. land, buildings, fixtures and vessels with a 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 for 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 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.

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 in 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 mortgage.

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). In term of corporate approval, as we have indicated in our response to question 2.5, shareholder approval is also required.

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, 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 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?

Please refer to question 5.1 above.

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" or commonly known as "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 Indonesia?

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 mortgage.

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, however, 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) This is not applicable in Indonesia.

(b) This is not applicable 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.

7.7 Will the courts in Indonesia recognise and enforce an arbitral award given against the company without re-examination of the merits?

Principally, an arbitral award does not need to be re-examined. 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 as contemplated in Article 66 (c) of the Indonesia Arbitration Law. 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.

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 several kinds of creditors, generally regulated in the Indonesian Civil Code ("**ICC**"), Indonesian Bankruptcy Law, and Law No. 6 of 1983 which was lastly amended by Law No. 16 of 2009 regarding the General Provision of Taxation ("**Tax Law**"), which have preferential rights as follows:

- Creditors who hold any tax debts. Such creditors have a higher position than creditors such as the holders of the security. This is regulated under Article 21 of Tax Law, and Article 1137 of ICC.
- Separatist/concurrent creditors. Such creditors are the holder of the security as regulated under article 1134 of ICC.
- Preference creditors as categorised under article 1149 of ICC and special preference creditors as stipulated under article 1139 of ICC.

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 other processes other than court proceedings that 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 (subject to the proper nexus to such 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 (this means all of its shares are owned by the Republic of Indonesia and enters into a commercial contract, it can be argued that such state-owned company has waived its entitlement (if any) to sovereign immunity).

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 to be a bank. It is required for lenders to be licensed in Indonesia. However, we normally assume that the lenders have proper licences under its jurisdiction to conduct its business, including lending money.

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 other 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 infrastructure, particularly with power projects.

A B N R
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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

Chiomenti Studio Legale

Francesco Ago & Gregorio Consoli

1 Overview

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

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 period. The result for the lending market is that new lending transactions are limited, and an increasing number of the existing borrowers are restructuring loans entered into the last years.

During the same period, the run from the risk has boosted the secured lending market if compared to the unsecured lending one. In particular, lenders have been looking for loans secured by the assets of the companies (trade receivables, securities, etc.) in order to grant new loans. Even many financial institutions have been able to borrow money on medium term duration only providing appropriate collateral.

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

Some significant lending transactions have been:

The financing of Banca IMI S.p.A., Intesa Sanpaolo S.p.A., UniCredit S.p.A., Société Générale Milan Branch, HSBC Bank plc, HSBC Bank plc - Milan Branch e Mediobanca-Banca di Credito Finanziario S.p.A. to Telco S.p.A. for an amount of Euro 1,050,000,000, refinancing the indebtedness for the purchase of Telecom Italia S.p.A.

The Euro 4.2 billion financing of the new Fiat Industrial Group.

The Euro 1.1 billion secured loan granted to Ferrovie dello Stato backed by VAT receivables.

The 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., for an amount of Euro 11 billion, 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 for 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 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 to banks and financial intermediaries. Notwithstanding, granting securities in respect of borrowings of other members of the group is not considered as an exercise of 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 activities unlawfully 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, such as 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.

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.

More 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 date certain at law 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 pledger).

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.

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 to 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 perspective, please note that the most common forms of securities utilised 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% on the secured amount.

ii) Assignments of receivables: registration tax applied at a rate of 0.5% on 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 in a nominal amount, €168.00); 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 is subject to a 0.25% substitute tax (on the amount of the loan) which applies *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, mortgages dues, stamp taxes) ordinarily applicable on deeds, contracts and formalities relating to the loan transaction and to its related execution, amendment and extinction.

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, 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.

(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 for 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 1701 *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 hold 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 they 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. In 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 Judgments 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, more 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 a bankruptcy proceeding (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 an insolvency proceeding, 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 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 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-*bi*s 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, allow 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 nor 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 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 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.

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 could 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 activity 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. More 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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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 were also common. Due to (i) the collapse of the so-called "bubble economy", which depended heavily upon the myth of never-ending increasing values of Japanese real estate, (ii) the long recession thereafter throughout the 1990s and 2000s, and (iii) the many suicides of guarantor directors, traditional lending has been subject to some criticism. 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?

No. In addition, a subsidiary has the corporate power to guarantee the debts of its parent. See question 2.4.

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 determine 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 (such as the factory estate mortgages over the Hiroshima factory of Elpida Memory).

(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), and amount, if applicable). If the target is a claim to be generated in the future (*shorai-saiken*, "future claim"), the period (beginning and end date) 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, but there are 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 debtor 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. 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). Such approval is best obtained in advance, at the time of the pledge.

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 value of each parcel of land and each building), (ii) movable assignment registration (JPY 7,500 per filing (up to 1,000 movables)), and (iii) claim assignment registration (JPY 7,500 per filing (up to 5,000 claims) and JPY 15,000 per 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 for 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 Agent 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 majority 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 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.

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. The effective tax rate on corporations in Japan is (i) 38.01% (including Special Reconstruction Income Tax, which is imposed until March 31, 2015) for the fiscal year commencing on or after April 1, 2012 until March 31, 2015, and (ii) 35.64% for the fiscal year commencing on or after April 1, 2015. Activities in Japan such as (i) having a branch office, (ii) performing operating construction work continuing 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 their making loans 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.

Prior to making loans 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 are 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 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).

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 an 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 done within 30 days prior to debtor's 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 was effective from 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 or 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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Luxembourg

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1 Overview

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

The current financial crisis and economic slowdown have led to an increase in debt restructurings and collateral enforcement proceedings. Luxembourg courts have been faced with litigation relating to 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. These court cases have confirmed the very lender friendly and effective framework of the Luxembourg Collateral Law.

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

Luxembourg has witnessed an increased number of acquisition finance transactions, such as the cash offer by SS&C Technologies Holdings Europe S.à r.l., a Luxembourg indirect wholly owned subsidiary of SS&C Technologies Holdings, Inc., for GlobeOp Financial Services S.A., a Luxembourg company whose shares were admitted to listing and trading on the London Stock Exchange.

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 participate 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 object 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 object, unless the limited liability company proves that the beneficiary of the guarantee knew that the grant of the guarantee fell outside the corporate object, 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 object. 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 95% of their net assets. This limitation is included in order to avoid that the guarantee exceeds 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 enforcement of a guarantee.

However, if a guarantee is granted in relation to an obligation expressed in a currency other than Euro, any court order will only be expressed in terms of Euro.

3 Collateral Security

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

Depending on the types of underlying assets, collateral can be given by way of 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.

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 pledge can be taken over cash in bank accounts. 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 either in bearer or registered form. The *lex rei sitae* of bearer shares is held to be the place where the bearer certificates are located. The *lex rei sitae* of registered shares is the place where the register in which the share inscriptions are made is located.

If the share register or the bearer shares are located in England or New York, security could, in principle, validly be granted under these laws, but in practice this would be very unusual in the case of registered shares. 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, plus a fee of 0.24% on any claims of money mentioned in the security agreements.

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 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 normally 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 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 approximately take 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 an 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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Mauritius

Uteem Chambers

Muhammad R. C. Uteem

1 Overview

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

1.1.1 Bank finance remains the main source of finance in Mauritius and credit extended by banks to the private sector grew by 10.7% to around Rs 240 billion as at June 2012. There are 20 duly licensed banks in Mauritius, which are well capitalised with capital adequacy ratios well above the regulatory minimum of 10% and are able to fund their lendings smoothly.

1.1.2 In June 2012, Moody's upgraded the sovereign debt rating of Mauritius to Baa 1.

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

1.2.1 Most lending transactions involving both domestic companies and global business companies are confidential and are not generally publicised. The government regularly borrows from international organisations and sovereign states to finance development projects. For example, it has been reported that, in 2011, China provided financial facilities of about RMB 40 million to Mauritius to finance projects mutually agreed by the two governments. Some of the projects under the ongoing Chinese assistance programme are the CCTV/radio communication project, the national airport, the Mauritius Broadcasting Corporation, and the Bagatelle Dam project, amongst others.

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, if the constitution of the company does not prohibit it from doing so and the necessary directors and/or shareholder approvals are obtained. It must be in the commercial interest of the guarantor to do so and the transaction should be at arm's length. If the company is in the business of providing guarantees, then it will need to apply for an appropriate licence from the Financial Services Commission.

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?

2.2.1 Every director of a company has a duty to act in good faith in the best interest of the company. However, the constitution of a fully owned subsidiary or joint venture company may authorise a director to act in the best interest of the shareholder who appointed him instead of the company.

2.2.2 If the company derives no or disproportionately small benefit from the transaction, this may be used in evidence to determine whether the director acted in good faith and in the best interest of the company in entering into the guarantee.

2.2.3 To avoid any issue of corporate benefit, we usually recommend that the transaction be approved by the shareholders of the guarantor company. In any event, the approval of shareholders is generally required if the value of the guaranteed obligations exceed 50% of the value of the guarantor company before the transaction.

2.2.4 It is worth noting that if a company entered into a transaction for no or little consideration, the transaction may be set aside if the company is subsequently placed into liquidation. The liquidator can apply to the bankruptcy division of the Supreme Court for an order to set aside a charge in cases where the charge amounts to a voidable preference, or a voidable charge under the Insolvency Act 2009 (the "**Insolvency Act**").

2.2.5 Under section 313 of the Insolvency Act, a transaction by a debtor may be set aside by the bankruptcy division of the Supreme Court on the application of the Official Receiver or a liquidator where it: (a) is a voidable preference; and (b) was made within 2 years immediately before adjudication or commencement of the winding up.

2.2.6 In addition, according to section 324 of the Insolvency Act, where the debtor has provided a guarantee for the benefit of another company which is a related company, within a period of 2 years before the date of winding up of the company, the liquidator may recover from the related company the amount by which the guarantee exceeded the amount of consideration received by the debtor.

2.2.7 A charge given by a debtor under an agreement to give the charge that was made before the period of 2 years immediately before the date of adjudication or the commencement of the winding up may, however, not be set aside.

2.3 Is lack of corporate power an issue?

2.3.1 The general rule is that a company has the capacity of giving and entering into and being bound by and claiming all rights under a deed or mortgage or other instrument unless its constitution expressly limits its ability to do so. A company holding a global business licence also generally has full capacity to do whatever lawfully permitted act unless its licence provides otherwise.

2.3.2 According to the Companies Act, a company or a guarantor of an obligation of a company shall not assert against a person dealing with the company the lack of capacity of the company, unless the third person has, or ought to have, by virtue of his position with or relationship to the company, knowledge of the lack of capacity.

2.3.3 It is also worth noting that a third party dealing with the company does not need to worry if the person acting on behalf of the company acts fraudulently or forges a document that appears to have been signed on behalf of the company, unless he has actual knowledge of the fraud or forgery.

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

2.4.1 Yes, shareholders' approval is required if it is a major transaction. Under the Companies Act, "major transaction", in relation to a company, is defined as:

(a) the acquisition of, or an agreement to acquire, whether contingent or not, assets, the value of which is more than 75 per cent of the value of the company's assets before the acquisition;

(b) the disposition of, or an agreement to dispose of, whether contingent or not, assets of the company, the value of which is more than 75 per cent of the value of the company's assets before the disposition; or

(c) a transaction that has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities, the value of which is more than 75 per cent of the value of the company's assets before the transaction.

2.4.2 The guarantee needs to be registered with the Registrar General in Mauritius for it to be effective against third parties.

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

2.5.1 Article 2016 of the Civil Code provides that the amount of a guarantee cannot exceed the amount owed by the debtor.

2.5.2 A company which is unable to pay its debts when they fall due should not incur further liability. A director may, under certain circumstances be personally liable for any loss suffered by creditors of a company as a result of the company continuing to trade when it was unable to pay its debts as they fall due.

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

There is no exchange control in Mauritius. Foreign currency can be freely repatriated from Mauritius.

3 Collateral Security

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

3.1.1 There are different types of collateral which are available to secure lending obligations under the Civil Code and the Mauritius Commercial Code (the "**Commercial Code**").

3.1.2 The different securities given under the Civil Code are as follows:

(i) fixed and floating charges (*sûretés fixes ou flottantes*);

(ii) liens (*privilèges*);

(iii) pledge (*nantissement-gage/antichrèse*);

(iv) non-possessory pledge (*gage sans déplacement*);

(v) mortgage (*hypothèques*);

(vi) special pledge in favour of banks (*gage spécial au profit des banques*); and

(vii) guarantee (*cautionnement*).

3.1.3 The Commercial Code provides for the following securities:

(i) pledge over receivables (*nantissement des créances*);

(ii) special pledge to the benefit of financial institutions (*gage spécial au profit des institutions financiers*); and

(iii) assignment of receivables (*cession des créances*).

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?

3.2.1 Yes, it is possible to give asset security by means of a general security agreement.

Floating Charge

3.2.2 A floating charge can cover all assets of a company, present and future. A floating charge is created by way of a deed under private signatures which must be in a prescribed format is provided for under the Civil Code. It must be noted that a floating charge can only be inscribed in favour of "*institutions agréées*" (approved institutions) (which includes a bank licensed in Mauritius and any body corporate not registered in Mauritius and having no place of business in Mauritius). The charge document must be inscribed with the Conservator of Mortgages for the charge to be effective.

Fixed Charge

3.2.3 A fixed charge covers all the present assets of a company. The charge is embodied in a deed under private signature and must be in the form prescribed under the Civil Code. Similar to a floating charge, a fixed charge can be inscribed in favour of an approved institution and the document inscribed with the Conservator of Mortgages for it to be effective.

Lien

3.2.4 A lien given by a company can cover both movable and immovable property of the company as security for the due and punctual discharge of secured amounts. The lien can be either in the form of a general lien or a special lien. A lien must be registered with the Registrar General for it to affect the rights of third parties.

Mortgage

3.2.5 A mortgage can also be taken over a company's immovable assets. According to article 2163 of the Civil Code, a mortgage can be created over the following properties:

(i) immovable property which may be the subject matter of legal transactions between private individuals, and its accessories deemed immovable; and

(ii) the usufruct of the same property and accessories for the time of its duration.

3.2.6 A mortgage has to be registered at the Registrar General and then be inscribed at the Conservator of Mortgages. Failure on the part of the debtor to repay his debt will entitle the creditor to proceed with the seizure and sale of the immovable property of the debtor according to the provisions of the Sale of Immovable Property Act 1868. Generally, seizure of immovable property has to be preceded by a *commandement* to be served upon the debtor in person.

Guarantee

3.2.7 A guarantee is a contract by virtue of which a person (physical/corporate) guarantees the debt of the principal debtor in cases where the principal debtor cannot repay the debt. The guarantor must write under his hand the maximum guaranteed amount.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

3.3.1 Yes, collateral security can generally be taken over immovable property, plant, machinery and equipment.

3.3.2 Securities which can be taken over land include a fixed charge, floating charge and mortgages.

3.3.3 Non-possessory pledges and charges can generally be taken over plant, machinery and equipment.

3.3.4 In a non-possessory pledge, the pledgor pledges a movable asset as security for a debt but he keeps the physical possession of the pledged assets. It is to be noted that a "*gage sans déplacement*" relates only to the assets set out by the law that creates and regulates it. A non-possessory pledge can only be taken over motor vehicles, tools and equipment for professional, industrial and agricultural purposes. Such a pledge must be in the form of an authentic deed or a deed under private signature, should contain the elements set out under the Civil Code and must be duly registered.

