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The International Comparative Legal Guide to:

Lending & Secured Finance 2015

3rd Edition

A practical cross-border insight into lending and secured finance

LSTA

Morgan Lewis

GLG

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EDITORIAL

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

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

It is divided into three main sections:

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

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

Country question and answer chapters. These provide a broad overview of common issues in lending and secured finance laws and regulations in 45 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 Morgan, Lewis & Bockius LLP for his invaluable assistance.

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

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

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PREFACE

Welcome to the 2015 edition of *The International Comparative Legal Guide to: Lending & Secured Finance*. Morgan, Lewis & Bockius LLP is delighted to serve as the *Guide*'s Contributing Editor, and I am honoured to have been invited to write this preface.

Cross-border lending has increased dramatically over the last decades in terms of volume of loans, number of transactions and number of market participants.

There are many reasons for this: the globalisation of business and development of information technology; the rise of emerging economies that have a thirst for capital; and the advancement and sophistication of global lending markets, which has led to a dramatic rise in the number of global lending market participants. These market participants search for the optimal mix of return and risk, a search that often leads to cross-border lending opportunities. For these reasons it is increasingly important to maintain an accurate and up-to-date guide regarding relevant practices and laws in a variety of jurisdictions.

The *Guide*'s first two editions established it as one of the most comprehensive guides in the practice of cross-border lending. Building on that success, this third edition, with contributions from the LSTA, the LMA, the APLMA, covering of 45 jurisdictions and with useful overview chapters exploring certain topics in-depth, serves as an even more valuable, authoritative source of reference material for lenders, global businesses leaders, in-house counsel and international legal practitioners.

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

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

Loan Syndications and Trading Association

Bridget Marsh

Ted Basta

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

In 2014, total corporate lending in the United States was approximately $2 trillion.[1] This figure encompasses all three subsectors of the syndicated loan market – the investment grade market, the leveraged loan market, and the middle market. In the investment grade market total lending – or issuance – stood at approximately $838 billion in 2014. 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 $940 billion.[2] Leveraged loans are typically made to companies seeking to refinance existing debt, to finance acquisitions, leveraged buyouts, or to fund projects and other corporate endeavours such as dividend recapitalisations. Although investment grade lending and leveraged lending volumes are roughly comparable, leveraged loans comprise the overwhelming majority of loans that are traded in the secondary market. Then there is the middle market. As traditionally defined, middle market lending includes loans of up to $500 million that are made to companies with annual revenues of under $500 million.[3] For these companies, the loan market is a primary source of funding. In 2014, middle market lending totalled more than $200 billion, with $159 billion of that amount considered large middle market deals.[4]

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

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

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

Growth of the Secondary Market for Leveraged Loans

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

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

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

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

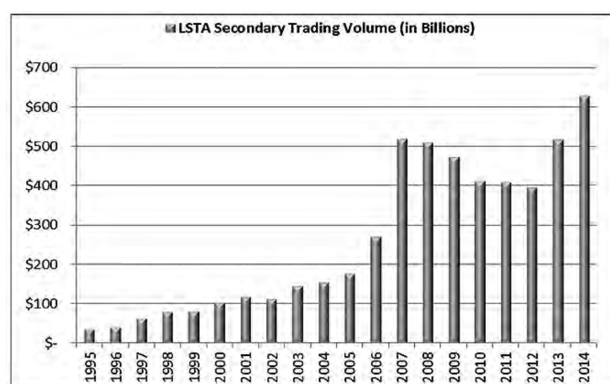
Although leveraged lending volume in the primary market had reached approximately $100 billion by 1995, trading activity was still relatively low, standing at approximately $40 billion.[6] The early bank loan trading desks at this time initially acted more as brokers than traders, simply brokering or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

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

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

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

Chart 1



Unfortunately, as the credit cycle turned and default rates increased sharply in the early 2000s, there was a temporary lull in the market's

growth, with secondary loan trading stalled for a number of years. By 2003, however, leveraged lending (and trading) volumes quickly rebounded as investor confidence was restored.

Even the most bullish of loan market participants could not have predicted the rate of expansion that would take place over the next four years, from 2003-2007. Once again, this growth was driven by M&A activity and large LBOs. Increasing by nearly 200 per cent in that four-year period, leveraged loan outstandings were more than half a trillion dollars and secondary trading volumes reached $520 billion. 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 five 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. Although secondary trading activity had been in steady decline from 2008 through 2012, the asset classes' investment thesis (senior secured, floating rate, high risk-adjusted return) coupled with all the investment tools put in place years earlier and the standardisation of legal and market practices would fuel the market's next phase of expansive growth which began in 2013.

Record levels of refinancing activity drove leveraged lending volumes in 2013 to an all-time high of $1.1 trillion – surpassing 2012's prior record by almost 50 per cent. On the institutional side, lending reached $639 billion, surpassing 2012's prior record by almost 90 per cent. Lenders also financed a substantial amount of new loans in 2013 and, as a result, the size of the secondary loan market finally returned to its pre-crisis size that year. These record levels of supply were funded by record levels of demand. Although CLOs still dominated institutional lending activity in the primary leveraged loan market, retail loan funds also increased. As a result, CLOs and retail funds together acquired a record $144 billion of new loans. Trading volumes for 2013 were $517 billion, a record post-recession high that even approached 2007's all-time record high of $520 billion. 2014 saw even higher volumes, reaching an all-time record of $628 billion.

Unlike other fixed income asset classes, loan trading liquidity levels remained strong in 2014. Trade activity in the secondary market continued at a strong pace in 2014, as did the number of loans traded. At the same time, there was a significant rise in liquidity in the leveraged loan market. The percentage of loans traded 20 times or more per quarter increased to a 54 per cent market share during the fourth quarter; while the percentage of loans traded less than five times per quarter fell to only 22 per cent. Although such statistics indicate a robust secondary market, a logical question to ask is whether loan trading volumes (and liquidity metrics) have improved over the past two years because of the rapid rise in loan outstandings or is the market actually more liquid today than in previous years? The annual turnover ratio, i.e., trade volumes divided by the size of the LLI, is a helpful indicator. In 2013 and 2014, the turnover ratio was 86 per cent, a post-financial crisis high. Today's secondary loan trading market is thus demonstrably more liquid and transparent than ever before.

The Standardisation of a Market

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

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

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

After agreeing the essential trade terms, loan market practice requires that parties then execute a form of LSTA trade confirmation (the legislative change discussed above merely makes it possible legally to enforce an oral trade even if a confirmation has not been signed). Loans can be traded on what is referred to as par documentation or on distressed documentation. Two forms of trade confirmations are available for this purpose and the choice of which one to use is a business decision made at the time of trade. Performing loans, where the borrower is expected to pay in full and on a timely basis, are typically traded on par documentation which means that the parties evidence their binding oral trade by executing an LSTA Par Confirmation and then settling the trade by completing the form of Assignment Agreement provided in the relevant credit agreement (the term par is used because performing loans historically traded at or near par). Alternatively, where a borrower is in, or is perceived to be in, financial distress or the market is concerned about its ability to make all interest payments and repay the loan in full and on a timely basis, parties may opt to trade the borrower's loans on distressed

documentation. In this case, the trade is documented on an LSTA Distressed Confirmation, and the parties settle the transaction by executing the relevant assignment agreement and a supplemental purchase and sale agreement. The LSTA has published a form agreement for this purpose which has been refined over the years and is generally used by the market. This agreement includes, amongst other provisions, representations and warranties, covenants, and indemnities given by seller and buyer. The adoption of standard documents in this regard, particularly for distressed debt trading, significantly contributed to a more liquid loan market, for market participants, knowing that an asset is being traded repeatedly on standard documents, can then uniformly price the loan and more efficiently settle the trade.

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

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

The LSTA continues to expand its suite of trading documents but forecasts that it will continue to play a more active role in the primary market in 2015. In 2014, the LSTA released new versions of its primary documents, including an expanded publication of its Model Credit Agreement Provisions which now include language addressing refinancing mechanics, "amend and extends" whereby certain lenders may extend their loan's maturity date in exchange for a higher margin (pursuant to this post-financial crisis credit agreement development, only those lenders participating in the extension need consent to it), sponsor and borrower acquisitions of loans on the open market or through a "Dutch Auction" procedure, and guidelines regarding the borrower's creation and updating of a list of entities and competitors it seeks to ban from joining the syndicate of lenders or acquiring participations in the loan. In 2015, we plan to start work on a complete form of credit agreement.