3.3.5 However, certain personal equipment and tools used in trade cannot be seized under the Civil Code. As per article 2139 of the Civil Code, movable property necessary to the living and to the work of the debtor and his family except for the payment of their price, within the limits fixed by the Code of Civil Procedure, cannot be seized.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

3.4.1 Yes, collateral security can be taken over receivables. Receivables can be assigned or pledged or be the subject matter of a floating charge as described above.

Assignment under the Civil Code

3.4.2 Receivables under the Civil Code can be assigned by the delivery of title. However, the assignment is binding on third parties only if the assignment has been duly notified by way of notice served by an usher or by registered mail with proof of delivery or if the debtor has accepted same in an authentic deed.

3.4.3 The assignment of a debt automatically carries the assignment of the accessories to the debt such as guarantees, security and mortgages.

Assignment of receivables under the Commercial Code

3.4.4 Under the Commercial Code, a debt held on a third party (body corporate or individual) in the exercise of its commercial or professional activity, can be assigned in favour of either a body corporate exercising a commercial or professional activity whether in Mauritius or abroad, or in favour of a banking and financial institution or any other entity holding a Global Business Licence delivered by the Financial Services Commission, by the remittance of a *bordereau*.

3.4.5 As per article 83 of the Commercial Code, the *bordereau* must include the following elements:

(i) the title "*acte de cession de créances*", i.e., deed of assignment of receivables, or "*acte de cession de créances à titre de garantie*", i.e., deed of assignment of receivables as security;

(ii) the name of the beneficiary; and

(iii) the designation or individualisation of the debts assigned or the elements likely to create the said designation or individualisation, particularly by indicating the debtor, the place of payment, the amount of the debts or of their valuation and, where applicable, their maturity date.

3.4.4 The borrower must be formally notified of the assignment, and the undertaking by the company to pay the assignee will only be valid if it is in a written instrument entitled "*acte d'acceptation de la cession d'une creance*" (i.e., acknowledgment and consent of counterparty).

Pledge of receivables under the Commercial Code

3.4.5 A pledge given under the Commercial Code can cover all receivables, including present and future ones (article 92-1 of the Commercial Code).

3.4.6 The pledge should be made in writing and the secured and pledged receivables must be stated in the instrument creating the pledge. If they are future receivables, the instrument in writing must allow their individualisation or contain elements allowing the pledging of the future receivables such as the indication of the debtor, the place of payment, the amount of the receivables or their valuation and, if it is necessary, their maturity.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

3.5.1 Yes, security can be taken over cash deposited in bank accounts by a special lien, a pledge or assignment of the bank account or a floating charge on the bank account.

Special lien

3.5.2 A special lien created pursuant to article 2150-1 of the Civil Code enables a bank, established pursuant to the Banking Act, to hold a special privilege over the credit balance in the account of the company with respect to a loan granted to the company. This lien only secures debts resulting from a facility evidenced in writing (2150-2 of the Civil Code).

Pledge over bank account under the Commercial Code

3.5.3 A company can also give a pledge over its bank account as security. A pledge given under the Commercial Code can take the form of a pledge over a bank account and such pledge is made by a deed under private signatures, entered into by the pledgor (who is the owner of the bank account), the pledgee (who is the bank who is financing the debt) and the debtor/company who owes the debt. The account bank (that is a registered bank holding the account which is subject to the pledge) must be notified of such pledge over the bank account, according to the procedure set out below:

(a) a *bordereau* must be executed by the pledgor; and

(b) a notice of pledge must be executed by the pledgor in respect of the charged account and duly served onto the account bank by registered mail with proof of delivery.

3.5.4 The pledge over a bank account will take effect between the

parties to the pledge, and against third parties, on the date of the pledge. The pledge over a bank account must be registered with the Registrar General within 8 days of the creation of the pledge.

Assignment of bank account

3.5.5 The procedure for an assignment of a bank account under the Commercial Code has been described under question 3.4, paragraphs 3.4.2 to 3.4.4, above.

3.6 Can collateral security be taken over shares in companies incorporated in Mauritius? 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?

3.6.1 Yes, collateral security can be taken over shares in companies incorporated in Mauritius. The shares are in certificated form.

3.6.2 Under Mauritius conflict of law rules, security interests over assets are governed by the laws of the place where the secured assets are located. If the secured assets are located in Mauritius, then the mandatory provisions of Mauritius will be applicable to the creation, perfection and enforcement of the security interest. As such, security on the shares on the Mauritius company cannot be validly granted under a New York or English law governed document.

3.6.3 Collateral security which can be taken on shares include fixed and/or floating charges and pledges. There are two procedures for taking a pledge on the shares of companies, one under the Civil Code and the other under the Commercial Code.

Pledge under the Civil Code

3.6.4 A pledge given under the Civil Code can cover both movable property and immovable property. A pledge given on a movable property is known as a "*gage*" and one given on an immovable property is known as an "*antichrèse*". A pledge under the Civil Code must be duly registered for it to be effective against third parties (article 2074 of the Civil Code).

3.6.5 When a company is pledging a share, for the pledge to be validly established as regards the parties to the pledge and as regards to third parties, there needs to be a transfer of the guarantee inscribed on the register of the pledgor. The inscription transfer in guarantee must mention that the title is the subject matter of the pledge, must include the names of the pledgor and of the pledge, and the consideration for such pledge of shares (article 2077 of the Civil Code).

Special pledge in favour of banks

3.6.6 Under articles 2129-1 to 2129-4 of the Civil Code, a special pledge in favour of banks can be created by a borrower or his guarantor in relation to a loan or an advance given by banks, for the benefit of the bank established in accordance with the provisions of the Banking Act 1988 (the "**Banking Act**"). The pledge must be registered with the Registrar General in Mauritius.

3.6.7 It is to be noted that a special pledge is limited to bonds or shares and only guarantees claims arising from a loan or advance made in writing.

3.6.8 A special pledge on shares is created by the delivery to the bank of:

(i) shares to secure the sum due from the borrower or the guarantor, as well as interests, commissions or expenses resulting therefrom; and

(ii) a blank transfer form, signed and undated allowing the sale of the securities pledged on behalf of the borrower or his guarantor.

3.6.9 The blank transfer form will take effect from the date of the execution of the title evidencing the loan or advance consent and is effective against third parties from this date.

Share pledge and special pledge to the benefit of financial institutions under the Commercial Code

3.6.10 Articles 92-6 to 92-11 of the Commercial Code provide for a special pledge of a commercial nature which can be given in favour of financial institutions. A special pledge is created only on transferable securities, including shares issued by an approved institution or any person having a Global Business Licence (delivered by virtue of the provisions of the Financial Services Act 2007).

3.6.11 Such a share pledge can guarantee only the receivables or obligations that are in writing. The special pledge is created by the remittance of:

(i) the movable securities which are intended to secure the obligation/debt of the debtor or of his guarantor, as well as the resulting interests, commissions or expenses; and

(ii) a blank share transfer form, signed but undated, allowing the sale, in the name of the debtor or of his guarantee, of the secured transferable securities.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, security can be taken over inventory by creating a floating charge on same.

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 give security interest to secure its obligations, subject to receipt of the necessary corporate approvals (i) as borrower, and (ii) provided that it is in the best interest of the company, as a guarantor of the obligations of other borrowers and/or guarantors 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?

3.9.1 The different fees in relation to security will depend on the nature of the transaction witnessed by the document.

3.9.2 **Registration duty**

Under the Registration Duty Act 1804, the rate of duty on a deed containing the creation of a mortgage or privilege or an instrument containing the creation of a fixed/floating charge or a pledge in accordance with the Civil Code is as follows:

Amount	Rs*
Not exceeding Rs 300,000	1,000
Exceeding Rs 300,000 but not exceeding Rs 500,000	3,000
Exceeding Rs 500,000 but not exceeding Rs 1,000,000	10,000
Exceeding Rs 1,000,000 but not exceeding Rs 5,000,000	30,000
Exceeding Rs 5,000,000	50,000

* Exchange rate USD 1 ≈ Rs 30

Registration duty levied on the registration of a pledge of an immovable property is at the rate of 5% of the value of the immovable property at the time of registration. Registration duty for notice of crystallisation for floating charges is Rs 1,000 and the duty payable on the renewal of a fixed or floating charge is Rs 1,000. The assignment of movable property by a debtor for the benefit of his creditors is subject to registration duty at a fixed fee of Rs 200.

Depending on the type of document, these documents must be registered with the RG within 8 days to 3 months of the execution of the documents, failing which, a penalty fee is payable.

3.9.3 **Stamp duty**

Under the Stamp Duty Act 1990, stamp duty is paid to the Registrar General on the documents listed below at the time of registration, transcription, inscription or erasure of inscription, as the case may be, as specified below:

Document	Rs
Loan agreement	500
Copy of loan agreement for inscription	500
Instrument of fixed charges, floating charges, pledge, *gage sans déplacement*, or renewal of charges or *gage sans déplacement* in respect of each original	500
Any other deed drawn up by a notary	300
Copy of any other deed drawn up by a notary for transcription or inscription or renewal of inscription	300

3.9.4 **Inscription fees**

Inscription fees under the Transcription and Mortgage Act 1863 are payable on documents security documents as follows:

Document	Rs
Mortgage	200
A fixed or floating charge	200
A non-possessory pledge	200
Renewal of an inscription of mortgage or privilege	200
For every entry in the margin of an inscription	200
For final or partial erasure of an inscription	200

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?

3.10.1 Please see question 3.9 for the expenses incurred in relation to the filing, notification or registration.

3.10.2 In practice, the registration of documents may take between two to four days. With respect to mortgages, fixed charges and floating charges, it usually takes a week or two to inscribe the charge in the register kept by the Conservator of Mortgages.

3.10.3 A company which has created a charge or made an issue of debentures charged on or affecting any property of the company, must, within 28 days of the creation by the company of any charge or of making the issue, file with the Registrar of Companies, a statement of particulars of charges with the Registrar of Companies.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

In general, no regulatory or similar consent is required. However, in the case of a non-citizen who holds property in Mauritius in respect of which he was required to seek the approval from the Prime Minister under the Non-Citizens (Property Restriction) Act 1975, his ability to create a security on such property will depend on the terms set out in the certificate delivered to him under the act.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

The ranking and priority of claim will depend on the nature of the security interest. Some creditors are mandatorily preferred by law such as amount due to revenue authorities. Privileged creditors will rank ahead of secured creditors and, even among secured creditors, ranking will be determined according to the type of security and date of creation of the security.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

3.13.1 Mortgages over immovable assets must be notarised. There are prescribed formats and fonts to be observed in respect of charges to be registered and transcribed such as fixed and floating charges.

3.13.2 Under the Civil Code, bilateral and multilateral contracts need to be executed in as many originals as the number of parties to the contracts.

3.13.3 There is also a requirement under the Civil Code that where one party alone undertakes towards another to pay him a sum of money or to deliver to him fungible goods, that legal transaction must be evidenced in a written instrument and bear the signature of the person who is making the undertaking, as well as the mention under his hand of the sum in words and in figures. A typical handwritten statement would be: "Read and approved. Good for the sum of [Amount in words] [Amount in Figures] plus interests, costs, charges, commissions and accessories."

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

4.1.1 The general rule under the Companies Act 2001 is that a company cannot give financial assistance, i.e., give a loan or guarantee or provide security, directly or indirectly for the purpose of or in connection with the acquisition of its own shares.

4.1.2 However, the company may have financial assistance for the purpose of or in connection with the acquisition of its own shares if the board of directors of the company (Board) has previously resolved that:

(i) giving the assistance is in the interests of the company;

(ii) 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

(iii) immediately after giving the assistance, the company shall satisfy the solvency test.

4.1.3 However, where the amount of any financial assistance approved above, together with the amount of any other financial assistance which is still outstanding, exceeds 10% of the company's stated capital, the company cannot give the assistance. The company must first obtain from its auditor or, if it does not have an auditor, from a person qualified to act as its auditor, a certificate that:

(i) the person has inquired into the state of affairs of the company; and

(ii) there is nothing to indicate that the opinion of the Board that the company shall, immediately after giving the assistance, satisfy the solvency test, is unreasonable in all the circumstances.

4.1.4 A private company may also by unanimous agreement of its shareholders agree to provide financial assistance in connection with the acquisition of its shares. In such a case, the formalities set out in question 4.1, paragraphs 4.1.2 and 4.1.3, need not be complied with.

4.1.5 It is to be noted that the restriction on giving financial assistance does not apply to: (a) the issue of shares by the company; (b) a repurchase or redemption of shares by the company; (c) anything done under a compromise under Part XVII or a compromise or arrangement approved under Part XVIII of the Companies Act; or (d) where the ordinary business of a company includes the lending of money by the company in the ordinary course of business.

(b) Shares of any company which directly or indirectly owns shares in the company

4.1.6 There is no prohibition on providing financial assistance in connection with such acquisitions.

(c) Shares in a sister subsidiary

4.1.7 There is no prohibition on providing financial assistance in connection with such acquisitions.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Mauritius 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?

Mauritius will recognise the role of an agent/trustee and will allow it to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of the lenders. The role and responsibility of the agent/trustee must be already spelt out in the agreement.

5.2 If an agent or trustee is not recognised in Mauritius, 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.

5.3 Assume a loan is made to a company organised under the laws of Mauritius and guaranteed by a guarantor organised under the laws of Mauritius. 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?

5.3.1 The transfer of the loan can be done by way of an assignment through an assignment agreement or by way of a novation through a novation agreement. In the case of an assignment, the rights attached to the loan, including all the securities given to secure the loan, are transferred to the assignee. The assignment agreement needs to be notified to the debtor, i.e., the company, by notice served by an usher or by way of registered letter with acknowledgment of receipt.

5.3.2 The novation of the loan through the substitution of Lender A by Lender B is subject to the execution of a new agreement amongst the parties, i.e., Lender A, Lender B and the borrower. The guarantor must consent to the novation for the guarantee to be maintained. The initial obligation of the company towards the initial charge holder, i.e., Lender A will disappear upon the creation of such novation. Therefore, any security provider will have to consent to the novation and agree to secure the novated loan.

5.3.4 In case of an assignment, in order to make the loan and guarantee enforceable by Lender B and make the transfer binding on the borrower, the latter needs to be formally notified of the transfer. Lender B can, at any time, prevent the company from paying any amount to Lender A by serving a notice of the assignment on the company. Lender B can also require the company to pay it directly instead of Lender A. However, the undertaking by the company to pay Lender B directly will not be valid unless it is in a written instrument (acknowledgment and consent of counterparty).

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 withholding tax in Mauritius on payment of interest on loans or proceeds of a claim under a guarantee or security 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?