Regulatory Challenges

The financial crisis and the myriad financial reform regulation it spawned has required the LSTA to be in frequent communication with regulators. Initially, the loan market faced regulatory pressure on one of its key demand streams, CLOs, but in the last two years the leveraged loan market and secured lending have themselves become targets. First, the Foreign Account Tax Compliance Act (FATCA) of 2010 set forth impracticable compliance requirements for those CLOs that predated the legislation. However, the result of non-compliance was a 30 per cent withholding on a CLO's incoming payments, so CLOs would have been in an impossible situation, had they not been granted relief in the implementing regulations in 2014. Second, as the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) led to sweeping changes across the financial markets, so it did in the CLO market. Dodd-Frank's Risk Retention and Volcker Rule raised grave concerns for CLOs as they are currently structured. Now that both are in final form, some aspects of the rules turned out more favourably than feared, while others will dramatically change the way CLOs are structured. And CLOs are not alone. It seems that just as 2014 saw resolution on some regulatory fronts, new ones emerged. The U.S. loan market continued to grapple with 2013's Interagency Guidance on Leveraged Lending, which affects both the origination and distribution of leveraged loans, and in December 2014, fundamental principles of secured lending were attacked in a final report published by the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 (ABI Commission).

The successful conclusion of the LSTA's four-year efforts seeking relief for pre-FATCA CLOs was the welcome regulatory news of 2014. After a number of written submissions and discussions with the U.S. Internal Revenue Service and U.S. Department of Treasury, the last round of implementing regulations that were released in February 2014 provided compliance relief for pre-FATCA CLOs. These regulations largely adopted the proposal submitted by the LSTA and the Securities Industry and Financial Markets Association. Although the market had some concerns with the drafting of the relief in the regulations, those concerns were put to bed, when the Cayman Islands, where the majority of U.S. CLOs are organised, clarified in its own implementing regulations and guidance notes the requirements a Cayman CLO would need to meet to qualify for relief. Unfortunately, that was the end of the good news. The final rules implementing Dodd-Frank's Volcker Rule released in December 2013 had a number of wins for the loan market: (i) loans were exempted from the proprietary trading restrictions imposed on banks for most other assets; and (ii) a clear path was set out for a complete exemption from the ban on banks owning or sponsoring CLOs, i.e. such CLO may not hold any securities or structured products other than short-term cash equivalents, but further issues with the final rules came to light in 2014. The LSTA was actively engaged with the regulators leading up to the promulgation of the final rules and, although pleased that the agencies recognised the need to address the issues for CLOs, the LSTA saw in 2014 that it still had more work to do. For a CLO that does not qualify for the exemption and is a "covered fund" for purposes of the Volcker Rule, banks are prohibited from holding its ownership interests. Because the final rules define ownership interest to include debt securities that have "indicia of ownership", such as the right to participate in the removal or replacement of the investment manager of the covered fund, it will not be possible for banks – the traditional owners – to hold CLO debt tranches. The LSTA and other trade associations sprang into action to approach the agencies to remedy this problem – either by clarifying "indicia of ownership" or extending the conformance period of CLO notes in existence prior to the final rules. Unfortunately, the agencies did not give any regulatory relief, but the Federal Reserve did extend the conformance period until July 2017 of CLO notes owned by banks as of December 31, 2013. This means that once a bank sells a CLO note, the extension is no longer applicable. Unless there is

legislative intervention, it seems that banks will be required to divest or restructure a significant number of legacy CLO notes by July 21, 2017, potentially forcing them to recognise significant losses. Can these legacy CLOs be amended or refinanced? How many CLO notes will be sold by bank – and at what price? It remains to be seen in 2015 and beyond.

With the modest good news (and remaining wrinkles) behind it, the CLO market faced the year's most disappointing development – the release of the final risk retention rules in October 2014. The final rules require securitisers of asset backed security vehicles to retain five per cent of the credit risk of the securitised assets. For CLOs, this means that CLO managers would presumably be required to retain CLO securities equal to five per cent of the fair value of the CLO on their balance sheet for the life of the vehicle, without the ability to sell or hedge – an impossible requirement for all but a handful of CLO managers. The agencies' final rules dismissed the LSTA's legal arguments questioning their statutory authority and further rejected the LSTA's proposal for a "Qualified CLO" which would require a CLO to be subject to a number of restrictions and protections, but for which a manager would only have to purchase and retain five per cent of the equity, not of the fair value of the deal. (For instance, $2.5 million of a new $500 million CLO, not $25 million.) There were aspects of silver lining, such as the removal of the proposed rules' "cash throttle" (the restriction on entities holding risk retention in the form of equity from receiving any returns on its investment until the CLO's notes began to amortise), but overall the final rules did not set forth appropriate relief for CLOs. Although not unexpected, the failure of the agencies to incorporate any of the several counterproposals offered by the LSTA in the final rules dashed the hopes of many in the market. Until December 24, 2016, when the rules take effect, the LSTA will continue pursuing all legislative, legal and market avenues of solutions for CLOs.

The threat to CLO formation from Risk Retention comes at the same time as new pressures emerge, and others intensify, on the whole leveraged loan market. The elimination of CLOs, which accounted for 62 per cent of the market's demand in 2014, would leave a significant gap in the syndicated loan market – and it is not clear how easily it can be filled by the banks in light of the U.S. banking regulators' "Interagency Guidance on Leveraged Lending" (Guidance) that took effect in May 2013. The Guidance could materially impact banks' ability to underwrite and hold certain types of leveraged loans. It allows banks to craft their own definitions of "leveraged lending" based on a number of enumerated criteria, such as companies which engage in an acquisition or recapitalisation transaction and companies with total leverage greater than four times, or senior leverage greater than three times, debt/EBITDA, but it seems that the agencies' definition of "leveraged lending" is tighter than what had previously been adopted by the market. Moreover, for the first time, the Guidance seeks to address not only loans arranged by banks, but also loans held by banks and takes a step even further by addressing pipeline risk. Perhaps the most significant change in the Guidance is the suggestion that a loan to a company that cannot show the ability to amortise from free cash flow all its senior debt or half its total debt within five to seven years will likely be criticised. The Guidance also looks sceptically at loans to companies that would have leverage levels of six times or more after planned asset sales and also loans which lack meaningful maintenance covenants or "covenant-lite" loans. Therefore, the number of criticised loans a bank holds may significantly increase. Structured as guidance rather than rules, but being followed quite literally by examiners, banks are still learning what the Guidance means for their leveraged loan businesses, but it seems clear that the rules have changed.

Even with all of the regulatory pressures described above, perhaps the greatest threat is also the newest. In December 2014, the ABI Commission released its 200-page Final Report and Recommendations (Final Report) after two-and-a-half years of study, including field hearings and working group efforts, which was then presented to the U.S. Congress. The goal? To propose reforms that would remediate the perceived problem of secured creditors exercising too much control over Chapter 11 cases and the inefficiencies brought to the bankruptcy process by the distressed debt markets. Even though some see the Final Report as a solution in search of a problem (given that data does not support many of the basic premises), the Final Report introduced many alarming proposals that would undermine the fundamental rights of secured creditors and could dramatically affect secured creditors' expectations of recovery in default scenarios. To wit, the Commission proposes: that adequate protection of secured creditors should be artificially based on the "foreclosure value" of the collateral securing the loan rather than its going concern value; no "rollups" of pre-bankruptcy petition debt into Debtor-in-Possession (DIP) loans by pre-petition lenders unless the lender extends substantial new credit on terms better than any alternative and the court finds it is in the best interest of the estate; the unenforceability of intercreditor agreement provisions restricting junior creditors' ability to provide a DIP loan; and the elimination of a U.S. bankruptcy code requirement that an accepting impaired class accept a reorganisation plan, thereby facilitating debtors' cramdown of plans over the objection of certain secured creditors. The Final Report does have some positive aspects, for instance it largely leaves claims trading undisturbed and generally recognises that secured creditors are entitled to the "going concern" value of their collateral rather than its liquidation value upon a sale or plan of reorganisation, but the worrisome aspects are many. The LSTA has shadowed the Commission's study since its inception, has gathered its own materials and data points to support the interest of secured creditors, and is preparing its own report in response. 2015 will see Judiciary Committee hearings in the House of Representatives and Senate and the market will have to watch this space to see what legislation is proposed to implement any of the Commission's recommendations.

Conclusion

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

Endnotes

1. Thomson Reuters Loan Pricing Corporation.
2. Thomson Reuters Loan Pricing Corporation. "Leveraged" is normally defined by a bank loan rating by Standard & Poor's of BB+ and below (by Moody's Investor Service, Ba1 and below) or, for non-rated companies, typically an interest rate spread of LIBOR + 125 basis points.
3. For a more detailed description on the loan market sectors, see Peter C. Vaky, Introduction to the Syndicated Loan Market, in THE HANDBOOK OF LOAN SYNDICATIONS & TRADING, 39 (Allison Taylor and Alicia Sansone, eds., 2007); Steve Miller, Players in the Market, in THE HANDBOOK OF LOAN SYNDICATIONS & TRADING, *supra*, 47.

4. Thomson Reuters Loan Pricing Corporation.
5. For a more detailed description of the history of the loan market, see Allison A. Taylor and Ruth Yang, Evolution of the Primary and Secondary Leveraged Loan Markets, in THE HANDBOOK OF LOAN SYNDICATIONS & TRADING, *supra*, 21.
6. Thomson Reuters Loan Pricing Corporation.
7. Thomson Reuters Loan Pricing Corporation.
8. For a detailed comparison of assignments and participations, see Richard Wight with Warren Cooke & Richard Gray, THE LSTA'S COMPLETE CREDIT AGREEMENT GUIDE, 507-508 (McGraw-Hill 2009).
9. For further information on the structure of assignments, see *id*. at 508-522.
10. For further information on the structure of participations, see *id*. at 522-527.

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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

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 578 in 2014, including banks, non-bank institutional investors, law firms, ratings agencies and service providers from 56 countries. The African Loan Market Association was integrated with the LMA from January 2014.

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. As the leveraged market evolved post-crisis, so did the suite of LMA template documents. 2013 saw the launch of an intercreditor agreement and super senior revolving credit facility for use in conjunction with a high yield bond. These were complemented in 2014 with a second super senior intercreditor agreement, for use alongside a super senior RCF, senior secured note and high yield note structure.

Historically, the LMA's principal focus has been on documentation relating to corporate investment grade and leveraged loans, alongside a full suite of secondary loan trading documentation. However, in recent years, and in response to member demand, the association has significantly expanded its coverage, both from a product and geographical perspective, the latter particularly with developing markets in mind. In 2012, a commercial real estate finance document for multi-property investment was launched, as well as a facility agreement for developing markets and a pre-export finance facility agreement. 2013 saw the launch of a single property development finance facility agreement and four further facility agreements intended for use in developing markets transactions. The LMA continued to expand its suite of documentation in these areas in 2014, with the publication of a real estate finance intercreditor agreement, also facility agreements for use in South Africa, Kenya, Tanzania, Uganda and Nigeria.

In Q1 2014, the association published a guide to *Schuldschein* loans, the result of extensive collaborative work by a working party based in Germany. Appropriately the guide was published in both German and English.

Following positive feedback from members on the *Schuldschein* project and in response to member demand, work commenced in early 2014 on the production of a standard form private placement document. An experienced working party was formed consisting of a number of banks, non-banks and City law firms, all of whom are active in the private placement market (both in the US and across Europe). The working party focused on the production of documents in both loan and note format and these were published in January 2015. The project benefitted from the involvement of the International Capital Market Association (ICMA) and the ACT. This provided valuable input particularly on the note format (developed in coordination with ICMA) and on borrower/issuer concerns (in the case of the ACT). The LMA initiative is a significant contribution to the development of a European private placement market particularly when seen in the context of the current work of the Pan-European Private Placement Working Group coordinated by ICMA, which also includes the Euro PP Working Group (composed of all relevant professional organisations and participants in the French market). The Euro PP Working Group has also produced French law private placement documents to complement the French Charter for Euro Private Placements released in 2014.

The development of a private placement market in Europe is backed by a number of public authorities across Europe. Most recently, there has been an announcement by the UK government relating to a proposed tax exemption from withholding tax for interest on private placements. It is hoped that such initiatives will help to unlock new sources of liquidity and reduce perceived barriers to entry of this market. The LMA will be offering training on the private placement documents for its members as part of its wide-ranging events programme in each of London, Paris, Frankfurt and Amsterdam.

Review and development

In response to member feedback, market developments, legislation and regulation, the LMA's document library is constantly reviewed and updated. Primary and secondary recommended forms have undergone several revisions and seen some significant amendments, a notable example being the combination of secondary par and distressed trading documents in 2010, updated once again in 2012. Continuing the theme, terms and conditions for secondary loan trading were subject to a full "Plain English" review in 2013 with the goal of making these more navigable, particularly for those whose native language is not English. In November 2014, revised facility agreements were published *inter alia* to facilitate the use of non-LIBOR interest rate benchmarks following the discontinuance of certain tenors and currencies.

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

Over recent years, the LMA has actively lobbied regulators in the UK, EU and US on various proposals potentially impacting the loan market. Responses to regulatory bodies are too numerous

to list. Examples of activity in this field are submissions to the Internal Revenue Service in the US regarding certain provisions under the Foreign Account Tax Compliance Act (FATCA), also to the European Commission relating to the drafting and interpretation of the Capital Requirements Directive IV and the Commission's consultation on shadow banking.

Proactive lobbying has led to tangible results, including confirmation from the Securities Exchange Commission and the Commodity Futures Trading Commission that US derivatives regulations under Dodd-Frank were not intended to capture LMA-style participations, also confirmation from the European Banking Authority that risk retention requirements in new Collateralised Loan Obligations are to be kept at 5% (*cf.* Article 394 CRD IV, previously referred to as Article 122a).

Other notable dialogue includes a response to a European Commission consultation to request that the list of eligible assets under Article 50 of the UCITS IV Directive be expanded to include certain types of loan. Also following consultation with a working party comprising a cross-section of its membership, the LMA responded to a European Commission consultation on the need to overcome barriers to long-term financing and diversify the system of financial intermediation for long-term investment in Europe. In July 2014, the LMA responded to an ECB and Bank of England consultation on a better functioning securitisation market. Also in 2014, the LMA led highly constructive dialogue over several months with the UK Treasury and Financial Conduct Authority following the decision in the *Fons Hf v Corporal Ltd and another (2014)* case, resulting in confirmation from the FCA that the decision would not affect their regulatory treatment of loans. Most recently in October 2014 submitted a response to the OECD's first set of recommendations under its "BEPS" (Base Erosion and Profit Shifting) Project, the latter of potentially huge significance for credit funds.

Significant progress has been made by the LMA in reducing the impact of regulation on the loan market and its participants, however undoubtedly changes in the regulatory and fiscal landscape will continue to present challenges. The LMA remains committed to play a pivotal role in tracking these changes and their potential impact on the loan product.

Education and Events

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

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

In September 2014, 850 delegates attended the LMA's 7th annual Syndicated Loans Conference in London, the largest loan market event in EMEA. Additionally, the LMA now also runs an annual Developing Markets Conference in London, an annual Real Estate Conference in London and Munich, and conferences in East and South Africa. In total over 20,000 delegates have attended LMA events across EMEA in the last 6 years.

In 2005, the inaugural LMA Certificate Course was held in London. Consistently oversubscribed, the course is now entering its 10th year and will be run four times in 2015. Held over 5 days, the course covers the syndication process through to secondary trading, including agency, portfolio management, pricing and mathematical conventions, terms sheets and an introduction to documentation.

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

In 2011, the LMA published *The Loan Book*, a comprehensive study of the loan market through the financial crisis, with contributions from 43 individual market practitioners. Over 10,000 copies of *The Loan Book* have been distributed to date since publication. In 2013 the association published *Developing Loan Markets*, a volume dedicated to the analysis of various regional developing markets, both from an economic and loan product perspective. A publication focused on the real estate sector is planned for 2015.

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

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 has a dedicated Loans Operations Committee focused on identifying roadblocks, communicating issues and promoting best practice solutions. Several administrative "quick-wins" have been implemented across major agency houses in 2014 as a direct result of the Committee's work.

Maintaining the spotlight on secondary settlement and operations in general is a core strategic aim for the LMA into 2015 and beyond.

Market Overview

A detailed study of the development of the syndicated loan market in EMEA, particularly post the financial crisis of 2007, is beyond the scope of this chapter. *The Loan Book*, as mentioned above, gives a practitioner's overview and detailed reference guide. It goes without saying, however, that the crisis sparked by the US sub-prime mortgage market had a significant impact. Fuelled by an abundance of liquidity, particularly from institutional investors in the leveraged market, primary volumes in EMEA soared in the years building up to the crisis. The liquidity crunch saw primary issuance fall dramatically by 2009 to barely one-third of the record $1,800BN seen in 2007. Volumes recovered some ground through to 2011 but dipped again in 2012 against the backdrop of the Eurozone sovereign debt crisis and the US "fiscal cliff". In contrast, 2013 saw markets rebound and loan issuance increase substantially. Policy intervention and specifically the Outright Monetary Transactions programme announced by the ECB in the 2nd half of 2012 was a significant driver of confidence. In 2013 issuance volumes reached $1,000BN, some 33% higher year-on-year. At $1,290BN, 2014

EMEA loan market volumes were at the highest level since 2007. Leveraged finance has recovered particularly strongly with issuance in 2014 also at a 7-year high.