6.2.1 There is no tax incentive provided preferentially to foreign lenders. However, interest paid to a non-resident carrying on any business in Mauritius by a corporation holding a Category 1 Global Business Licence, or by a bank out of income derived from its banking transaction with non-resident and global business companies, are exempt from income tax in Mauritius.

6.2.2 The maximum registration duty payable on the registration of the loan agreement and/or security documents, applicable to both local and foreign lenders is Rs 50,000 under the Registration Duty Act 1804, even if the loan amount given exceeds Rs 5 million.

6.3 Will any income of a foreign lender become taxable in Mauritius solely because of a loan to or guarantee and/or grant of security from a company in Mauritius?

No. A foreign lender not resident in Mauritius will only be liable to income tax on income derived from Mauritius. Under the Income Tax 1995, income derived from Mauritius includes income derived by a person from money lent by him:

(i) in Mauritius; or

(ii) outside Mauritius to:

(A) a resident, other than a resident banking company, except where the money lent is used by the resident for the purpose of a business carried on by him outside Mauritius through a fixed establishment outside Mauritius; or

(B) a non-resident, if the money lent is used by the non-resident for the purpose of a business, other than the business of money-lending, carried on by him in Mauritius through a permanent establishment in Mauritius.

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.?

6.4.1 In practice, security documents provide that it is the borrower who bears the registration, stamp, inscription and legal fees. However, it may also be agreed between the parties that costs will be shared between them or will be borne by the lender only. In such case, other than registration, stamp, inscription and legal fees, there is no other significant cost which would be incurred.

6.4.2 According to the Notaries Act 2008, the fees payable to a notary public for drafting loans and security documents are 2% on the first Rs 250,000 – subject to a minimum charge of Rs 1000, 1.5% on the next Rs 500,000, 1% on the next Rs 1,000,000 and 0.5% on the remainder.

6.4.3 However, most loan agreements and security documents do not need to be drafted by notaries. The legal fees for drafting these documents will depend on the seniority of the lawyer involved and the market considerations.

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.

6.5.1 There are no thin capitalisation rules in Mauritius. Save for certain regulated sectors such as banking, there is no limit on the amount of foreign currency debt which a local company can borrow.

6.5.2 An adverse consequence that the company can face is the exchange rate risk. If the exchange rate moves against the Mauritian Rupee, repayment of foreign currency debt by the local company would become more expensive.

6.5.3 A local company borrowing from foreign banks may also experience difficulties in repaying the debts in foreign currency if the interest rate of that country rises considerably.

7 Judicial Enforcement

7.1 Will the courts in Mauritius recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Mauritius enforce a contract that has a foreign governing law?

7.1.1 The choice of a law other than Mauritius Law ("**foreign governing law**") made to a contract, to the extent that it is made in good faith, is valid and binding between the parties and will be recognised and upheld by courts in Mauritius. However, the court will apply Mauritian law to the following issues: (i) authority and capacity of the company to enter into contracts; (ii) governmental consents needed for acts or contracts to be performed wholly or partly in Mauritius; (iii) the formalities for the execution of contracts and other instruments within the territorial jurisdiction of Mauritius; and (iv) matters of procedure in judicial or administrative proceedings in Mauritius.

7.1.2 Courts in Mauritius will enforce a contract that has a foreign governing law to the extent that a Mauritian entity is involved, since under the provisions of article 20 of the Civil Code, a Mauritian can be bought before a court of Mauritius for obligations contracted in a foreign country, even with a stranger. Expert evidence on the foreign law will need to be adduced to interpret the contract.

7.1.3 The court in Mauritius has the discretion not to hear a case if it determines that there is a more appropriate forum to determine the issues more effectively. Thus the courts in Mauritius can stay an action if there is already another action pending before another court to avoid any conflicting judgment.

7.2 Will the courts in Mauritius 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?

7.2.1 Generally, courts in Mauritius will recognise and enforce a judgment given against a Mauritius company in New York courts (the "**NY courts**") without re-examination of the merits of the case if:

(i) the NY courts which rendered such judgment had jurisdiction to hear the claim;

(ii) the NY courts applied the proper law applicable to the determination of the claim against the company;

(iii) the judgment of the NY courts was not rendered in breach of any rule of procedural or substantive public order applicable in Mauritius;

(iv) the judgment of the NY courts had not been obtained by fraud, or is not upon its face founded in mistake, or considered irregular and bad by the law of the place where it is awarded;

(v) the company had been summoned to attend the proceedings before the NY courts in accordance with the procedures set out in the rules of the foreign courts; and

(vi) the judgment of the foreign courts is still valid and capable of execution in the jurisdiction of those NY courts.

7.2.2 In case of a judgment obtained in England and Wales, the judgment creditor may apply to the Supreme Court of Mauritius, within 12 months after the date of the judgment, or such longer period as may be allowed by the Supreme Court of Mauritius, to have the judgment registered in the Supreme Court of Mauritius, and on any such application the Supreme Court of Mauritius may, if in all circumstances of the case it is considered just and convenient that the judgment should be enforced in Mauritius, and

subject to this section, order the judgment to be registered accordingly.

7.2.3 However, such a judgment will not be registered by the Supreme Court of Mauritius where:

(i) the original court acted without jurisdiction;

(ii) the judgment debtor, 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 submit to the jurisdiction of that court;

(iii) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;

(iv) the judgment was obtained by fraud;

(v) the judgment debtor satisfies the Supreme Court of Mauritius either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or

(vi) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the Supreme Court of Mauritius.

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 Mauritius, 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 Mauritius against the assets of the company?

7.3.1 It depends on the complexity of the cases and amount involved. The Supreme Court has jurisdiction to hear claims exceeding Rs 500,000 (approximately USD 17,000). If the case is contested, it can take years before the case is fixed for trial and finally disposed of.

7.3.2 It should be noted that an exequatur needs to be obtained first before the foreign judgment may be recognised and enforced in Mauritius. If exequatur proceedings are undefended, it will take a few weeks. But it can take a year or so to get exequatur of a foreign judgment which is contested. Once the foreign judgment is made exequatur, the lender will have to initiate proceeding for seizure and sale of assets of the borrower if he refuses to pay.

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?

7.4.1 Generally, there is no significant restriction which may impact the timing and the value of enforcement. The point at which a secured lender can enforce its collateral depends on the commercial agreement reached between the parties. The security documents can provide that the security is enforceable on an event of default, usually defined by reference to the terms of the security documentation.

7.4.2 In general, it is not mandatory for most types of security interest that enforcement must be carried out by public auction or court intervention. A security under a security agreement may be validly enforced in accordance with the terms of the security documentation without the need for any judicial intervention.

7.4.3 In the event that a security interest in shares or in immovable property is enforced in favour of a non-citizen, permission from the relevant authorities in respect of the acquisition of immovable properties in accordance with the Non-Citizens (Property Restriction) Act is required.

7.4.4 However, specific proceedings are applicable for the sale of immovable property which was given as security for a debt culminating in a sale by public auction. With respect to enforcement of a pledge of shares under the Civil Code, after the required notifications and delays, the pledged shares must be sold by public auction.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Mauritius or (b) foreclosure on collateral security?

No restriction applies to foreign lenders as such. However, the foreign lender may be called to furnish the defendant company with security for the costs that it may incur in defending the proceedings.

7.6 Do the bankruptcy, reorganisation or similar laws in Mauritius provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

7.6.1 There is generally no moratorium on the enforcement of lender claims under the bankruptcy, reorganisation or similar laws in Mauritius.

7.6.2 However, in respect of loan not exceeding Rs 2,000,000, the Borrowers Protection ACT 2007 provides a mechanism to prevent lenders from seizing and selling secured assets in an abusive manner. In such cases, the Commissioner for the Protection of Borrowers can request the lender to reschedule the debt and stay any enforcement proceedings under the credit agreement.

7.7 Will the courts in Mauritius recognise and enforce an arbitral award given against the company without re-examination of the merits?

7.7.1 Yes, the courts of Mauritius will recognise and enforce an arbitral award given against a company without re-examination of the merits of the case subject to the following qualification:

(i) the party applying for recognition and enforcement in Mauritius of any arbitration award must supply the original award or certified copy of the award bearing the seal or signed by the Judge or officer of the judicial authority of the state in which the arbitration award was made.

7.7.2 Recognition and enforcement of the arbitration award in Mauritius may be refused where:

(a) the company was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(b) 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;

(c) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;

(d) 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;

(e) the subject matter of the difference is not capable of settlement by arbitration under the laws of Mauritius; or

(f) the recognition of the award would be 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?

In the event that the transfer of the collateral security by the borrower to the lender amounts in a voidable transaction as defined under the Insolvency Act, the Bankruptcy Division of the Supreme Court may set aside the charge in case where the charge amounts to a voidable preference or a voidable charge or a transaction with a debtor for excessive consideration. Please see question 2.2, paragraphs 2.2.4 to 2.2.7.

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 preferential creditors' rights with respect to security. In general, a secured party has priority over other creditors on the enforcement over collateral security. In case of bankruptcy proceedings, as per the Insolvency Act, secured claims are repaid in the following priority:

(i) costs of liquidator;

(ii) amounts due to Government and its Agencies;

(iii) wages or salaries due to employees;

(iv) costs of compromise with creditors;

(v) payments made *pari passu* with first ranking fixed and floating charges and mortgages (*hypothèque conventionelle*) inscribed for more than three years;

(vi) rent: Landlord's special privilege;

(vii) first ranking, fixed and floating charges and mortgages (*hypothèque conventionelle*) inscribed for less than three years;

(viii) claims of victims of an accident;

(ix) other privileges, securities and creditors;

(x) amounts due to Government and its Agencies in relation to amounts due and unpaid for over three months; and

(xi) all other unsecured creditors who have proved in the bankruptcy or winding up.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Certain statutory bodies are regulated by their own Act of Parliament.

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?

8.4.1 Some security interest can be enforced without the need for a court order or judicial process. For example, in a non-possessory pledge on motor vehicles, tools and equipment for professional, industrial and agricultural purposes, the failure by the debtor to pay his debt by the agreed period of time allows the creditor to seize the vehicles or tools or equipment after 2 days' notice given to the debtor. Further to the seizure, the creditor can sell the vehicle or tools or equipment 3 days after a notice is published in 2 newspapers.

8.4.2 Where the charge documents provide for the appointment of a receiver or a manager, then the receiver can take possession of the secured assets and sell them without court process.

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 Mauritius?

A party's submission to a foreign jurisdiction and waiver of immunity are legally binding and enforceable in Mauritius.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Mauritius?

A party's waiver of sovereign immunity may be legally binding and enforceable under the laws of Mauritius, as long as such waiver is not contrary to the public order and mandatory laws of Mauritius.

10 Other Matters

10.1 Are there any eligibility requirements in Mauritius 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 Mauritius need to be licensed or authorised in Mauritius or in their jurisdiction of incorporation?

10.1.1 A lender needs to be licensed in Mauritius to give loans to company if it is in the business of lending money. Under the Moneylenders Act 1959 (the "**MA 1959**"), a moneylender is defined as a "person whose business is that of money lending or who carries on, advertises, announces himself or holds himself out in any way as carrying on that business, whether or not he possesses or owns property or money derived from sources other than the lending of money and whether or not he carries on the business as a principal or as an agent".

10.1.2 In order to be licensed, a moneylender must apply for a certificate authorising the grant of a licence to the Magistrate of the district in which the moneylender's business is to be carried in. If there are two or more places where the business will be carried in, a separate certificate shall be required in respect of each place of business. After getting the certificate, a moneylender shall in his true name, take out annually in respect of every address at which he carried on his business.

10.1.3 The following persons are exempt from the application of the MA 1959. The Fourth Schedule of the MA 1959 provides for exempted persons:

1. Any person *bona fide* carrying on the business of banking or insurance or *bona fide* carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes of which he lends money.
2. Any body corporate, incorporated or expressly empowered, or any other person expressly empowered, by any other enactment to lend money.
3. Any organisation whose operations are of an international character and which is approved by the Minister.
4. Any society registered under the Cooperative Societies Act.

5. Any licensed broker in the performance of his duties as public officer.
6. Any licensed pawnbroker in the performance of his duties as pawnbroker.
7. The following bodies:
   (a) the Mauritius Housing Corporation Ltd;
   (b) the Development Bank of Mauritius Ltd;
   (c) the State Finance Corporation Limited; and
   (d) the State Investment Corporation Ltd.
8. Any person who is required to be licensed under the Financial Services Development Act 2001.
9. Any trustee in the exercise of his functions under the Trusts Act 2001.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Mauritius?

10.2.1 Lenders should make sure that their services are not being used in money laundering transactions or in terrorist financing activities.

10.2.2 Lenders are strongly advised to take independent legal advice before participating in any financing in Mauritius.

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Muhammad Uteem is the head and founder of Uteem Chambers. He graduated in the UK and holds a Masters in International Business Law. For several years, he worked as an associate of Winthrop Stimson Putnam & Roberts (now Pillsbury Winthrop Shaw Pittman LLP), an American law firm, in Singapore, Hong Kong and Japan.

Muhammad's practice concentrates on international commercial law, trusts, tax consultancy, other areas of offshore business and litigation. He gives advice on a variety of funds, including the choice of the most appropriate structure, tax implications and is involved in the negotiation and drafting of PPMs and other offering documents. He also regularly advises banks on different types of structured financing, securitisation, debt structuring and tax planning using Mauritius vehicles.

Muhammad's experience with regards to litigation includes representing domestic and international clients in civil and commercial matters before the tribunals and courts in Mauritius, as well as the Privy Council.

Muhammad has also been involved in drafting various financial legislation. He regularly writes articles for international journals and books, and often speaks in international conferences.

Since May 2010, Muhammad is an elected member of the National Assembly.

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In recent years, Uteem Chambers has shifted towards a more African-focused practice in line with the market trend. In 2011, the firm advised the Emerging Africa Infrastructure Fund – a public-private partnership providing US dollar and Euro funds to private infrastructure projects across sub-Saharan Africa – on additional financing from international institutions. The firm also advised on the setting up of the Aureos Africa Fund, a private equity firm investing into small and medium sized businesses in emerging markets.

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, Mexico has enacted significant reforms of its secured transactions laws. A new type of non-possessory pledge allows a debtor to pledge all of its unspecified inventory and receivable, to a secured party without requiring that possession of the collateral be transferred. This pledge allows the debtor to sell the pledged collateral in the ordinary course of business without obtaining a case-by-case release from the secured party, and can automatically subject newly acquired property to the pledge without any further filing, which effectively results in a floating lien. A similar effect can be achieved through a guaranty trust with respect to the same or similar types of property, whereby title to the collateral is transferred to a Mexican trustee.

The establishment of a Sole Registry of Chattels provides legal certainty to creditors or third parties regarding the priority of credits.

Real Estate Investment Trusts ("REITS") and securities certificates (*Certificados Bursátiles*) in Mexico have also been used as an interesting option to obtain capital in recent years.

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

The new reforms have allowed for a significant increase in lending transactions, among these, syndicated credits are commonly used as Mexican operations can be used as collateral in a global deal.