Demand for the leveraged loan product in particular has spread across a broader investor base than seen prior to the 2007 financial crisis. However, institutional investors have also become more visible in other loan asset classes, such as real estate and infrastructure finance. Several funds have been set up to lend directly to small and medium companies, particularly in the UK. Retrenchment by banks post crisis opened the door to alternative sources of finance across the loan market and many institutions are now established participants. A significant driver of institutional demand within leveraged finance pre-crisis, the CLO returned to European markets in 2013 with new vehicle issuance volume of €7.4BN, compared with virtually zero since 2008. European CLO issuance nearly doubled in 2014 to €14.5BN and analysts predict between €15BN and €25BN of issuance in 2015.

The Way Forward

Results from a survey of LMA members at the end of 2014 suggest that market participants expect overall growth to continue into 2015. Some 50% of respondents expect loan market volumes across EMEA to increase by more than 10% year on year. Competitive pressure was cited as the single biggest influencing factor on the syndicated loan market in the short term, closely followed by global economic and geopolitical risks. Regulatory issues also remain high on the agenda and the LMA's focus on lobbying and advocacy will continue unabated.

Other trends will also determine the focus of the LMA's work into 2015 and beyond. With bank capital constraints in mind, we have seen borrowers access funding sources on an increasingly global basis and the LMA will continue to work to promote further cross-border liquidity. The institutional investor base will continue to grow and non-bank finance will increase in importance across loan asset classes; publication of standard form private placement documentation in loan and note format is a working example of LMA engagement in alternative finance. 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 integration of the African LMA in January 2014 has seen significantly increased coverage of African markets.

The LMA's principal objective some 18 years ago was to promote greater liquidity in the 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.

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 578 organisations covering 56 nationalities, comprising commercial and investment banks, institutional investors, law firms, service providers and rating agencies.

Asia Pacific Loan Market Association – An Overview of the APLMA

Asia Pacific Loan Market Association

Janet Field

Katy Chan

Founded in 1998, the APLMA is a pan-Asian not-for-profit industry association dedicated to promoting growth and liquidity in the primary and secondary loan markets of the Asia-Pacific region, and advocating best practices in the syndicated loan market. The APLMA is headquartered in Hong Kong with branches in Singapore and Australia. Due to the size and diversity of the Asia-Pacific region, the operations of the APLMA are decentralised. In addition to the branch network, the APLMA has a number of offshore committees in China, Taiwan, Malaysia, India and New Zealand. We aim to continue to establish new chapters in the key markets of the region, as well as forging working relationships with other associations across Asia.

The APLMA has 253 institutional members from Asia-Pacific, Europe, the US and the Middle East. Membership includes commercial and investment banks, non-bank financial institutions, law firms, rating agencies, financial information service providers and online trading platforms. There are also 11 Honorary Members comprising regional regulators and trade associations.

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

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

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

Standard Documentation

One of the APLMA's core missions is to standardise both primary and secondary documentation for syndicated loan transactions in the Asia-Pacific markets. These documents have become the market standard for Asia.

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

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

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

Different Jurisdictions

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

The first Australian law document, launched in 2001, reflects the unique features of Australian law and local market practices. This was followed by the launch of the S.128F loan note structure documents (multicurrency term and revolving facilities subscription agreement and loan note deed poll).

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

Other Templates

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

These include a sample Asia arbitration clause with a litigation option for a hybrid dispute resolution process (under such process

both parties are required to submit all disputes to arbitration). The sample clause provides various options under which arbitration can be administered.

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

Documentation Updates

In 2014, the APLMA rolled out a number of new and revised documents including:

i) Revised Term Sheet;

ii) Hong Kong law Mandate Letter (best efforts and underwritten) – New;

iii) Term Sheet and Mandate Letter for secured transactions;

iv) Revised English law and Hong Kong law primary documents:
- APLMA multiple borrower;
- Multiple guarantor, single currency term facility agreement;
- APLMA single borrower, single guarantor, single currency term facility agreement; and
- APLMA multiple borrower, multiple guarantor, multicurrency term and revolving facilities agreement;

v) Offshore RMB (CNH) facility agreement – New;

vi) Revised unsecured Mandate Letter and unsecured Term Sheet (to include an English law option in addition to Hong Kong law); and

vii) Revised Hong Kong law Confidentiality Letter for primary syndication.

The update of the primary documents was mainly to amend the Screen Rate definition and the LIBOR definition to ensure the templates are adequate for the new LIBOR arrangement as well as any future change of LIBOR Administrator. "Interpolated rate" language is also incorporated in both the LIBOR and HIBOR definitions.

The Term Sheet was revised to reflect the changes made to the primary document and the updated Confidentiality Letter reflects the change to the reference in the Companies Ordinance (Cap. 622) on terms related to holding companies and subsidiaries.

The Australian suite of mandate and syndications documents was also updated for the first time in 6 years. The revised documents are now closer to equivalent LMA and APLMA Asian agreements while still reflecting Australian market practices and legal requirements. The updated documents published in 2014 include:

i) Term Sheet;

ii) Australian Law Mandate Letter (best efforts and underwritten) – New;

iii) Commitment Letter – for initial and final commitment – New;

iv) Confidentiality Agreement – for information memorandum;

v) Confidentiality Agreement – for sell down; and

vi) Confidentiality and Front Running Letter for primary syndications – New.

The syndication documents are designed to be used with the APLMA Australian law Investment Grade Multicurrency Term & Revolving Syndicated Facility Agreement and the APLMA primary loan agreements.

In addition, a new notices clause was published which includes provisions on electronic communications and the addition of the LSTA's Market Guidance Note on Dodd-Frank Keepwell clauses for guarantees by US persons that cover swap obligations. The Committee also made a written submission on the Federal Government's review of the Personal Property Securities Act 2009 relating to the transfer of loans under syndicated facilities.

Major Projects 2015

The APLMA is currently working on a number of document revisions including:

i) updated Chinese translations of the standard facility agreement, term sheet and confidentiality letter templates to reflect recent revisions to the primary documents;

ii) new standard provision on sanctions/anti-corruption/anti-money laundering;

iii) an updated version of the sample Asia arbitration clauses to take account of the changes to arbitration law in Hong Kong and China; and

iv) an updated Singapore dollar Singapore law facility agreement to include a footnote on the Personal Data Protection Act.

Agency Issues

FATCA remained the main focus of Agent banks in 2014. The US IRS issued Notice 2014-33 on 2 May 2014 which outlined several significant changes to FATCA including corporate accounts opened prior to 1 January, 2015 now being treated as pre-existing accounts, essentially providing a six-month delay for new account due diligence (NADD). Since syndicated loan borrowers are mainly corporates, Agent banks' NADD requirements were largely postponed to early 2015 instead of 1 July 2014.

In January 2015, the APLMA released a FATCA Note for Agents operating in an IGA Model 2 jurisdiction (Hong Kong, Japan, Taiwan). The Note provides a sample provision which protects the Agent against any liability which may result from its failure to withhold on account of FATCA due to a Lender failing to provide accurate information about its FATCA status, or a US or FFI borrower failing to correctly act on that information.

After a series of changes to the reference interest rate offering requirements, banks were interested in acting for the Reference Bank to provide reference interest rates for odd interest periods. The loan market has tended to apply the interpolation rate concept, similar to the bond market, for new facilities. However, for existing agreements, lack of Reference Bank interest rates would trigger market disruption and cause substantial administrative work for the Borrower, the Lenders and the Agent.

Some Agent banks have reached agreement with Borrowers and Lenders who are funding an odd interest period to use the interpolation rate as an alternative funding base pursuant to the Agreement upfront rather than formally triggering market disruption during the rate fixing.

In Hong Kong, due to the typhoon season members have also raised concerns about Agents' duties in respect of the half Business Day process, especially since the Hong Kong Banking Association is now also publishing HIBOR in the afternoon. The APLMA will be issuing a new guideline on this in early 2015.

The half Business Day process is already covered in the existing APLMA standard agreement. Unless the Agent has obtained all parties' approval to use the afternoon HIBOR, the APLMA standard agreement states that the Agent shall obtain the rate from the Reference Banks if no HIBOR appears at 11:00 a.m. Hong Kong time. As far as it is a Business Day and HKD clearing is working,

whether it is a full or half day, the payment must be settled as normal and if any party cannot arrange payment due to it being a half day, it shall be treated as non-payment under the agreement.

Regulatory Issues

The APLMA has hosted a series of regulatory seminars across the region to update members on how regulatory changes will impact on the loan market in Asia, with particular focus on the ongoing development of the Basel III proposals and implementation in Asia, extra territoriality issues embedded within European and US legislation, and the introduction of taxes on banks' businesses, such as those levied under FATCA. In 2014, the LMA revised its primary document templates to incorporate FATCA wording as per Annex I of its FATCA Summary Note published on 9 June, 2014. The wording in Annex I is drafted for Agents operating in a Model 1 IGA (Intergovernmental Agreement) jurisdiction and who are not a Qualified Intermediary. All parties (Obligors, Agent and Lenders) are entitled to withhold tax if required by FATCA and do not need to gross up payments. In Asia-Pacific, most countries (e.g. Australia, China, India, Malaysia, New Zealand, Singapore and Thailand) have signed or are about to sign a Model 1 IGA with the US, but a few will sign a Model 2 IGA (e.g. Hong Kong, Japan, Taiwan). The APLMA will not however be incorporating FATCA provisions in its document templates at this stage (with the exception of the Australian law templates). The APLMA has instead published a guidance note summarising the impact of FATCA under the Asia-Pacific context and the options available.

Best Market Practices

The APLMA has drafted a set of non-binding guidelines on best practice in the Asian cross-border syndicated loan market. Over the past year, a number of new recommendations were drafted relating to the following issues:

i) fee sharing among MLAs with different final holds;
ii) listing of banks in communications such as tombstones, information memoranda and cover pages of facility agreements;
iii) confidentiality undertakings; and
iv) amendments and waivers.

Projects for 2015 include a review of the implications of the new Hong Kong Competition Ordinance which comes into force later this year.

Education and Training

As part of its commitment to enhancing industry education and providing a vibrant pan-Asian professional network, the APLMA holds over 80 seminars, conferences, training courses and networking events each year in all the major financial centres, most of which are free of charge.

Events for 2015 include:

- Global Loan Market Summit.
- 4th Annual Syndicated Loan Market Awards.
- Annual APAC Syndicated Loan Market Conference.
- 1-week Syndicated Loan Certificate Course.
- Documentation training.
- Regulatory seminars.
- Overseas conferences in China, Taiwan, India, New Zealand, Indonesia, Malaysia, Thailand and Dubai.
- Quarterly Young Leaders' series.
- Quarterly Women's series.

A full list of 2015 events can be found on the APLMA website: www.aplma.com.

APLMA China

In 2014, a number of new initiatives were rolled out to expand the APLMA's footprint in China, including high-level meetings with both the China Banking Association (CBA) and the Shanghai Banking Association (SBA) to establish closer cooperation. The APLMA Annual China Loan Market Conference will be held in Beijing in collaboration with the CBA in April. In light of the increasing number of young banking professionals in the syndicated lending space, a new Shanghai Young Leaders Committee has also been established to provide an education and networking platform for local bankers with less than five years' experience in the syndicated loan market.

New Mobile App

In 2014, the APLMA launched its new website with multiple new features. The next phase is the roll out of the new APLMA app in Q1 2015 which can be used on iPhones and other smart phone devices. The app will be available in English, Traditional Chinese and Simplified Chinese and will include the following features:

- **Events**: event calendar; online event registration; event details (time, venue, programme, speakers); locate event venue via Google Maps; and sync event registration to your mobile device calendar.
- **Announcements**: access latest market information and APLMA announcements.
- **Contact Database** (Full Members only): search APLMA member contact database (over 4,000 contacts) and sync contacts with your device.
- **Edit Personal Profile**: edit your personal profile in the APLMA contact database.
- **Contact APLMA**: queries, confirmations and other information.

Looking Ahead

Documentation will continue to be a core focus in 2015. In response to member demand, the APLMA has been expanding its documentation coverage in recent years to include local laws and practices.

The APLMA will also continue to monitor fiscal and regulatory developments in the region and publish market and legal guidance notes for members as required. A full calendar of over 80 events is planned for 2015. For details, please refer to the APLMA website: www.aplma.com.

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Janet Field is the Managing Director of the Asia Pacific Loan Market Association (APLMA). She is based in Hong Kong and oversees all operations of the APLMA across Asia-Pacific. She heads up a team responsible for the development of standard primary and secondary loan documentation for a number of different jurisdictions, guidance notes, best market practices, lobbying, and organising educational seminars, conferences and networking events across the region. The APLMA has a network of branches in Hong Kong, Australia and Singapore, as well as offshore committees in China, Taiwan, India, Malaysia and New Zealand.

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Katy Chan joined the APLMA in June 2014 as a Director. Katy is responsible for developing the APLMA's presence in China and Taiwan and building up the APLMA's presence in new markets in Asia. She is also focusing on membership and working with the APLMA committees. Before joining the APLMA, Katy was with Standard Chartered Bank's Wholesale Banking Division. She also worked in Project and Structured Finance at ANZ from 2008 to 2011 and prior to that she was a Director in Principal Investments at HSBC where she worked from 2000 to 2008.

Founded in 1998, the APLMA is a pan-Asian not-for-profit industry association dedicated to promoting growth and liquidity and advocating best practices in the primary and secondary loan markets of the Asia-Pacific region. Its main tasks include: providing standard loan documentation templates; formulating guidelines on market practices; organising seminars, trainings and networking events; monitoring legislative, regulatory and market changes for impact on the syndicated loan market; and serving as a liaison between major loan market players and regional regulators.

The APLMA is headquartered in Hong Kong. It has branches in Australia and Singapore and offshore committees in China, India, Malaysia, New Zealand and Taiwan. Currently it has 253 institutional members from Asia-Pacific, Europe, the US and the Middle East. Membership comprises commercial and investment banks, non-bank financial institutions, law firms, rating agencies and financial information service providers.

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

Thomas Mellor

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1 Introduction: The Rise of Cross-Border Lending

Increase in Cross-Border Lending. For lenders and lawyers who practice in the cross-border lending area, whether in the developed economies or the emerging markets, this is a dynamic and exciting time. Cross-border lending has increased dramatically over the last couple of decades in terms of volume of loans, number of transactions and number of market participants. According to the Bank for International Settlements, the amount of outstanding cross-border loans held by banks worldwide was approximately $7.2 trillion in 2014, an increase from $1.71 trillion in 1995. There are many reasons for this increase: the globalisation of business and development of information technology; the rise of emerging economies that have a thirst for capital in order to develop their economies to their full potential; and the development of global lending markets, especially in the US, which has led to a dramatic rise in the number of market participants searching for the right mix of yield and risk in the loan markets, a search that often leads to cross-border lending opportunities.

Challenges of Cross-Border Lending. For those lenders and lawyers who practise 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, is referred to collectively as *country risk*. Understanding country risk is imperative for a lender to a cross-border loan and for investors to be able to compare debt instruments of similarly situated companies located in different countries.

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

2 Legal Risk in the Cross-Border Lending Context

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

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

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

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

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

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

3 Can Legal Risk be Measured?

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

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

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

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

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

World Bank "Doing Business" Rankings. The World Bank publishes an interesting study each year titled the *Ease of Doing Business Rankings*. These rankings rate all economies in the world from 1 to 185 on the "ease of doing business" in that country, with 1 being the best score and 185 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 2014 rankings each of Uzbekistan, Belarus and the Russian Federation have a better "enforcing contracts" score than the United Kingdom. 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 guarantee is one of "payment" and not of "collection", since the latter requires a lender to exhaust all remedies against a borrower before obligating the guarantor to pay. In a cross-border context, this could result in a lender being stuck for years in the quagmire of costly enforcement activity in a foreign and hostile court. While almost all New York and English law guarantees are stated to be guarantees of payment, it is nevertheless always wise to confirm this is the case, and especially important if the guarantee happens to be governed by the laws of another jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 Final Thoughts

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

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

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

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Global Trends in Leveraged Lending

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The significant global trends in leveraged lending in 2014 were driven by a rise in M&A activity and new money deals, a changing regulatory environment and broad macro-economic and political developments, including a substantial drop in oil prices, fears of rising interest rates (coupled with the consequential pull-back in the fixed coupon bond market) and the long overdue rise of the U.S. dollar. The end of quantitative easing in the U.S. (and the start of QE in Europe), persistent speculation on rising U.S. interest rates and renewed regulatory clampdown on federally regulated entities (e.g., banks) contributed to an environment of volatility. Despite the fluctuation of sentiment and market stability, the leveraged finance market as an asset class performed well. We discuss below specific trends in leveraged lending from 2014.