Financing investment projects through structuring of equity issues or debt through the capital markets are also common transactions. The issuance of securities certificates (*Certificados Bursátiles*) gives operational flexibility with a placement programme that can be exercised in one or more issues. The securities certificates enable the securitisation of non-performing assets of the company, such as accounts receivable, among others.

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, for joint ventures where two or more groups are involved, it should be noted that, if the directors are perceived to have a conflict of interest with the corporation as to a particular transaction, they must state this to the other directors and must abstain from any deliberation and resolution on the 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, the 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 authority to act unless specific powers are granted to such individuals.

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 used collateral 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. For example, mortgages do not require any governmental authorisation but formalities such as notarisation and recordation with the Public Registry of Commerce are required. The issuance of securities in the stock market requires a series of filings and formalities to carry out the issuance.

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

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 for 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 process under Mexican courts. In addition, in the event of a judicial collection process, the payment can be done 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. As mentioned, 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 other types 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 the 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, there is the need to notify the debtors.

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 only in a non-possessory pledge along with the assets of a company. The process involves the execution of the respective non-possessory pledge agreement before a notary public and its registration in order to attach all of such company's assets and on-going operations as a guaranty of payment. 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 shareholder's 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.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

With the new non-possessory pledge, inventory can be collateral security. The process involves the execution of the respective non-possessory pledge agreement before a notary public and its registration in order to attach the inventory as part of the on-going 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, 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 that has a direct relation to the value of the assets. It goes from approx. USD$500.00 to USD$5,500.00 for assets worth approx. USD$1,500,000.00. 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 value of the 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?

Filing and registration requirements vary significantly on the type of transaction. Securities involving the stock exchange require significant pre-filing requirements and time. 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 or 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 govern 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 this can diminish the 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 to have the respective deed 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 support to the finance or refinance of a direct or indirect acquisition of its shares by a third party (even if it is related).

(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 refinances of a company which owns shares in the company.

(c) Shares in a sister subsidiary

There are no prohibitions or restrictions for the company to guarantee or give support to the finance or refinances of a sister company.

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.

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 trustee appointed 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 that create the security interests.

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 and thin capitalisation rules are met (please see question 6.5). For foreign lenders, tax withholding obligations must be complied with in order to deduct interest; foreign banks registered with the Mexican tax authorities are entitled to a preferential 4.9% rate of withholding tax. Under Mexico's domestic law, the withholding tax rates on interest vary from 4.9%, 10%, 15%, 21% and 30%, depending on the type of loan and on the effective beneficiary of the interest. These rates are generally reduced in tax treaties. 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) informative tax return of loans granted or guaranteed by foreign residents; (b) informative tax return containing a description of tax withholdings and payments to foreign residents; (c) transfer pricing study to support the arm's length principle with respect to related parties' transactions; and (d) 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. There are no specific requirements for deduction or withholding tax from 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 that 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 incentives provided preferentially to foreign lenders with respect to domestic lenders other than reduced income tax rates provided in tax treaties for payment of interest. Foreign lenders are subject to withholding income tax over 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 30% tax withholding rate but can be reduced in certain tax treaties. As indicated in question 3.9 above, recordation 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 interests (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 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.

Assuming that the borrower is a Mexican company, the only adverse consequence could be as a result of thin capitalisation rules given that the latter are applicable only to debts contracted with foreign related parties.

Interest generated on debts held by the borrower with related parties exceeding triple the amount of the net-worth ("*capital contable*") – 3:1 – are non-deductible. For calculation purposes, the net-worth is subtracted from an annual average of all the borrower's debts generating interest and the difference is considered as "the excess". Interests for loans with foreign-related parties would not be tax deductible if the annual average amount of such loan is lower than "the excess".

If the annual average amount of the loans with foreign-related parties is larger than "the excess", then non-deductible interest would be those resulting from applying the following formula: NDI = IL x (Excess/APL), where NDI is the non-deductible interest, IL is the interest under the foreign-related party loans, and APL is the annual average of such loans.

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 status and legal capacity of individuals and all rights related with real estate (including a lease).

The application of foreign governing law is valid, in any other event, as long as the substantive matter or the respective resolution is not considered contrary to Mexican law, public policy or public interest.

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?

Foreign definitive judgments from any country may be recognised and executed in Mexico, so long as such judgments are not contrary to law or public policy/interest, or related to real property rights, through the respective homologation procedure. However, treaties and conventions, to which Mexico is a signatory, may provide differently for a certain country.

The homologating court can neither examine the substance nor 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?

In Mexico, there is no mandatory prior procedure to file a suit, so it is basically immediate. However, obtaining a judgment and enforcing it takes approximately 24 months. Enforcing a foreign judgment takes approximately 12 months, but if the defendant files a request for expert opinions or raises issues related with 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, a trial has to be filed in order to collect, and the enforcement of the decision could 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, bankruptcy law establishes 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?

Yes, courts will still analyse whether Mexican due process has been followed (such as the correct delivery of notices) and that the arbitration was conducted in accordance with the agreed arbitration rules.

Mexican courts will not enforce an award considered illegal or contrary to public law.

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 suspension of payments decision is issued and the reorganisation/bankruptcy process starts. The suspension of payments (*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, such as employee-related claims (wages for the previous year and severance payments). Tax debts go after mortgaged and pledged credits.

There is what the law denominates as a "retraction period" (270 days) that protects creditors against fraudulent transfers of assets. Any transfers within such period may be voided by the judge if 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.

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?

The parties can legally agree a foreign jurisdiction in a contract except for contracts involving real estate collateral.

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 to be a lender as 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. Only registered banks will get the 4.9% withholding rate.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Mexico?

Foreign lenders should take into consideration the specifics for application of the different withholding rates as they can be 4.9% for registered banks, or 10%, 15%, 21% or 30% for other cases depending on the type of lending entity and the countries.

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Chapter 31

Morocco

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1 Overview

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

The lending market in Morocco was very active during 2011, but it slowed down during 2012 because the Moroccan Central Bank exercised a drastic control over the local banks' prudential ratios in compliance with the Basle III regulation.

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

With respect to the investment projects recently implemented in Morocco, it should be noted that the main financing operations relate to several areas, such as, for example, energy, tourism, highways, new towns, sport centres and some major merger and acquisition transactions. The Moroccan and foreign capital markets have been solicited for the financing of such projects either through Moroccan banks' syndication, local and international banks' consortium, or often with bank guarantees from international export agencies.

Generally, the financing structuring is established through bonds issuances with Moroccan and international market targeting institutional investors. In 2010, the Kingdom of Morocco subscribed for EUR 1 billion at 4.50% before international banks including, among others, Barclays, HSBC and Natixis.

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 relating (i) to fraudulent transfer and financial assistance below, and (ii) to concerns arising from the absence of benefit for the guaranteeing company in question 2.2 below, 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 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 of 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 isolated.

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 board of directors.

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 for example the prior approval of the majority shareholders is obtained.

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 accessory real 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 depends on others. As a consequence, it is often required for 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 the proof of 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 ten-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 (i) the concerned director is a legal entity, and (ii) 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 property purpose 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 time. As regards the amount of fees related to such securities, except for the fees of authentication of signature (stamp duties) which consist of a stamp over every page of the security deed, the registration fees are calculated over 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 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 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 related security 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)?

In general, the execution is subject to the beneficiary of the security sending prior notification several days (generally 7 or 8) before the execution, in order to allow the debtor to regularise its situation. Furthermore, except when the law explicitly allows direct enforcement, the obtaining of a final judgment which has the force of *res judicata* is necessary to the enforcement of a 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?

(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. This prohibition suffers no exceptions.

(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 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 its turn disclose the names of each of the secured creditors. Thus, the security agent having a valid mandate from each creditor 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 out of the territory of Morocco are exempt from the payment of the withholding tax on (i) interest payable on loans made to the State, or (ii) on interests relating to loans in foreign currency for a 10-year period or more. All the other cases are submitted 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.

Besides, additional taxes applying to foreign lenders are, in addition to those indicated in question 6.1 above, 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 from 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, registration before the land registry in case of guarantee over a real estate, registration before the trade registry in case of security over the goodwill or machinery and material, and tax registration at a rate *pro rata* the amount of the deed.

For example, the costs of obtaining a mortgage over a real estate are relatively high as taxes and registration fees would account for up to 2% of the secured amount. The recordation of a pledge over a going concern/goodwill with the Commercial 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 Commercial 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 this person.

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 that the judgment does not contain any provision that may be contrary to the Moroccan 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 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 upon 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 to any interested person to cause a new bid within ten days from the date of the first bid if this party deems the price as 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 that this company will have 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 eight months, but commonly for years; the court may use eighteen-month claw back 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 the other entities. As a consequence, in 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, being privileged creditors, secured creditors, and unsecured ones.

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 one.

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 the waiver of enforcement and jurisdiction immunities to 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. The latter are the only entities allowed to provide credit. In order to establish a credit institution in Morocco, the licence delivered by the central bank/Bank Al Maghrib is required. Any breach of the banking monopoly exposes the violator to criminal penalties.

However, this monopoly suffers from some exceptions. 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 language of related documentation. Indeed, translation of complex common law contracts could raise serious legal or contractual misunderstandings as judicial, on oath, translators are not often at a fair level of understanding of some common law concepts.

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1 Overview

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

The lending markets in the Netherlands have been affected by the credit crisis and subsequent regulation requiring banks to deleverage. This development was exacerbated by the take-over of ABN AMRO Bank in 2007, at the time, the largest bank in the Netherlands, and the focus of international lenders to their own home markets. At the same time, Dutch banks continue to provide lending to companies, albeit primarily to Dutch borrowers, and normally for smaller amounts per lender. Activity in real estate financing and leveraged finance is significantly less than before 2008.

A renewed focus has arisen on borrowing base type financing and on export financing (with ECA support).

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

One of the larger transactions in the market was the €1.5 billion export credit and multipurpose facilities agreement for the largest Dutch ship building company, IHC Merwede. The significant change in the Dutch supermarket landscape, where Jumbo supermarkets was forced (by the Dutch Competition Authority) to sell part of its newly acquired C1000 stores to its competitors Coop and Ahold, led to restructurings and new working capital and acquisition facilities agreements for the large Dutch supermarket companies. Intertrust has recently entered into an acquisition and working capital facilities agreement to finance its acquisition of Walker Management Services. We also saw other acquisition financings being put in place such as the €500 million acquisition facilities agreement for 3i's acquisition of retailer Action and the €190 million acquisition facilities agreement for Sun's acquisition of fashion retailer Scotch & Soda.

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 will 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 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 none of 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.
- A receivable cannot be made subject to a security right if the contract governing the receivable contains assignment restrictions.
- 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, ships and 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).
- 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 an "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 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 (for date stamping only).

A secured party is generally not considered to control the assets if the grantor may still trade the assets. Therefore a non-possessory pledge is normally created, to be converted into a possessory pledge upon the occurrence of a certain trigger event only.

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 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. 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). 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 required 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.

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 will the security over the shares so as to become 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 a 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.

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 per 1 October 2012. Obviously, providing financial assistance is subject to the corporate benefit test (see question 2.1). There is no specific case law or market practice yet to provide guidance whether or not a more burdensome test will need to apply for providing financial assistance.

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.

In practice, 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 in an amount equal to the aggregate obligations towards the secured parties. 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.

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 are scheduled to be 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 residents 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) risk of embezzlement. The defendant will normally not be heard ("*ex parte*") and limited evidence is required. Leave is granted under 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 the enforcement of 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) recently 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 come with the additional cost of getting the local banks to guarantee the loans.

Nigeria's Minister of Trade and Investment recently expressed the determination of the government to bring down lending rates to single digit levels before the end 2015. The Nigerian government has also set up various funds targeted at specific industries to ease the funding problems in these industries. Credit from these funds, which are disbursed by the CBN through local banks, are priced at significantly subsidised interest rates. Example of such funds are the N300 Billion power and aviation fund to finance projects in the power and aviation industry and the N200 Billion refinancing and restructuring facility for manufacturing businesses. In addition, the CBN established the Small and Medium Enterprises Credit Guarantee Scheme for promoting access to credit by SMEs in Nigeria. Also, very recently, the government announced plans of collaborating with some international development partners to set up a 'wholesale lender'. A primary objective of this initiative is to drive down interest rates by providing access to long-term financing at reduced interest rates.

All these interventions have led to improvement in lending activities over the last year.

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

Notable recent significant lending transactions include: International Financing Corporation led syndicated lending of US$800 Million to the Indorama Eleme fertilizer project (2013); the syndicated lending (involving a number of South African banks) of US$1.5 Billion to the Nigerian National Petroleum Corporation and ExxonMobil joint venture (2012); the Export-Import Bank of China's US$1 Billion financing of the Zungeru hydroelectric power project (2012); and the syndicated US$650 Million credit facility (involving 8 Nigerian banks) for the network expansion programme of Emerging Markets Telecommunication Services, trading as Etisalat Nigeria (2011).

Also, following the recent approval of preferred bidders for several privatised electricity companies, many local and foreign banks have been involved in financing payment of the winning bids by the preferred bidders.

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 Articles of Association ("Articles").

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 Articles). 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 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 require special formalities, for example: (a) a pledge of 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 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 pay 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*]. The cash at 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 pledge 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 legal title to 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 pledge securities that is registered by the Securities and Exchange Commission (SEC) as collateral, the borrower is required to deposit the pledge document, as well as duly executed share transfer forms, and a letter to the registrar stating the securities and amount of the securities pledged 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 questions.

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, governor's consent and registration fees are collected by the relevant state government where the asset is a 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 depends 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 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 or (much) longer days for 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 the security agreement is required to be created by deed. 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) 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 or 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) 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) 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 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 where such income is deemed 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 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 is required to 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 procedure differed 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 is 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 s. 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. S. 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 whether or not to grant the stay. The Supreme Court [in *Nika Fishing Company Limited v Lavina Corp*.] has 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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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.

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

The landmark transactions in Portugal during the last year have been: (i) the EUR 1bn loan facility to utility company EDP by the China Development Bank Corporation; (ii) the EUR 600 million Export Credit Facility to Galp Energia by a syndicate of banks and arranged by Banco Santander; (iii) the refinancing of debt of Cimpor in the context of the taker-over bid by Camargo Corrêa; and (iv) the USD 550 million financing to a Portuguese subsidiary of Grupo R, arranged by Mizuho.

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 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?

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 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 so as 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; and

(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 one year or more and 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, 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)?

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; or (c) 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 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 – please see above.

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 or 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 per cent., 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? 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 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 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 an insolvency proceeding 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; or

(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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William Smithson advises on debt and equity capital markets transactions and has established an active banking and structured securities practice. He has built up an extensive securitisation practice having worked on more than 80 ABS, RMBS, CMBS and trade receivables transactions by Portuguese originators and bilateral secured and unsecured lending transactions.

William Smithson joined Simmons & Simmons London as trainee in 1987 and became an English solicitor in 1989. In 1992 moved to the Simmons & Simmons Lisbon office, becoming a Simmons & Simmons Partner in 2001. He was Managing Partner of Simmons & Simmons, Lisbon, from 2004-2008. He is now a partner of SRS Advogados and head of the Financial Markets Group.