1 Volatility Reigns

Leveraged loan issuance proved robust in the first two quarters of 2014 and was headed for a record-breaking year until issuance dropped significantly in Q3 (and then somewhat rebounded in Q4) – the quintessential archetype of market volatility. Geopolitical instability and the impact of regulation on banks contributed to the choppy nature of the market.

2014 was punctuated with marked challenges driven largely by government policies. The U.S. Federal Reserve finally ended its quantitative easing programme, while the ECB has just started rolling out theirs. Speculation mounted that the Fed would raise interest rates in the U.S., while in Europe, interest rates are expected to remain low for the foreseeable future. Oil prices suffered one of the largest declines since the 1980s. Tensions mounted between Russia and Ukraine, culminating in robust economic sanctions on Russian trade. The prospect of Greece defaulting on its debt continued to cause concern in Europe. The Swiss Franc was unpegged from the Euro causing a near 30 per cent. rise against the Euro, triggering large losses in the FX markets. Across markets, borrower costs rose and investor confidence oscillated.

The leveraged lending markets in North America and, to a lesser extent, Asia Pacific proved to be more susceptible to these economic and political pressures than their European counterparts. Overall leveraged lending in North America in 2014 declined by around 17 per cent. from 2013, totalling USD $940.06 billion. The U.S. high yield market declined by around 7.63 per cent. from 2013 levels, sitting at USD $307.65 billion by the end of last year. The leveraged lending market in Asia Pacific (excluding Central Asia) fell to a lesser extent to USD $14.2 billion, representing just 1.2 per cent. of the global total, while high yield volumes in Asia Pacific were over USD $18.52 billion last year. In Europe, the leveraged loan market showed a steady increase from USD $191.462 billion in 2013 to USD $200.76 billion in 2014, representing a 4.86 per cent. upswing. According to Moody's, European high yield issuance rose by around 29.69 per cent. from USD $151.9 billion in 2013 to over USD $197 billion in 2014. Loans remained the main source of funding for leveraged finance in the U.S., whereas loan and high yield volumes were almost equal in Europe and high yield was the major source of funding in Asia.

Despite the tepid growth rate and market turmoil of 2014, it was not all doom and gloom. Deal flow remained strong for most of the year as borrowers continued to access the markets while interest rates remained low. Excess cash on companies' balance sheets drove a strong upswing in M&A deals and a consequent rise in acquisition financings. Notwithstanding U.S. banking regulators' efforts to rein in excessive leveraged lending, competition in the credit markets managed to drive average pricing of U.S. leveraged buyouts to near-peak levels, with unregulated credit providers partly filling the liquidity chasm. While overall global leveraged lending decreased by 17 per cent. last year, global loan issuance increased by nine per cent., reaching a notable USD $4.70 trillion, evidencing that, on the whole, loan markets managed to ride through choppy conditions and end in positive territory.

2 Rise of M&A Activity and New Money Deals

The mélange of deals shifted from the refinancings and repricings of 2013 to a renewed focus on new money deals in 2014, particularly to finance M&A activity. Leveraged recaps declined slightly across the U.S. and Europe while ABL deals remained strong in the U.S. Unitranche lending gained momentum in mid-market financings. First and second lien credit facilities also drove volume in the middle market.

Leveraged credit new-issue activity in the U.S. proved robust, reaching the second highest volume on record. Mergers, acquisitions and leveraged buyout activity in the U.S. was at its highest since 2008, at USD $267.34 billion, representing more than a 20 per cent. increase from USD $221.01 billion in 2013. European M&A-related leveraged financings reached USD $60.76 billion in 2014, representing over 30 per cent. of European leveraged loan issuance. Asia Pacific M&A-related financing volumes were at USD $8.9 billion, representing over 62 per cent. of the Asia Pacific total leveraged loan issuance. The increase in M&A deals was partly driven by cash-rich corporates seeking growth through acquisitions whilst interest rates remained low, particularly in the healthcare and pharmaceutical sectors. Private equity deals were less common than in previous years.

Large-cap lending increased significantly while mid-market financing saw less of a growth spurt. There were some jumbo deals in the U.S. and Europe in 2014. In the U.S., U.S.-Singapore chip developer Avago Technologies raised finance of USD $5.1 billion to acquire LSI Corporation and Burger King raised USD $7.25 billion to acquire Tim Hortons. The USD $6.95 billion Petsmart financing was the largest U.S. private equity LBO deal in 2014. Notable European deals included the acquisition financings of the mergers of DE Master Blenders/Mondelez (EURO 7.6 billion), Numericable/SFR (EURO equivalent of 4.5 billion), Dufry/Nuance (Swiss Francs 2.4 billion), GTECH/International Games Technology (USD $10.3 billion) and Combibloc (EURO 3 billion).

In Europe, refinancings totalled USD $130 billion in 2014, as opposed to USD $129.374 billion in 2013, representing over 64 per cent. of European leveraged loan volume in 2014. In the U.S., refinancings totalled USD $546.91 billion in 2014 as opposed to USD $756.77 in 2013, representing over 58.18 per cent. of U.S. leveraged loan volume in 2014. By Q214, companies had already successfully lowered their financing costs and pushed out maturities so as to take advantage of cheap debt financing, thereby lowering the demand for refinancings and repricings. In spite of this, the European market still saw some significant refinancing deals last year (i.e., the refinancings of Grifol (USD $4.8 billion) and Formula One (USD $4.1 billion) and the amend and extend transactions for Alliance Boots (£5.0 billion), Airwave Solutions (£1.75 billion) and eircom (EURO 2.0 billion)). It is likely that the ECB quantitative programme will increase liquidity and promote refinancings and repricings in Southern Europe where borrowers have typically had more expensive financings than their Northern European neighbours who have already largely taken advantage of refinancing opportunities.

This year may pose some challenges to the rapid growth of the M&A boom. The U.S. government recently passed a bill aimed at restricting U.S. corporates from structuring acquisitions that allow them to re-domicile to lower-tax jurisdictions (so called "tax inversions"). Pfizer's failed take-over of AstraZeneca and Medtronic's bid for Covidien are representative of the type of deals that the U.S. government is trying to curb. This bill has resulted in certain large cross-border inversion deals being restructured or even cancelled.

Shareholder activism is increasing in both the U.S. and Europe. Several U.S. activists have launched funds in London, including Elliott Management, Tom Sandell and Bill Ackman, albeit that European laws make shareholder activist activity more difficult than in the U.S. Shareholder activism has been a catalyst for transformative corporate events, including spin-offs and related financings.

3 The Reshaping of Liquidity and CLO Issuance

U.S. CLO issuance hit an all-time record of USD $124 billion in 2014, a significant increase from the 2013 levels of USD $85 billion, obliterating the 2006 prior record of USD $97 billion. European CLO issuance increased to EURO 13 billion from EURO 7.8 billion in 2013 but was still less than a third of the peak issuance in 2006. However, Barclays has forecast that European CLO issuance may rise to more than EURO 20 billion in 2015. The CLO market continues to provide attractive spreads to AAA investors, but regulatory overhang from the risk retention rules that will become effective starting December 24, 2016 has adversely affected the year-end issuance of CLOs in 2014 and will likely continue to impact the 2015 pipeline as the market grapples with the potential impact on CLOs. Risk retention is costly, and the requirement will therefore likely slow the influx of new CLO managers and potentially drive smaller managers to combine or exit the market unless they gain access to viable funding solutions that fit within the requirements of the risk retention rules. Investors look to the refinancing option within a CLO as a key part of the economics of investing in these securitisation vehicles, and the uncertainties around how the impact on the risk retention rules on refinancings and questions around managers' ability to afford the future risk retention already impacts current U.S. CLO issuances. The European Banking Authority recently provided recommendations for how to interpret and apply the European risk retention rules, and among these recommendations was to limit which entities should be permitted to retain the required risk. The recommendation signals a move from an "originator" model where loans could effectively be retained by a special purpose entity set up with the goal of providing a risk retention funding platform towards a "sponsor" model, where the risk will have to be retained by an entity with active involvement in the relevant securitisation. The risk retention rules are already effective in Europe, and until uncertainties around permissible risk retention structures for CLOs subside, the demand from AAA investors will likely be limited.