Recent transactions include advising Oversea Chinese Banking Corporation on a €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 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, Itaú BBA on the EUR 204 million loan to Cimpor and Mizuho on the USD 550 million Senior Secured Loan Facility to Grupo R.

SRS Advogados is a full-service law firm capable of advising the largest companies on all their legal requirements.

The Financial Markets Department has extensive experience in 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.

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.

Singapore

Valerie Kwok

Blossom Hing

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1 Overview

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

In Singapore, loans for purchase of residential property continue to dominate the portfolio of the major local banks followed by loans to the building and construction sector. Rising property prices were a major concern in 2012, and in January 2013, the Government announced measures to cool the buoyant residential property market and discourage over-borrowing. These measures do not currently extend to cover commercial properties.

Demand for infrastructure growth both in Singapore and regionally continues to represent an opportunity for Singapore to grow into a regional project finance hub. To tap into this growth area, Temasek Holdings, a Government-linked investment company, put together a consortium of reputable financial institutions to establish a project finance company that seeks to allow Singapore-based companies to take advantage of the infrastructure demand and growth opportunities in Asia and other emerging markets.

Another significant development in the Singapore lending market is the Government's largest review of the Singapore Companies Act (Cap. 50, 2006 Rev. Ed.) ("CA"), which includes proposed amendments to provisions relating to financial assistance and the prohibition of providing guarantees or securities to secure loans to companies related to directors.

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

In 2012, primary bond offerings from Singapore-domiciled issuers witnessed record volumes as corporate borrowers moved from traditional loans to take advantage of the low interest environment and liquidity in the capital markets. Examples include significant bond offerings by DBS Group Holdings Ltd, Genting Singapore PLC and Oversea-Chinese Banking Corp Ltd.

Notable private lending in 2012 centred around the largest takeover battle in Singapore's (and Southeast Asia's) corporate history – the bid for blue chip Fraser & Neave Ltd. Rival bidders TCC Asset Ltd ("TCC"), a related entity of Thai Beverage Plc and OUE Baytown Pte Ltd (a consortium led by OUE Limited) raised financing estimated to be between S$9.3 billion and S$13.8 billion to fund their respective bids for control of Fraser and Neave Ltd, which eventually saw TCC emerging as the winning bidder.

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 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 Accounting and Corporate Regulatory Authority ("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 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, it has to be in writing with express notice in writing 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 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 lodgment 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 HRMC.

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 lodgment 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. MOF plans to table the amendment Bill in Parliament to implement the changes by the end of 2013.

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 to approved Singapore branches of 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 the 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 above), 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 clawback 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 undervalue) to 6 months (preference) from the commencement of winding up. Generally, floating charges created within 6 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 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.

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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Spain

Héctor Bros

Manuel Follía

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1 Overview

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

After several years of a booming market, the current economic turmoil in the Eurozone and the particularities of the Spanish crisis are having a severe impact on the dynamism of the finance markets in Spain.

The slowdown in activity is also related to the current liquidity restrictions affecting Spanish banks, immersed in a wave of sector restructuring which is reducing substantially the number of financial institutions that will emerge from the crisis (mainly due to a concentration process under which banks are acquiring a number of ailing savings banks – the so-called "*cajas*").

Notwithstanding this, in the last couple of years, new players -such as infrastructure funds and distressed debt entities- have irrupted in the market, taking a substantial slice in transactions and bringing new savvy to the sector.

The immediate future looks particularly promising for refinancing, distressed debt and M&A deals. Cash stripped lenders may also be keen to refinance existing transactions, which opens the door for the long-awaited awakening of the Spanish project bond market. These trends will surely shape the Spanish finance landscape in the coming years.

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

Notwithstanding the severe reduction in the volume of new lending, we have seen a number of major lending-based transactions in Spain in the last few years. This can partly be explained by the very large refinancing deals prompted by a combination of the financial crisis and the voluminous loan portfolio which Spanish credit entities had accumulated during the booming years.

- **In the area of debt restructuring**: For obvious reasons, being the most dynamic market there have been several remarkable transactions.

  We can mention, amongst others, the €30 bn loan facility granted to "Fondo para la Financiación del Pago a Proveedores", a public special purpose vehicle intended to refinance the majority of debt held by regional and municipal governments with private suppliers, with a syndicate of 26 lenders where Santander, Bankia, BBVA and ICO acted as Mandated Lead Arrangers. This was the largest ever lending transaction in the Spanish market, and Cuatrecasas Gonçalves Pereira acted as counsel to lenders. In the area of regional debt restructuring, it is worth referring also to the €1.4 bn debt restructuring of the transport infrastructure related debt of Generalitat de Catalunya (regional government of Catalonia), through its wholly-owned subsidiary Infrastructures de la Generalitat de Catalunya (IGC).

  Within the private sector, we can outline in the construction sector the €3.3 bn debt restructuring of Grupo Ferrovial, in the context of its merger with the concession group Cintra; in the publishing business, the €1.5 bn refinancing of the group Planeta Corporación; in the real estate business, the €4.2 bn debt refinancing of Inmobiliaria Colonial or the €3.3 bn debt restructuring of Metrovacesa; and in the chemical industry sector, the €300 million debt restructuring of Ercros.
- **In the area of acquisition finance**: €240 million acquisition facility by Caixabank, BBVA, Banesto and Banca March, as lenders, and Inocsa, as borrower, for the acquisition by the latter (together with its subsidiary Grupo Catalana Occidente) of the entire share capital of Seguros Groupama Seguros y Reaseguros, S.A., the Spanish subsidiary of the French insurance group Groupama.
- **In the area of project finance**: €2.5 bn PPP financing for the construction, maintenance and operation of the subway stations of Barcelona's Line 9 metro; the €900 million project financing of the hard toll highways AP-1 / AP-8 and GI-632; and the €336 million Abengoa sponsored project financing for the construction, operation and maintenance of two concentrated thermal generation power plants of 50 MW each.

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 Administration Body and the General Meeting of Shareholders to pass a resolution approving the measure, referring to the corporate interest or benefit that the company granting the guarantee or security or the group as a whole will obtain through the transaction.

Finally, subject to certain case law, the relevant guarantee constituted by a Spanish affiliate in favour of its parent company might be challenged by a Spanish court if no consideration (*contraprestación*) is provided to such 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?

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 for the secured liabilities, often borrowers request that certain mitigation language is included in the collateral documentation and in the corporate resolutions to minimise the potential risk for the Administration Body of the company in the event of an eventual insolvency situation on the part of the company (i.e., there is a potential risk that the insolvency administrators might presume that the granting of said collateral could have implied the insolvency alleging that it is detrimental to the insolvency estate, and therefore the Administration Body can 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 behalf of it.

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

Usually, no governmental consents nor filings are needed to grant security 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*), the 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 mitigation 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, the Spanish Insolvency Law imposes an important restriction on lenders facing the potential or real insolvency of its debtors, as it renders unenforceable contractual early termination clauses solely based on a declaration of insolvency. Provisions allowing the lender to declare the early termination at will or providing it with wide latitude are null and void.

3 Collateral Security

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

The most commonly used types of collateral to secure financing transactions are generally classified into two main groups: (1) *in rem* guarantees (the most common being: (i) mortgage over real estate (*hipoteca inmobiliaria*); (ii) ordinary pledges 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); and (2) *in personam* guarantees (being mainly first demand guarantees or undertakings to grant pledges or mortgages).

The main difference between *in rem* guarantees and *in personam* guarantees is that, in the former, a specific asset secures fulfillment of the obligation, while in the latter, an individual or corporate entity guarantees fulfillment 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 guarantee" 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, an 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 enforcement 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 mortgages) or the Chattel Registry (*Registro de Bienes Muebles*) (e.g., mortgage on inventory), while such registration is not required for other collateral (e.g., common pledges 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 mortgaged property for its exploitation, enjoyment or decoration, or dedicated to any industry on the site, unless they cannot be separated without damaging them or the property; the proceeds generated by the property; and any outstanding rental leases payable on the charged property at the time of repayment.

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 of one or another option 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 over the receivables; and (ii) by creating a non-possessory registrable pledge (*prenda sin desplazamiento de la posesión*).

With respect to the possessory pledge over the receivables, in order for the pledge to be perfected, notification to the debtor is required, although considering the commercial effect of the notification, it can be considered that notice to the relevant debtors shall 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 property registry would give it the necessary publicity *vis-à-vis* third parties.

The procedure for grating both types of collateral will require notarisation, and, only in the case of the non-possessory registrable pledge, also registration with the relevant public registry (see question 3.2 above).

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 account balance.

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 it is possible, and such a pledge, by the *lex rei sitae* principle, should be always governed by Spanish law, not New York or English law. Exceptionally, creating a pledge under a law other than Spanish law could be considered, although enforcement proceedings will be longer and burdensome as summary enforcement proceedings (which require having an enforcement title) will probably not be available.

If the shares to be pledged belong to a private limited company (*sociedad limitada*), as the quota units are not represented by issued certificates, possession is transferred by the entry into the notarial deed of pledge and, eventually, registration of the pledge at the Registry Book of Shareholders (*Libro Registro de Socios*) of the relevant pledged company.

When the shares belong to a public limited company (*sociedad anónima*), transfer of possession is achieved as follows: (i) if the share certificates (*títulos multiples* or *resguardos provisionales*) have been issued, by endorsing the title guaranty and entering the pledge in the Registry Book of Shares (*Libro Registro de Acciones*); and (ii) if no share certificates have been issued, by registration of the pledge in the Registry Book of Shares.

In both cases, it is also advisable for the pledgee to request and obtain certification from the company's secretary that the pledge has been entered in the Registry Book of Shareholders or the Registry Book of Shares, as applicable, which will also comply with the requirement of notification of the pledge to the company whose shares are pledged.

When the pledged company has its shares represented by book entries (*anotaciones en cuenta*), the pledge must be entered in the relevant account, and is enforceable against third parties once entered on the book entry register; in the case of shares traded on a Spanish secondary market, the book entry register will be held with the central clearing house.

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 within the relevant public 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, that is, equipment and machinery in a broad sense, intellectual property (including commercial names and patents), property leases (except non-assignable leases), as well as raw materials and finished goods (provided that they belong to the business and have been paid for).

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) and certain corporate benefit issues (see question 2.1).

Aside from this, and considering the restriction in Spain regarding floating charges (see question 3.2), 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 Euro 6,000,000, they can be reduced through negotiation with the notary.

For the types of security that are 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?

For the security documents that need to be filed within a public registry, the expected elapsed 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 of 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 then have to 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. Exceptions are provided for banks and employees.

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.

As a matter of practice, to comply with the Spanish financial assistance prohibition, if the financing agreement is separated by tranches, it is quite usual that the relevant Spanish target company secures any other tranches which have non-acquisition purposes.

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. This system has nevertheless two problems: from a practical perspective, Spanish banks are reluctant to grant powers of attorney to other banks, and prefer to appear themselves throughout the enforcement proceeding; and from a legal perspective, authors and case law are inconsistent regarding the role of an agent acting on behalf of the syndicate of lenders upon enforcement, so there is a risk that a court might consider that the security agent has no right to enforce all the debt, but only its own portion. Finally, in a situation of insolvency lenders which security is not under their own name may see their claims not qualifying as privileged claims.

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 in market practice.

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, registrable security such as mortgages and non-possessory pledges), in order to be effective against third parties, the assignment of this collateral securing a financing agreement 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 a tax-haven jurisdiction) are not subject to withholding tax (irrespective of whether payments are made to a financial institution or a regular company).

An alphabetical listing of Spanish Income Tax Treaties is available at http://www.agenciatributaria.es/AEAT.internet/Inicio_es_ES/La_Agencia_Tributaria/Normativa/Fiscalidad_Internacional/Convenios_de_doble_imposicion_firmados_por_Espana/Convenios_de_doble_imposicion_firmados_por_Espana.shtml.

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.

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 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 (both in force and in negotiation) 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 made to the lenders will not be subject to any withholding or deduction, given 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.

As stated on question 6.1 above, 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 a tax-haven jurisdiction) are not subject to withholding tax (irrespective of whether payments are made to a financial institution or a regular company).

Finally, it is important to point out that none of the parties to a loan or guarantee and/or grant of 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, a loan, a guarantee or a security document needs to be notarised. Notarisation implies certain fees which will vary in accordance with the figures granted under the loan or the liability secured under the guarantee or the security document. In addition, certain security documents (such as mortgages) are usually registered with the relevant Land Registry, which will imply the accrual of registry fees.

For a better reference on notarial and registry fees, 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, tax adverse consequences (e.g. documentation obligations) might arise where the borrower is 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. To that effect, article 3.1 of Regulation Rome I recognises the freedom of the parties to choose the law applicable to their agreement.

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, by any means of verification necessary. 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. "Judgment" means any judgment given by a court or tribunal of an EU Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution. 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/her 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 USA to final judgments handed down in Spain. Spanish courts usually recognise judgments rendered in the USA based on the positive reciprocity principle.

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: (i) whether the enforcement action is grounded on an enforcement title, such as public instruments, or on an ordinary title, such as private contracts; and (ii) the amount of work accumulated in the court.

   Enforcement titles can be enforced directly and, thus, the procedure is quicker: it does not take more than six months, including the defendant's opposition to the enforcement (the time needed to realise the debtor assets will depend on how easy it is to find the debtors assets and to realise them). Otherwise, ordinary proceedings would be required to obtain a decision that can be enforceable (an average of 14.5 months was required to obtain an ordinary judgment).

b) Enforcement of a foreign judgment in a Spanish court will depend on the amount of work accumulated in the court to which the case is randomly assigned. 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 USA judgment would require prior *exequatur* proceedings (it takes on average between six and nine months (including the defendant's opposition)), and once the judgment has been recognised, enforcement will follow the same proceeding as explained in point a).

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?

Timing and value of enforcement will depend very much on the type of security enforced and the enforcement proceedings chosen by lenders.

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 lender shall specify the agreement giving rise to the claim, the final due amount with a full break-down of each concept, provide a notarial deed where a notary public represents that calculations have been made in accordance with the terms and conditions of the facility agreement and present a copy of the notarial request for payment addressed to the debtor.

For the enforcement of a pledge, the court will request the deposit

of the pledged assets and for the enforcement of a mortgage will give notice of the foreclosure to any other mortgage creditor. Once the above actions have been taken the court will publish a date for auction. The debtor will only be able to oppose to foreclosure under limited circumstances, such as the prior extinction of the pledge, full payment of the secured obligation or existence of a material error on the calculation of the due amounts.

The time schedule for the actual recovery of amounts through enforcement will depend on each case, since there is no time limit for the court to complete the proceedings.

Restrictions to enforcement of security regarding regulatory consents are very specific, and will ultimately depend on the kind assets of the security enforced.

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 enforcements due to the debtor's declaration of insolvency. Once the insolvency is declared, enforcements in process shall be suspended in accordance with the Insolvency Act. 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 ground of criminal procedure: the initiation by any party of criminal proceedings in a Spanish court relating to the financing agreements or the collateral 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 is therefore is subject to recognition and enforcement of foreign arbitral awards in the terms established in the convention.

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.