Relatively deep market liquidity, largely supported by CLOs, has continued to back-stop a market that has seen an overall deterioration in covenant quality and an increase in cov-lite loans, including in Europe. On the other hand, liquidity provided from mutual funds has decreased. A recent focus by regulators (and certain market participants) on deteriorating credit quality coupled with a slight reduction in overall liquidity will likely result in covenant quality improving.

4 European Borrowers Accessing the U.S. Loan Financing Markets

The number of European borrowers accessing the U.S. debt markets has grown. U.S. markets offer deeper liquidity and more favourable lending terms. In the past, European companies would only access the U.S. markets if they had a significant U.S. business. This approach has gradually changed. European companies are increasingly taking a dual track approach where they plan at the outset to syndicate in both the European and U.S. markets (but with the option to drop the U.S. dollar tranche if sufficient debt can be syndicated on satisfactory terms in Europe). The rising U.S. dollar may result in the cost differential between raising money in Europe and in the U.S. (potentially with some level of FX hedging) declining.

One result of the growing U.S. TLB market is that financing terms for loans syndicated in Europe have started to converge with U.S. financing terms. Investors buying into European TLBs are often familiar with the terms of high yield bonds as well as U.S. TLBs. TLBs to European borrowers, whether syndicated in the U.S. or Europe, do not always reflect all the customary borrower-friendly terms seen in the U.S., but further convergence is expected. USD TLBs are usually only borrowed by European borrowers for larger cap deals. They are more often than not cov-lite.

Certain areas where there may be some differences between a covenant package for a TLB for a U.S. borrower and a TLB or other cov-lite loan for a European borrower are referred to in section 7 below, but the area is developing and there are no hard and fast rules.

U.S. deals exclude certain specifically defined and negotiated assets from the definition of Collateral (i.e., equity interests that constitute voting stock of a foreign subsidiary that is a "controlled

foreign corporation" in excess of 65 per cent. of the voting stock of such Subsidiary and certain other UCC asset classes). There is no equivalent to these asset classes in the laws of European jurisdiction and the legal treatment of collateral varies widely between European jurisdictions. As a result, in Europe, it is more common to negotiate a set of security principles which sets out the types of security to be taken. In the U.S., sponsors often resist requirements for control agreements on the basis that these are often time-consuming to put in place. In Europe, the perfection steps for European collateral differ from those required in the U.S. and therefore, different arrangements are usually agreed.

5 Asian Borrowers Accessing the U.S. Loan Financing Markets

TLBs have not taken off to the same extent with Asian borrowers. The deal size, requirement for ratings and higher price tags often precludes a U.S. TLB financing. Recovery ratings may also be low as the legal framework is underdeveloped and there is little track record. Most financings in Asia are bank-led deals which feature less aggressive leverage, higher amortisation and maintenance-based covenants. Accordingly, the whole of the TLB may need to be syndicated in the U.S. This means that the business may need to have significant U.S. links or be owned by U.S. sponsors able to market the debt in the U.S. However, Asian funds have raised significant capital recently and the position may change.

Recent deals have included the USD $520 million TLB for KKR's buyout of Goodpack, the USD $1.805 billion TLB for Japan's Arysta LifeScience, the USD $1.5 billion financing raised for Carlyle's acquisition of Focus Media (which raised USD $500 million within six months for a dividend recap) and the USD $850 million financing of the sponsor-led acquisition of Chinese online gaming company, Giant Interactive. Chinese banks provided two-thirds of the Focus Media financing which incorporated a China holdco financing structure. Such structures present risks in terms of enforcement and upstreaming of cash offshore but are becoming increasingly accepted.

6 Oil/Gas Effect

A fall in global oil demand coupled with oversupply resulted in a steep drop in the price of oil from above USD $100 per barrel (Brent crude) in June 2014 to below USD $60 per barrel at year end, the lowest price since 2009. Consumer-purchasing power increased as gas prices fell and U.S. automakers and airline companies saw a dramatic rise in profits. Net energy importers (including China, which imports 60 per cent. of the 9.6 million barrels of oil it uses each day) also benefited from the lower energy prices.

Although some have benefited from falling oil prices, the exposure of the credit markets to the oil and gas sector is a cause for concern. Approximately 15 per cent. of the high yield debt issued in the U.S. last year was issued by companies in the energy sector. A sizeable share of lending activity in the mid-market has been to oil and gas companies. Over the past few years, energy companies, including companies in the shale business, have borrowed cheap debt, particularly in the U.S. leveraged loan markets, to finance exploration, new production and related services. This has resulted in a number of over-leveraged North American oil and gas producers, as well as small shale companies, which are expected to face financial difficulty if oil prices continue to decline. The drop in profit and turnover of companies in the energy sector also led to the postponement of several financings planned for the end of last year.

It is unclear for how long oil prices will remain low and the impact of geopolitical forces on the situation is largely unknown. Following the 1980s oil price decline, the market reacted by cutting supply and the oil market took years to recover. OPEC has recently announced that it currently does not intend to cut supply to shore up pricing. Watch this space in 2015 for insolvencies, work-outs and distressed dispositions.

7 Cov-lite Loans

Following the trend of 2013, a significant proportion of sponsor TLB loans issued in the U.S. markets were cov-lite, although enhanced regulatory scrutiny of covenant protection tempered this trend. U.S. cov-lite loan volume hit USD $336 billion in 2014, representing an 11 per cent. decrease year-on-year from 2013.

Cov-lite deals were big news in the European market in 2014. Thomson Reuters reported that there were 26 cov-lite deals in Europe in 2014 compared with 3 cov-lite deals in 2013. The largest cov-lite loan in Europe was the USD $2.85 billion loan to finance French telecom's operator Numericable's acquisition of SFR. Other large cov-lite loans in Europe included CEVA Sante Animale (USD $818 million), Siemens Audiology (EURO 785 million), Mauser (EURO 1.6 billion), Continental Foods (EURO 425 million) and Sebia (EURO 500 million). The cov-lite loan product is more common for loans over EURO 500 million. Cov-lite is still not popular in Asia, however.

A cov-lite loan typically does not benefit from financial maintenance covenants, although a revolving facility in the structure may benefit from a springing financial covenant (where a leverage ratio is only tested quarterly if the loan is drawn 25-35 per cent.). Generally, the borrower is permitted to use an equity cure to avoid a breach of such springing covenant. In addition, the financial covenants may now be set with a 25-35 per cent. cushion to the sponsor's model instead of 20-30 per cent. as seen in prior periods. If the covenant is tested on a net debt basis, then there may be a limit on the cash that may be netted.

Standard & Poor's has warned about the risks of the cov-lite product and it has come under scrutiny by U.S. regulators. In the leveraged loan market, only two Moody's-rated loan defaults were recorded in Q314, both outside of the U.S. The U.S. leveraged loan default rate ended Q3 at 0.9 per cent, down from 1.7 per cent in Q2 and 2.9 per cent in 2013. Standard & Poor's has pinpointed 2017 to 2019 as a potential stress point for the global leveraged financial market as hundreds of billions of loans are due to mature in this period.

Rating agency research indicates that recovery rates for cov-lite loans to U.S. borrowers are not significantly less than for loans with financial maintenance covenants. In Europe, there is no track record for cov-lite loans and there is some concern that cov-lite loans to European borrowers may be more risky than loans to U.S. borrowers as European bankruptcy processes do not typically protect enterprise value. A lack of financial maintenance covenants means that there is no early warning system to trigger a restructuring at a time when more options may be open to preserve value outside a formal insolvency process.

It will be interesting to see whether financial maintenance covenants will make a comeback in restructured oil/gas leveraged loans and in light of or as a result of the crackdown by regulators. On the other hand, due to the heightened scrutiny by regulators, the future months may see intense competition between banks over non-criticised, lower levered deals (giving relevant borrowers more leverage in negotiating loan terms).

The structural integrity of covenant packages has further deteriorated in 2014, particularly in relation to the further widening of ratios for incurrence of debt and restricted payments (dividends and distributions and repayment of junior debt). Moody's measures high yield bond covenant quality on a five-point scale, with 1.0 denoting the strongest investor protections and 5.0 the weakest. Moody's Covenant Quality Index, a three-month rolling average measured across all major U.S. corporate sectors, hit a record low of 4.23 in November 2014 and since has shown no appreciable improvement. Covenant quality may improve as the U.S. Federal Reserve winds down its asset purchase programme and eventually raises interest rates.