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, secured lenders will be prevented from enforcing their security until the earlier of the following: a composition of creditors is approved, or at least one year has elapsed since the declaration of insolvency, provided that during this period no liquidation proceedings have been commenced.

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 that the relevant security be 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?

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". As a general rule, no third parties may benefit from the value of the secured assets insofar as the secured creditor has not been paid (whether by enforcement of the relevant security or at the request of the insolvency administrator – see question 8.1 above). In this connection, secured creditors will not be affected by the contents of the creditors' composition agreement unless they agree otherwise.

It may be possible to challenge security created "to the detriment of the insolvency estate" within the two years preceding the declaration of insolvency, even in the absence of fraudulent intent. In particular, there is a presumption of prejudice to the insolvency estate in the event (i) that the security was granted for pre-existing debts or for new debt incurred to cancel pre-existing, unsecured, debt, or (ii) of any prepayments or other acts of early cancellation of secured payment obligations.

Refinancing agreements achieved before the date of insolvency which meet certain requirements (substantial increase in the available credit, extension of the maturity date, general enhancement of the financing obligations of the relevant debtor) and which result in a general improvement of the prospects of the debtor in the short and medium term may not be challengeable during the two year claw back period, provided that (i) the refinancing agreement is entered with creditors representing at least 60% of debtor's liabilities as of the date of the agreement, (ii) the terms of the agreement are deemed reasonable and the security granted proportional bearing in mind the applicable market conditions, and (iii) the refinancing agreement is formalised as a notarial deed.

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 enterprises 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, in Spain it is possible to seize the assets of a company by out-of-court proceedings to the extent that the relevant creditor benefits from some specific forms of security, notably possessory pledges (shares, receivables, bank accounts).

Out-of-court foreclosure 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. Should the auctioned assets not be acquired by any bidder after the two first auctions lenders are given the option to acquire ownership over such assets, but in that case lenders shall not be able to sue the grantor of security for any outstanding amounts.

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 private sales of the secured assets 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). Notwithstanding this, loans and other forms of financing between a Spanish resident and a non-Spanish resident must be declared to the Bank of Spain when specific thresholds are exceeded, in order to obtain a financial transaction number (*Número de Operación Financiera* or "NOF").

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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Amongst other transactions, Héctor Bros has recently advised lenders in the €2.5 bn financing of Tranches I, II and IV of the Barcelona Metro Line 9, the €900 million financing of the AP-1, AP-8 GI-632 hard toll highways in the Basque Country and the €1.4 bn regional infrastructure debt restructuring of Generalitat de Catalunya, and assisted borrowers in the €150 bn CDS note offering programme of the leisure group Melia and the €400 million acquisition finance by Inocsa of the Spanish insurance business of the French group Groupama.
Recommended by several directories, including Chambers Europe, Who's Who Legal, Best Lawyers and Legal 500 in Banking & Finance, Project Finance and Public Law.

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A collaborating lecturer of corporate and finance law at ESADE Business School, the Universitat de Barcelona and the Barcelona Bar Association, he also written several articles on insolvency law and the legal aspects of financing transactions.
Manuel Follía has led some of Iberian major corporate finance transactions in recent years, including the €1.5 bn financing of the Planeta Corporation Group, and debt refinancing of major Spanish listed companies (Fersa, Ercros, etc.). He also has assisted in the structuring of complex finance cross border transactions.
Currently working in a PhD with an intended thesis on structured financing and insolvency law.

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We have 25 offices in cities in Europe, America, Asia, and Africa, where we advise on Spanish, Portuguese, French, Moroccan, and European Union law. The firm stands out for its work in the Iberian, Latin American, and African legal services markets. With over 35 specialties, we provide legal advice in all areas of business law. Our firm combines traditional legal practice with the specialty required by each case and specific knowledge of each sector, area, or business group.

The firm's Finance Practice consists of over 40 lawyers based in Madrid, Barcelona, Lisbon and London, with expert knowledge and exclusive dedication. The lawyers work seamlessly from different locations, ensuring wide coverage for their clients, wherever they are based. The team has extensive expertise advising sponsors and banks in all types of domestic or foreign, corporate and structured, financial and debt capital markets transactions. Among others, such transactions consist of structured and project financial facilities, refinancing, acquisition finance and other sorts of repackaging, synthetic and mortgaged-backed securitisation, credit assignments, issuance of fixed-interest securities and other financial instruments, and consumer credits.

In addition, we deal with bankruptcy issues in order to efficiently ensure the bankruptcy remoteness and an adequate security package structure, extending the scope of our advice to the restructuring of debt. Likewise, we advise on matters and relevant issues related to equity requirements for credit institutions as well as for other entities.

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"Leader of the ranking of Best Lawyers in business law" (Best Lawyers, 2013 and 2012)
"Most innovative law firm in client service" (Financial Times - Innovative Lawyers, 2011)
"European Firm of the Year" (The Lawyer, 2011)
"Iberian Firm of the Year" (The Lawyer, 2011)

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 was doing relatively well in 2012. Despite several 'crisis' in Europe and globally, the Swiss banks were providing the necessary liquidity to the corporates in Switzerland. During the first half of 2012, it was notable that, in syndicate lending, several Swiss banks did not agree to structures where another bank was fronting the client to avoid funds having to be lent 'through' another bank.

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

The Swiss lending market saw several corporate lendings of several billion Swiss francs. For example, the Swiss based Glencore (listed in London and Hong Kong since 2011) lent money from banking syndicates at various occasions, such as for the acquisition of Viterra. The Swiss hospital group Hirslanden (owned by the South-African Mediclinic) refinanced its loan portfolio of also several billion Swiss francs in 2012. Several Swiss-based commodity-trading companies also entered into large 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?

Under certain circumstances, there are such concerns.

First of all, a director of a Swiss company must act in the interest of the company. Non-compliance with such obvious 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 under 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 under 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 under 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?

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, 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 in 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, made by a notarised deed and an entry being made 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) 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 is required and the secured party must 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 guarantees or a security interest that guarantee or secure the finance or refinance of an acquisition of the shares of the company, 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 one 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 guarantee documentation and collateral security and to apply the proceeds from the collateral to the claims of all the guarantors?

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 guarantee is made to a company organised under the laws of Switzerland and guaranteed by a guarantor organised under the laws of Switzerland. If such guarantee is transferred by Lender A to Lender B, are there any special requirements necessary to make the guarantee 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 guarantees made to domestic or foreign guarantors, 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 specifically apply to foreign investment. However, the cantons may grant special incentives (including tax incentives) to non-Swiss companies migrating to Switzerland.

6.3 Will any income of a foreign lender become taxable in Switzerland solely because of a guarantee 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 guarantee/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 express 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 guarantee 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 get 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 the parties mutually agree in the security agreement 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 a company's creditor, under certain circumstances. 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 both 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 had the intention to disadvantage or favour certain of its 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 goal to adjudge bankruptcy on them. 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 with 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) 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.

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 under 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. 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 having no 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 answers 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?

Not applicable.

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 23 jurisdictions, namely, Australia, Belgium, Denmark, France, Gambia, Hungary, Indonesia, India, Israel, Macedonia, Malaysia, New Zealand, the Netherlands, Paraguay, Senegal, Singapore, Slovakia, South Africa, Sweden, Swaziland, Switzerland, 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 the 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 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 types 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 after 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 within six months before the declaration of the bankrupt's bankruptcy: (i) to secure its outstanding debts except that 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 prior to 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 prior to unsecured creditors; and

(iii) fees and debts incurred for the benefit of the bankruptcy estate which will rank prior to 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 loaning business, the risk that providing loans on a cross-border basis be 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 ("IC"), MOEA is required.

As to the foreign exchange control, please refer to our answer to question 2.6.

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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.

Trinidad & Tobago

J.D. Sellier + Co.


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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 within 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 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 share holders are given this power under the Articles or By-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 offend 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 of 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 were 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 response 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 is 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.

A statement of charge must be registered within 30 days from the date of creation of the charge.

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 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 creation of the charge.

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 charge.

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 charge waiving.

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 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 and Tobago solely because of a loan to or guarantee and/or grant of security from a company in Trinidad and Tobago?

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 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 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.

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 at least in 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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Tunisia

Maya Boureghda Chebeane

Jurismed

Leila Zine

1 Overview

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

In consideration of the recent political changes in Tunisia, reforms are underway in various sectors, including the lending market.

A restructuring of the banking sector is under preparation and a new law on Public-Private Partnership (PPP) should be adopted soon to launch several infrastructure projects.

The debt market is also evolving with the adoption of a new law on repurchase agreements (law nb 2012-24 dated 24 December 2012) that is broadening the scope of these transactions to all companies, including Undertakings UCITS, to strengthen their use by the financial actors.

In addition, there are some projects to introduce Islamic finance to allow the issuance of *sukuk*.

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

A syndicated export credit lending transaction has been concluded with BNP Paribas and Société Générale and the National Shipping Company for an amount of Euro 153 million and US$ 202 million, guaranteed by MIGA. This transaction has received the award for deal of the year 2011 by Trade Magazine.

Several syndicated transactions have been concluded in the energy sector to finance the construction and operation of power plants, refineries, etc.

A syndicated credit of Euro 350 million was granted in 2006 to the telecommunication company Tunisiana by a syndicate of international banks, composed by 30 banks, from Europe, Asia, Middle East and North Africa with a local tranche of Euro 125 million. The mandated lead arrangers of this transaction were Citi Bank NA, and Arab Banking Corporation (ABC).

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 article 474 of the Code of commercial companies ("**CCC**"), it is possible for a company to guarantee borrowings of one or more other members of its corporate group provided that such a company has control over the company member (whose liability is guaranteed) by holding more than 50 percent of the share capital.

In addition, it is stated that such guarantee can be of any kind or duration.

This provision is an exception to the monopoly of credit institutions provided by law nb 2001-65 dated 10 July 2001, relating to credit institutions (the "**Banking Law**").

However, such financial operations shall be concluded under the following conditions:

- The transaction must be concluded under "normal" conditions and not present difficulties for the company that is concluding it.
- The transaction must be justified by a real need of the concerned company, and shall not be based on tax considerations.
- The transaction must include an effective or expectable counterparty for the company that is concluding it.

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?

Management liability:

As mentioned above, according to article 474 of the CCC, the guarantee issued by a company for the benefit of a company member of its corporate group must include an "effective and expectable counterparty".

The CCC does not provide for sanctions in case of violation of this provision.

However, such violation might be considered as "poor management", according to article 214 of the CCC for corporations (*société anonyme*) and article 121 of the CCC for limited liability companies (*société à responsabilité limitée*) (a company with dual regime of partnership and public limited companies), and as a result in assuming all or part of the losses of the company by its manager(s) in the event of insolvency proceeding against the said company.

Enforceability:

The shareholders of a corporation holding more than 10% of the share capital, may request the cancellation of a decision that violates the interests of the company, and taken for the benefit of certain shareholders only or third parties.

2.3 Is lack of corporate power an issue?

A company must have the corporate power to grant a guarantee securing a third party's debt.

Article 200 of the CCC provides that the guarantee has to obtain the prior authorisation of the board of directors, the approval of the general assembly and the audit of the statutory auditors (unless the by-laws of the company provide for a waiver of such authorisation, approval and audit and for specific guarantees within a specific limit).

These authorisations are not applicable to credit institutions and insurance companies.

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

Company authorisations:

If the company issuing the guarantee holds less than 50 percent in the share capital of the company whose liability is guaranteed, this operation shall be submitted for prior authorisation of the board of directors, the approval of the general assembly and the audit of the statutory auditors (unless the by-laws of the company provide for a waiver of such authorisation, approval and audit and for specific guarantees within a specific limit).

These authorisations are not applicable to credit institutions and insurance companies.

In any event, it shall be noted that the guarantee must be granted in accordance with the corporate interest of the company.

In fact, pursuant to the provisions of the CCC on both corporations (*sociétés anonymes*) and limited liability companies (LLC), the company's decisions must be taken in accordance with the corporate interest. Then, a guarantee granted by a company can be cancelled by the court in case it is considered as contrary to the corporate interest.

Guarantee in foreign currency:

Principle: The transfers of funds related to a guarantee granted by a non-resident entity shall be freely executed as far as the loan subject of the guarantee is considered "free".

A loan granted by a non-resident shall be considered as "free" in the following cases:

Resident companies may, for the need of their business, freely conclude with non-residents, borrowings in foreign currency provided:

i. (a) the maturity of the loan does not exceed 12 months, and (b) the amount of the loan does not exceed ten million Dinars (TND 10,000,000) (the equivalent of Euro 5 million) per year, if the borrower is a credit institution and three million Dinars (TND 3,000,000) (the equivalent of Euro 1.5 million) per year for all other types of companies; or

ii. in case the maturity exceeds 12 months, (a) the amount of the loan may not be limited for credit institutions and should not exceed ten million Dinars (TND 10,000,000) for other types of companies, and (b) the borrower shall be (1) rated by a rating agency (Fitch North Africa, Moody's, Standard and Poor's or Fitch Ratings), or (2) listed on the Stock Exchange.

All other loan agreements require the authorisation of the Central Bank of Tunisia ("**CBT**") and if a non-resident entity grants a guarantee of a debt outside that framework, such operation shall be submitted to the prior authorisation of the CBT.

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

The guarantee can provide for an amount lower than the underlying obligation and therefore secure a part of the debt only. If a specific amount is not specified, the guaranteed amount will be equal to the amount of the underlying obligation.

This rule is only applicable to accessory guarantees. With respect to independent guarantees, a maximum amount has to be specified.

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

The enforcement of a guarantee by a non-resident creditor (that implies a transfer of foreign currency), is free subject to the entry of the guaranteed borrowing in the framework of article 1 of the circular of the Central Bank of Tunisia nb 93-16, as modified by the circular nb 2007-01 (the "**Circular**").

According to the article 1 of the Circular, resident companies may, for the need of their business, freely conclude, with non-residents, borrowings in foreign currency, provided:

i. (a) the maturity of the loan does not exceed 12 months; and (b) the amount of the loan does not exceed ten million Dinars (TND 10,000,000) (the equivalent of Euro 5 million) per year, if borrower is a credit institution and three million Dinars (TND 3,000,000) (the equivalent of Euro 1.5 million) per year for all other types of companies; or

ii. in case the maturity exceeds twelve months, (a) the amount of the loan may not be limited for credit institutions and should not exceed ten million Dinars (TND 10,000,000) for other types of companies, and (b) the borrower shall be (1) rated by a rating agency (Fitch North Africa, Moody's, Standard and Poor's or Fitch Ratings), or (2) listed on the Stock Exchange.

All other loan agreements require the authorisation of the Central Bank of Tunisia and if a non-resident entity grants a guarantee of a debt outside that framework, such operation shall be submitted to the prior authorisation of the CBT.

3 Collateral Security

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

The following types of collateral can be taken to secure lending obligations:

- Pledge on bank accounts.
- Share pledges.
- Pledge of securities.
- Pledges on movable property such as oil, equipment, etc.
- Mortgages on immovable property.
- Pledge of equipment and machinery.
- Pledge of going concern (limited to: *the sign and brand name; right to lease; clientele; commercial furniture; machinery and equipment; inventory; licences; marks; models and industrial designs; and industrial, literary and artistic property rights*).
- Assignment of receivables.

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 give asset security by means of a general security agreement but it is required to conclude a security agreement for each type of asset.

The procedure is different according to the type of security and assets.

Procedure to constitute a mortgage:

Validity:

Pursuant to article 275 of the Real Property Code ("**RPC**"), a contractual mortgage may be granted only in writing. The property on which a mortgage is held as well as the amount of the debt must be determined in the contract.

Enforceability:

The mortgage shall be assigned a rank on the date of its registration on the landed property registry (article 277 of the RPC), for registered property, and on the date of the mentioning of the mortgage in the title deed by two notaries.

Procedure to constitute a pledge:

Validity:

Pursuant to article 212 of the RPC, the perfection of the pledge between the parties is submitted to the following conditions:

- the consent of both parties about the pledge; and
- the effective remittance of the secured asset to the creditor or to a third party chosen by both parties.

Specific rules apply to the pledge of going concern (*fonds de commerce*):

Pursuant to article 239 of the Code of commerce, the pledge of going concern must be registered in a public registry before the court of first instance in a maximum of one month after signing the pledge contract.

Specific rules apply to the pledge of patent:

The pledge of patent is provided by article 1 paragraph 4 of decree nb 2001-328 dated 23 January 2001, and is created by a registration thereof on the National Register of Patents (*Registre National des Brevets*), held by the Institut National de la Normalisation de la Propriété Industrielle (INNORPI).

Enforceability:

Pursuant to article 214 RPC, against third parties, the pledge is only enforceable when it is made in a written document having a certain date (fixed date), mentioning the amount of the guaranteed debt, the due date for payment, description of the pledged assets.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Real property: it is possible take collateral security over real property. The procedure of taking a mortgage on real property is described in question 3.2 above.

Plant: it is possible to take collateral security over a plant. The procedure of taking a pledge over a plant is described in question 3.2 above.

Machinery and equipment: it is possible to take collateral security over machinery and equipment. The procedure of taking a pledge on equipment and machinery is described in 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?

1 Pledge of receivables:

Possibility to take collateral security over receivables:

According to article 218 RPC, collateral security can be taken over receivables, with the subject for the receivable being included in a written document.

Procedure:

Validity:

Pursuant to article 212 RPC, the perfection of the pledge of claims between the parties is submitted to the following conditions:

- the consent of both parties about the pledge; and
- the effective remittance of the document evidencing the debt to the creditor or to a third party chosen by both parties.

Enforceability:

Pursuant to article 214 RPC, against third parties, the pledge is only enforceable when it is made by a written document having a certain date, mentioning the amount of the guaranteed debt, the due date for payment, and the description of the pledged claim.

Pursuant to the article 218 of the RPC, the pledge is proven:

- by the remittance of the document establishing the debt; and
- by the notification of the pledge to the debtor, or by the acceptance of the pledge by the latter in a document having a certain date (fixed date).

Notification of debtor's requirement:

The notification to the debtor is only required as a condition of enforceability (against third parties), and not for the validity of the pledge (between parties).

2 Pledge of professional receivables (*créances professionnelle*):

This type of pledge is inspired from the French "Bordereaux Dailly" (law nb 81-1 dated 2 January 1981) and introduced in Tunisia by law nb 2000-92 dated 31 October 2000.

The credit facility granted by a banking or financial institution to a legal entity or natural person in the course of its professional activity may give rise to a pledging or the assignment of any true and liquid debt payable in cash or at term, held by the beneficiary of the loan in favour of the financial establishment by the remittance of a title known as "note" (*bordereau*).

Validity:

The title must contain the following mentions:

1. The title "Trade Debt Pledge Agreement".
2. The mentioning that the agreement is submitted to the provisions of law nb 2000-92 dated 31 October 2000.
3. The company name of the credit institution which is the beneficiary of the receivable.
4. For each pledged or assigned receivable, the identity of the debtor, the place of payment, the amount of debt, and the according terms.
5. The signature of the person granting the pledge.

In case the pledge of the trade debts is made by an electronic method that permits them to be clearly identify, it will be only necessary to indicate the items mentioned in 1, 2, 3, and 5 above, the method under which the pledge has been granted to them, their number and their global amount.

Enforceability:

Pursuant to Article 6 of law nb 2000-92 dated 31 October 2000, the pledge shall be enforceable against third parties since the date mentioned in the note (*Bordereau*).

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 cash deposited in bank accounts in Tunisia, although the legal regime is not clear.

It is possible to take a pledge on the bank accounts of the debtor or to take a cash collateral if the cash is remitted in a third party account.

The granting of a pledge on a bank account follows the same procedure as taking a pledge on a movable asset.

3.6 Can collateral security be taken over shares in companies incorporated in Tunisia? 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 corporations (*société anonyme*) and limited liability companies (*LLC*) are different, while shares of corporations have been dematerialised; shares of LLC are only in registered form but not dematerialised.

All securities are issued solely in book-entry form (required under the Law on Dematerialization of Securities, n°2000-35 dated 21 March 2000) and, even if not listed, can only be transferred through a broker licensed with the Stock Exchange.

The shares of a *société anonyme* are not in certificated form, but are a book entry recorded in an account maintained by the issuing legal person or by a licensed intermediary.

Taking collateral security over shares of *corporations*:

- Possibility to take collateral over shares:

Considered as transferable securities, the shares of a *société anonyme* incorporated under Tunisian law, can be pledged (Article 710 of the Commercial code).

- Possibility to grant such security under a New York or English law:

The rights over property are governed by the law of the place in which the property is located. As the shares, even though in book entry, are maintained in a register in Tunisia, the security taken over these shares cannot be granted under a foreign law (Article 58 of the Code of private international law) but the security should be governed by Tunisian law to be enforceable in Tunisia.

- Procedure:

The pledge follows the same procedure of the pledge of movable property but should be notified to the intermediary holding the securities.

If the by-laws of the company provides for the approval of new shareholders by a general meeting resolution, then the according procedure shall apply at the moment of the enforcement of the pledge by the secured creditor.

The shares of *LLC*:

- Possibility of collateral securities over shares:

The principle to take security over shares is admitted by article 221 of the RPC.

- Possibility to grant such security under a New York or English law:

The rights over property are governed by the law of the place in which property is located. As the shares are registered in the company's registry in Tunisia, then security cannot be granted under a foreign law (Article 58 of the Code of private international law).

- Procedure:

According to article 221 of the CRP, the pledge shall be deemed constituted since its recordation in the company register.

At the moment of the enforcement of the pledge by the secured creditor, the approval procedure provided by article 109 of the CCC shall apply.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

The inventory may be the subject of security in the framework of a pledge of going concern (*nantissement de fonds de commerce*) according to article 237 of the Code of commerce ("**CC**"), however the goods are not included in the pledge of going concern.

The inventory can be pledged through a pledge on movable property.

Please refer to question 3.2 for the procedure to take a pledge of going concern.

Please refer to question 3.2 for the procedure to take a pledge of movable property.

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)?

Security granted by a company in order to secure its obligations:

There is no prohibition under Tunisian law for a company to grant a security interest in order to secure its obligations. However, such operation must be concluded in accordance with the conditions and limitations set by the by-laws of the company (if any).

Security granted by a company in order to secure other borrower's obligations:

Société anonyme:

A company can grant a security interest to guarantee the obligations of other borrowers. However, such operation shall be submitted to the authorisation of the board of directors of the controlled company, the audit of the auditor, and the approval of the general meeting. These authorisations are not applicable to credit institutions and insurance companies (article 200 of the CCC).

Such transaction is not possible when the borrower (whose liability is guaranteed) has one of these positions in the company:

- Chief executive officer.
- General manager.
- Directors.
- Assistant general manager.
- Director.
- Spouse, ascendants and descendants of the above persons, and all intermediaries.

LLC:

Pursuant to article 116 of the CCC, it is prohibited for a company to guarantee the debts of its manager, and partners (natural persons), and the legal representatives of the partners (legal persons) as well as the spouse, ascendants, descendants of these persons.

In any event, it shall be noted that the guarantee must be granted in accordance with the corporate interest of the company.

In fact, pursuant to the provisions of the CCC on both corporations (*sociétés anonymes*) and limited liability companies (*LLC*), the company's decisions must be taken in accordance with the corporate interest. Then, a guarantee granted by a company can be cancelled by the court in case it is considered as contrary to the corporate interest.

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 or the discharge of mortgages in the land register is subject to a real property protection right of 1% of the concerned property's right value (article 45 of the law nb 82-91 dated 31 December 1982) (with a minimum of 5 Dinars).

  When the mortgage is securing a loan, the real property protection right is 0.2% of the concerned property's right value.
- The registration fee applicable to the pledge of receivables is of 0.25% in principal perceived at the moment of registry of the pledge contract (article 34 of decree dated 18 July 1927).
- The fixed registration fees for the transferring acts are for Public auctions of secured assets (20 Dinars per page). (Article 23 of the Code of the registration rights and stamp duties (as modified by article 43 of law nb 2012-1 dated 16 May 2012 complementary finance law for the year 2012).)
- Stamp duties are payable on a pledge contract of production machinery and equipment: The registration of such contracts in court as well as registration of amendments thereof (5 Dinars) (Article 117 of the code of the registration rights and 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?

Not really.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

CBT's authorisation shall be required in the following cases:

- The creation of security by a non-resident entity out of the scope of the permitted loans (see the answer to question 2.6).
- The pledge of foreign banknotes, cheques, letters of credit, bills of exchange, paper instruments and any other overnight or short term debt security in foreign currency held on Tunisian territory, whether constituted in Tunisia or abroad (Article 17 of decree nb 77-608).

The authorisation of the local governor is required for a mortgage or a pledge of going concern granted in favour of a foreigner. An exception is provided for mortgages granted in favour of foreign banks established in Tunisia.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

It depends on the terms of the revolving credit facility agreement.

Insolvency rules should be paid attention to in order to avoid a preference period.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

The Pledge agreements must be signed before a notary public or have a legalised signature.

Signature in counterpart would not have a legal effect for a contract governed by Tunisian law.

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?

Corporation (société anonyme):

Shares of the company

There is no prohibition for a company to guaranty and/or grant a security for the financing of acquisition of its shares, unless the guarantee and/or borrowing is granted for:

- The chief executive officer of the company.
- The general manager.
- The instructed director.
- The assistant general manager.
- The directors.
- The spouse, ascendants and descendants of the above persons, and all intermediaries.

These transactions shall be submitted to the prior authorisation of the board of directors, the approval of the general meeting and the audit of the statutory auditors (unless the by-laws of the company provide for a waiver of such authorisation, approval and audit and for specific guarantees within a specified limit).

These authorisations are not applicable to credit institutions and insurance companies.

However, it must be noted that the borrowings, current account overdrafts, advances, and grants made by a company to a shareholder of the company, the spouse, ascendants and descendants of a shareholder, or an intermediary for the financing of its shares are prohibited and shall be considered null.

Shares of any company which directly or indirectly owns shares in the company/shares in a sister subsidiary

In principle, such transaction is possible, unless the guaranteed person is:

- The chief executive officer of the company.
- The general manager.
- The instructed director.
- The assistant director general.
- The directors.
- The spouse, ascendants and descendants of the above persons, and all intermediaries.

In such a case, these operations shall be submitted to the prior authorisation of the board of directors, the approval of the general meeting and the audit of the statutory auditors (unless the by-laws of the company provide for a waiver of such authorisation, approval and audit and for specific guarantees within a specified limit).

These authorisations are not applicable to credit institutions and insurance companies.

Limited Liability Company (LLC):

In principle, these transactions are allowed unless the guaranteed person is the manager, the partners (natural persons, and the legal representatives of the partners (legal persons) as well as the spouse, ascendants, descendants of these persons).

In any event, it shall be noted that the guarantee must be granted in accordance with the corporate interest of the company.

In fact, pursuant to the provisions of the CCC on both corporations (*sociétés anonymes*) and limited liability companies (LLC), the company's decisions must be taken in accordance with the corporate interest. Then, a guarantee granted by a company can be cancelled by the court in case it is considered as contrary to the corporate interest.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Tunisia 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?

Tunisian law would recognise the role of the agent to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders if the agent is mandated by all lenders for such purpose. The trustee is not recognised under Tunisian law.

5.2 If an agent or trustee is not recognised in Tunisia, 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 could be used but has never been tested and could present some specific risk of lacking a "cause of the contract".

5.3 Assume a loan is made to a company organised under the laws of Tunisia and guaranteed by a guarantor organised under the laws of Tunisia. 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?

Pursuant to article 205 of the Code of obligations and contracts, in order for such transfer to be enforceable against the debtor, it must be notified or accepted by the debtor in a document having a fixed date.

In addition, certain securities may need to be registered again in the name of the new lender, such as mortgages.

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) Interests:

Withholding tax on interest payable on loans made to domestic lenders:

Under article 52 of the Personal income and corporation tax code, a withholding tax shall be deducted from the interests of the borrowings with a rate of 20%.

Withholding tax from interest payable on loans made to foreign lenders:

Under article 52 of the Personal income and corporation tax code, a withholding tax shall be deducted from the interests of the borrowings with a rate of 5% when the foreign lender is a banking institution, and 20% when the foreign lender is an entity other than a banking institution.

Such provisions shall be applicable in the absence of other provisions contained in treaties on the avoidance of double taxation concluded between Tunisia and the lender's country.

(b) Registration of contracts:

Loan agreements and credit facilities are subject to registration with tax authorities within sixty days as from the date of their execution. The registration is subject to a registration fee of 20 TND per page. In case of non-registration within 60 days, a penalty of 0.5% of the registration amount due by month or a portion of month of delay would be payable.

(c) Proceeds of a claim under a guarantee or the proceeds of enforcing security:

The reimbursement of interests after calling a guarantee or enforcing a security shall also be submitted to withholding tax by applying the rates specified in (a).

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 incentives or other incentives for foreign lenders:

All non-double taxation treaties concluded with the Tunisian government provide for a withholding tax rate lower than the rate indicated in question 6.1.

Taxes for the purposes of effectiveness or registration:

See the response to question 3.9.

6.3 Will any income of a foreign lender become taxable in Tunisia solely because of a loan to or guarantee and/or grant of security from a company in Tunisia?

A foreign lender would not be deemed to be carrying on any commercial or banking activity in Tunisia as a result only of the entry into and performance of a loan agreement and receiving a security, therefore, except withholding tax, its income should not become taxable in Tunisia.

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.

We do not see any adverse consequences thereof.

7 Judicial Enforcement

7.1 Will the courts in Tunisia recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Tunisia enforce a contract that has a foreign governing law?

The courts shall recognise the governing law chosen by the parties in a contract, for both validity and enforcement issues if the legal relationship is considered as international.

However, the rights attached to property rights in Tunisia shall be governed by the law where the property rights or the secured assets are located, i.e. Tunisian law (under the provision of article 274 CPR, written documents drafted in foreign countries cannot constitute a deed relating to the mortgage nor constitute a mortgage for immovable assets situated in Tunisia) and the enforcement of collateral securities in Tunisia shall be governed by Tunisian law.

7.2 Will the courts in Tunisia 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 shall be recognised in Tunisia based on international treaties on recognition and enforcement of foreign judgments concluded by Tunisia or on the code of international private law.

The enforcement procedure (the *exequatur* of the judgment) does not imply, in principle, a re-examination of the merits of the case.

However, the *exequatur* is not granted in the following cases:

- The disputes relate to a subject which falls under the exclusive jurisdiction of Tunisian courts.
- The Tunisian courts previously rendered a judgment, through ordinary recourses, on the same topic, with the same parties and on the same cause.
- The foreign decision is against public policy within the meaning of Tunisian international private law.
- The foreign decision was rendered without respect of the rights of defence.
- The foreign decision was cancelled or its enforcement was suspended according to the law of the country where it was rendered, or was not yet enforceable in this country.
- The country where the foreign decision was rendered has not met the condition of reciprocity.

Tunisia has not concluded a convention on the recognition and enforcement of foreign judgments with the UK and the US.

Therefore, a UK or US judgment would be recognised in Tunisia based on the Tunisian code of international private 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 Tunisia, 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 Tunisia against the assets of the company?

Notwithstanding the applicable rules in case of insolvency proceedings, this would depend on the situation of the debtor (place of residence –Tunisia or abroad–, etc.), the type of secured asset (movable or immovable) as well as other factors.

Usually, it takes at least three (3) to six (6) months to obtain an initial judgment.

For the enforcement of a judgment against the assets of a company, please see question 7.4 below.

For the enforcement of a foreign judgment, please see question 7.2 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?

Yes, such restrictions exist under Tunisian law.

(a) Public auction:

When enforcing a security, the secured properties must be sold at public auction.

Such procedure shall take place, after notification of the summons to pay by the secured creditor to the debtor.

The public auction proceedings shall be different depending on whether the secured property is a movable or immovable asset. In both cases, some formalities are to be observed, which shall impact the timing of enforcement.

The enforcement of a mortgage takes more time (at least 4 months) than the enforcement of the pledge (where time frames are more limited).

The value of enforcement shall correspond to the more interesting price offered.

(b) Regulatory consents:

The regulatory consent requirements shall depend on the sector of activity of the company, its nationality, residence, etc. For instance, a foreign person must obtain the Tunisian Central Bank authorisation for the purchase of shares of a Tunisian company operating in certain specific sectors or if the foreign shareholding becomes higher than 50%.

Restrictions attached to regulatory consent might impact the timing of enforcement but not its value.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Tunisia or (b) foreclosure on collateral security?

No, there is no restriction for foreign lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in Tunisia 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 moratorium on enforcement of lender's claims can be adopted in the context of an insolvency proceeding applicable to a company (generally called the rescheduling of debts). The moratorium can apply to enforcement of collateral security as well.

In addition, individual lawsuits shall be suspended for all creditors during the observation period (during which the restructuring plan is prepared), and, in certain cases, during the enforcement of the restructuring plan, including enforcement of collateral security.

For the enforcement of collateral security, please see question 8.1 below.

7.7 Will the courts in Tunisia recognise and enforce an arbitral award given against the company without re-examination of the merits?

Tunisia has concluded the New York Convention on the recognition and enforcement of arbitral awards.

A valid arbitral award will be enforceable in Tunisia without re-examination of the merits if it fulfils the conditions of the Tunisian Arbitration Code, which restates the provisions of the New York Convention on the recognition and enforcement of arbitral awards. Article 81 of the Tunisian Arbitration Code provides for the following conditions to be met by an arbitral award:

- the arbitral agreement is valid;
- the award deals with a dispute not contemplated by the submission to arbitration or not falling within the scope of the arbitration agreement;
- the arbitral tribunal was not properly appointed, or the arbitral procedure was not properly conducted;
- it does not contravene Tunisian public policy; and
- it was properly notified to the party against whom it was rendered.

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 a bankruptcy proceeding is declared on a company, all individual suits are suspended. Therefore, lenders cannot enforce their collateral security during the observation period.

We shall detail the consequences attached to the opening of a bankruptcy proceeding regarding enforcement procedures (i) before analysing the situation of secured creditors in case of the opening of a bankruptcy proceeding (ii).

(i) Judicial proceedings

The judicial proceeding begins with an observation period during which a restructuring plan is prepared.

Observation period:

According to article 32 of the law, in the event of opening the observation period against a company, a lender cannot begin or undertake:

- to file a proceeding in a court against the company or in relation to property of the company (whether movable or immovable); or
- the enforcement process in relation to such property.

This principle shall apply to both secured and unsecured creditors whose debts existed prior to the date of opening of the observation period. The debts arising after the opening of the observation period shall not be barred by the prohibition to file individual suits.

However, the suspension of an enforcement proceeding would only be applicable towards the company against which the insolvency is opened but not towards the company's guarantors and/or co-debtors against which enforcement proceedings would be possible, unless the creditors expressly consent to the suspension of the enforcement proceedings.

At the end of the observation period, there are two possible outcomes:

- either it appears that the company's situation is likely to be rescued and the judge approves the plan prepared by the receiver (*administrateur judiciaire*); or
- it appears that the company's situation cannot be saved, and a bankruptcy proceeding is opened against the company.

Restructuring plan:

The restructuring plan can be either a recovery plan or a sale plan.

Enforcement proceedings in the event of recovery plan

The principle is that enforcement proceedings are allowed during the recovery plan.

However, the President of the Court can order for the suspension of enforcement proceedings during the execution of the recovery plan, in case the concerned movable or immovable assets are necessary to the continuation of the company's activity.

More generally, the possibility for secured lenders to enforce their rights shall depend on the terms of the recovery plan decided by the President of the Court.

In any case, in the event of the sale of a pledged or mortgaged property during the execution of the recovery plan, the portion of the price corresponding to the secured debt shall be paid to the secured creditor by respecting the preferred creditors (mainly the State Treasury, the employees, and the creditors whose debts was born after the beginning of the observation period).

Enforcement proceedings in the event of sale plan

The company's assets shall be transferred free of any charge (mortgage, pledge, etc.).

In this event, the secured creditors shall be treated as if they were unsecured creditors for the unpaid part of their loan.

(ii) Bankruptcy proceedings

Pursuant to article 459 of the Code of commerce (CC), the court decision declaring bankruptcy does not suspend the enforcement proceedings for secured creditors.

However, in case the sale price of the property (the subject of the security) is not enough for the reimbursement of the totality of the lender's loan, then the lender will have to compete with the unsecured creditors to get the reimbursement of the remaining sum in the following order:

- Bankruptcy administration costs.
- Aid which would have been granted to the debtor and his family.
- Preferred creditors (mainly the State Treasury, and the employees).
- Creditors whose debts were born after the judgment declaring the judicial proceeding or bankruptcy against the company.
- Mass of creditors (the unsecured creditors, and the secured creditors who have not been reimbursed in whole or in part after the enforcement of their 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?

Certain agreements or undertakings entered into, and payments made or other actions taken, by the insolvent company may be declared void if entered into, or made or taken, during the preference period. This period starts from the date of "*cessation des paiements*" (suspension of payments), (which is fixed by the court, as the date on which the debtor became insolvent), at any time up to eighteen months prior to the judgment commencing insolvency proceedings until the date of commencement of the insolvency proceedings.

Claims arising in a proper manner after the issuance of the commencement order for the needs of the proceedings and which

are directly related to the continuation of the activity, shall be paid in priority to all other claims, whether these are secured or not by preferential liens or guarantees, except for those benefiting from a statutory liens.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Collective proceedings

The provisions of law nb 95-34 on companies in difficulty (the "**Law**") benefit all natural and legal persons submitted to the real tax regime (rather than flat-rate tax regime), and exercising a commercial, industrial, or artisanal activity.

According to the Tunisian tax legislation, all legal persons are submitted to the real tax regime. Natural persons can choose between real tax regime and flat-rate tax regime.

Bankruptcy proceedings

Basically, bankruptcy proceedings are reserved to the persons having the status of trader.

Then, except the "sleeping partnership", (*sociétés en participation*), and the companies where the partners are responsible for the company's debts (article 592 CC), all the companies existing under Tunisian law are included in bankruptcy proceedings.

For the excluded companies, the bankruptcy proceedings shall apply directly to the partners.

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 Tunisia?

Principle:

When the parties to a contract agree to submit any litigation that may arise between them to a foreign jurisdiction, such clause shall be valid except in certain matters provided below.

Exceptions:

Pursuant to article 8 of the International Private Law Code, Tunisian courts shall have exclusive jurisdiction on: all matters relating to Tunisian citizenship; all actions related to an immovable property situated in Tunisia; actions related to insolvency proceedings or bankruptcy that have been initiated in Tunisia; and actions whose subject is related to a protective measure on properties situated in Tunisia.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Tunisia?

First of all, a distinction should be made between the waiver of immunity from jurisdiction, and the waiver of immunity from execution.

Immunity from jurisdiction:

Article 21 of the International Private Law Code provides that the foreign states and the legal persons under public law acting on behalf of their sovereignty shall not benefit of their immunity of jurisdiction, if they expressly accept to submit to the Tunisian jurisdiction.

Then a party's waiver of sovereign immunity shall be legally binding and enforceable under Tunisian law.

The State, acting as private and commercial actor for private and commercial purposes, can waive its immunity from jurisdiction in any proceedings taken in Tunisia.

Immunity from execution:

Waiver of Tunisian State's immunity:

Under Tunisian law, the Tunisian State and the legal persons acting on behalf of its immunity can waive their immunity from execution, subject to the following limitations:

- Certain assets belonging to the State are not available for seizure (e.g. the foreign embassies, the consular possessions, etc.).
- A security granted by the Tunisian State or the legal persons acting on behalf of its immunity must be approved by an act of parliament.

Waiver of Foreign State's immunity:

Article 25 of the International Private Law Code provides that the foreign states and the legal persons under public law acting on behalf of their sovereignty can waive their immunity from execution for their properties that are covered by this immunity. Such waiver must be certain, express, and unequivocal.

The assets that are covered by this immunity are not clearly defined under this provision.

However, there is a risk that such assets fall within the ambit of government assets and as such cannot be attached pursuant to the provisions of Article 37 of the Code on public accounting which provides that: the following "may not be confiscated, even with a writ of execution: public money, revenue claims, titles, movable and immovable assets and generally all assets, without exception, owned by the State, any public entity or local governmental entity. Any seizure or writ of enforcement or any other act, executed in contravention of the above rule shall be considered as null and void".

10 Other Matters

10.1 Are there any eligibility requirements in Tunisia 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 Tunisia need to be licensed or authorised in Tunisia or in their jurisdiction of incorporation?

According to the Banking Law, the activity of granting loans is a monopoly of the credit institutions, unless otherwise provided for by special texts (e.g. between companies belonging to the same corporate group; see question 2.1 above).

Then, in order for a legal person to practice the activity of granting loans on a regular basis, it must obtain an authorisation to practice banking activities from the Ministry of Finance, upon the approval of the CBT.

A foreign financial institution will not be deemed to be carrying out banking activities only as a result of the entry into and performance of a loan agreement with a Tunisian borrower; however, if several banking transactions are held in Tunisia, the financial institution would need to be licensed in Tunisia.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Tunisia?

No other material considerations should be raised.

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JURISMED is composed of multilingual and multicultural lawyers and provides advisory and dispute resolution assistance to clients in all areas of business law. The main practice areas of the firm are banking and financial law, corporate law, energy, employment law, property law and construction law. The firm also specialises in commercial litigation.

JURISMED lawyers have significant experience in local and international lending transactions, as well as in capital market transactions.

JURISMED has been involved in syndicated financing transactions in Tunisia, as well as in several corporate finance and acquisition finance transactions. JURISMED was acting for the lenders in the syndicated export credit held in 2011 which received the award for deal of the year 2011 by Trade Magazine. JURISMED was also involved in several transactions involving taking security in Tunisia, including in oil & gas.

JURISMED has also been active in several seminars and round-tables on structured finance, Islamic finance, private equity and securities.

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1 Overview

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

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 the Search for Returns. The Federal Reserve announced in September 2012 that it would keep interest rates low through the end of 2015. This is an effort to boost economic growth and employment, which have been slack since the financial crisis, 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).

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 Return of Covenant-Lite. There has recently been an increase of what are commonly known as "covenant-lite" loans, which were popular before the financial crisis. 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 are available only 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 regained traction since the financial crisis and can now be seen in many large corporate and middle-market deals. 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 (typically not more than a 50 bps differential). 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" proposed by federal regulators would apply 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. "Risk retention rules" and the "Volker Rule" could seriously impact CLO managers and banks that structure, warehouse and make markets in CLOs. In an effort to fill the government tax coffers, the Foreign Account Tax Compliance Act ("FATCA"), which partially goes into effect on January 1, 2013, is a major revamp of the US withholding tax system, imposing a new 30% withholding on certain payments from foreign lenders that fail to enter into an agreement with the IRS to identify and report specified information with respect to US account holders and investors. This sweeping law could have a significant impact on loan payments and receipts.

The Courts: The TOUSA Decision. In the US, few court cases have spread such a broad concern among lenders in recent years as the TOUSA decision. 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.

European Borrowers and US Lenders. With the ongoing turmoil in the Eurozone and the impact on European banks, 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: The Unitranche Facility. 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). One innovation that has become increasingly 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 generally restricted to the

middle-market, and lenders of unitranche loans are typically finance companies and hedge funds (and not banks).

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:* Automatic Data Processing (June 20, 2012); Bristol-Myers Squibb Company (July 30, 2012); and United Technologies Corporation (April 24, 2012); *Unrestricted Subsidiaries:* 99¢ Only Stores (January 13, 2012); and Memorial Resource Development LLC (July 13, 2012); Incremental Facilities: Kinetic Concepts, Inc. (November 4, 2011); and *European Borrowers:* Seagate Technology Public Limited Company (January 18, 2011); Sensata Technologies (May 12, 2011); and LyondellBasell Industries (May 24, 2012).

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 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 be a "deemed dividend" from the foreign subsidiary to the US parent and subject to US tax. This tax also may apply if collateral at the foreign subsidiary is used to secure the loan to the US parent. The US parent may also be subject to tax consequences if it 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?

With respect to the payment of interest to foreign lenders (other than a payment made 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 payments on interest and other amounts (other than 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 www.irs.gov. Generally, the proceeds of a claim under a guarantee or the proceeds of enforcing security are similarly taxed. Such withholding taxes may also be reduced by the so-called "Portfolio Interest Exemption," which is generally not available to banks, but could be available to non-bank lenders such as hedge funds provided the requirements for the exemption are satisfied.

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. Note that under FATCA (mentioned in question 1.1), foreign institutions will be required to identify and report directly to the US IRS information about financial accounts held by US taxpayers, and failure to comply with FATCA may result in such foreign institutions being required to file a refund claim pursuant to the applicable bilateral tax treaty to recoup any amounts withheld under FATCA, and could result in the limitation of or denial of benefits under the tax treaty.

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 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). 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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