U.S. large cap and mid cap leveraged loan terms usually permit the borrower to change its capital structure by incurring incremental debt, refinancing (with some exceptions from the soft call premium), carrying out asset sales and retaining the cash and carrying out acquisitions. Incurrence-based flexibility to incur debt outside the credit facilities (e.g., including equivalent incremental debt that shares in the collateral) and the ability to pay uncapped dividends subject to satisfying a ratio test has been a feature of certain 2014 U.S. top-tier leveraged financings.

European deals are beginning to adopt loan covenants similar to those in the U.S. markets, particularly where the loans are cov-lite or include a tranche to be sold into the U.S. While covenant packages vary significantly from deal to deal, there is a trend towards increased convergence in both the U.S. TLB loan market and high yield bond market.

U.S. cov-lite leveraged loans and European leveraged loans traditionally permitted borrowers to borrow incremental debt that fell within a fixed dollar limit. More recently, U.S. borrowers may be permitted to incur debt up to the greater of a "freebie basket" and an uncapped amount subject to compliance with a *pro forma* leverage test (the ratio debt test). There is some restriction on the flexibility in that the incurrence of senior secured debt may only be permitted if a secured debt to EBITDA ratio is satisfied.

Borrowers may be permitted to re-classify debt previously incurred between the basket and the ratio test to free up capped baskets even though the borrower did not have the EBITDA to support borrowing within the ratio test when the debt was incurred. The freebie basket is usually a fixed dollar cap or the greater of the cap and a percentage of total assets or EBITDA, and may be increased if the credit facilities are prepaid or there is a debt buyback. The freebie basket may permit the borrower to incur debt and exceed its opening leverage whatever its financial situation. Borrowers may be required to use the freebie basket before the ratio debt test to try to restrict the leverage increase and the freebie basket is also sometimes subject to flex rights to remove or modify.

The debt incurrence covenant is in some respects similar to the debt incurrence test applicable to high yield bonds which incorporates a fixed charge coverage ratio debt test set at 2.0x and permits utilisation of a small basket on top of this ratio. The incurrence of debt in subsidiaries designated as "unrestricted subsidiaries" (and therefore not subject to ring fencing covenants) is not restricted. European borrowers of larger cov-lite loans syndicated in Europe or the U.S. have been given similar flexibility to incur debt although the freebie basket is not always seen and there is often no concept of unrestricted subsidiaries.

Borrowers may now be able to incur debt under "sidecar facilities" that permit the borrower to issue *pari passu* notes secured by the same collateral as for the credit facilities or to borrow subordinated unsecured debt or possibly secured debt outside of the credit agreement. This flexibility is creeping into the European market. The incurrence of further *pari passu* secured debt raises credit issues in U.S. loans where the lenders of the original loan may no longer be able to control senior secured debt in a restructuring. In Europe, there may be additional risks as a result of the less favourable bankruptcy laws and the issues posed by legal limitations on up and cross-stream credit support by companies in some European jurisdictions where the new debt is structurally senior.

In the U.S. and Europe, most-favoured nation (MFN) provisions usually apply, which means that if incremental debt is borrowed above the yield for the original leveraged loan by an agreed amount, then the original loan's margin may be increased to an amount that is the agreed amount lower than the yield on the new debt. A sunset provision may apply providing that the MFN will only apply until a specified date (usually 6-12 months) after the closing date, although underwriters may have a flex right to remove this sunset provision. Larger cap European deals typically incorporate an MFN but the treatment of the sunset may vary.

U.S. cov-lite leveraged loans often have an "Available Amount" or "builder basket" based on either a percentage of consolidated net income or retained excess cashflow plus certain new equity contributions and returns on capital and possibly declined proceeds from ECF mandatory prepayments or a percentage of total assets. The builder basket can be used to pay dividends, make investments and repay subordinated debt. The underwriters may have a flex right to reduce the relevant percentage. This basket works in a similar way to the restricted payments test in high yield bond covenants. Typically, high yield bonds also require the borrower to be able to satisfy the debt incurrence ratio test in order to make a payment and for there to be no event of default. Compliance with a ratio test and absence of a default are usually conditions to use of the builder basket for the payment of dividends but may not apply to use of the builder basket for the making of investments or prepayment of subordinated secured debt. The use of builder baskets in European deals is still somewhat variable.

In both U.S. and European deals, add backs to EBITDA are usually permitted for non-recurring charges, run-rates cost savings and synergies, particularly as the sponsor model will often incorporate such adjustments. Sponsors may also seek to add back start-up losses for new facilities. In Europe, borrowers may be permitted to add back cost savings and synergies to EBITDA which can be realised within 12 months and which are often capped at a proportion of EBITDA (up to 10 per cent.) and the amount may be subject to certification or verification. In most European deals, equity cures must be treated as applied against debt for the purposes of the leverage or cashflow cover tests but EBITDA cures commonly seen in the U.S. are making their way into cov-lite loans.

U.S. cov-lite deals have typically included soft call protection requiring a 1 per cent. premium to be paid on a voluntary prepayment using cheaper debt or by the same lenders at a cheaper price. Second lien debt may be subject to hard call protection applying also to mandatory prepayment. The soft call protection may not always apply if the borrower is required to refinance its existing debt to complete a significant acquisition or other transformative event occurs. Soft call protection on European TLBs is now becoming standard but the exceptions to the requirement may vary.

Whereas U.S. cov-lite loans may permit asset disposals provided that 75 per cent. of the proceeds are received in cash or cash equivalents and the proceeds are reinvested or used to prepay debt (including *pari passu* debt), European cov-lite loans have tended to use the more traditional formulation that requires all disposal proceeds to be used to prepay loans subject to certain agreed exceptions, including for reinvestment.

U.S. cov-lite loans will typically not cap the acquisitions that a borrower can make, other than with respect to companies that

do not become guarantors or have assets that are unsecured, and subject, occasionally, to certain leveraged parameters. In European deals, acquisition caps remain common but may be limited to a fixed amount or a ratio test (sometimes by reference to total assets). A guarantor coverage test is fairly standard in European deals which requires guarantors to have together 75-85 per cent. of total assets and total EBITDA. The laws of some European jurisdictions make the grant of guarantees and collateral by targets challenging, so the guarantor coverage test adds protection against significant dilution of collateral protection on an acquisition and is often backed by restrictions on value transfers from guarantors to non-guarantors. However, borrowers often request the ability to make acquisitions and not comply with the guarantor coverage test if the grant of guarantees or collateral would be in breach of applicable local law requirements and therefore they do not need to structure the acquisition in a way that would maintain the guarantor coverage.

U.S. cov-lite deals may incorporate events of default that incorporate certain concerns from the equivalent provisions in high yield bonds including aspects of bond-style insolvency events of default. In Europe, the convergence has been more limited even in cov-lite loans. It is an event of default under most European leveraged loans if the borrower defaults on other debt over a threshold, whether or not the debt is accelerated. Sponsors are now requesting that this be limited to situations where there is payment default or acceleration under the other debt in cov-lite loans, but this remains a negotiated point. In addition, insolvency events of default tend to be tailored for the jurisdictions involved, often requiring much shorter grace periods as creditors may be required by local laws to act quicker or potentially lose their rights.

8 Investment Grade Loans

The investment grade loan market remained strong in 2014. Pricing remained fairly stable across the sector allowing for an orderly flow of renewals and extensions. In addition, the sector had a significant boost due to M&A activity in the pharmaceutical industry.

Provisions related to anti-corruption laws and sanctions became more consistent in 2014. Most investment grade credit facilities entered into (or renewed) in 2014 include representations as to compliance with anti-corruption laws and sanctions (typically including a representation that the borrower maintains internal policies and procedures to promote such compliance), a representation that the borrower is not itself the subject of sanctions and a negative covenant prohibiting the use of proceeds of the credit facility in violation of anti-corruption laws and sanctions.

Turmoil in the Europe money markets edged the screen rate for the euro to dip into the negative, prompting many lenders to insist on including a zero per cent. floor, particularly in multicurrency facilities.

A typical component of the change of control event of default in the U.S. loan market is a turnover of a majority of the board of directors over a specified period of time. Delaware courts have addressed that provision, suggesting that such a provision is an impediment to the shareholder franchise and should be resisted by public companies incorporated in Delaware. As a result, some borrowers negotiate very hard to have that component of the change of control definition removed. Lenders have generally resisted the request, and have in some cases resorted to providing a letter to the borrower verifying the strenuous negotiations.

9 Sanctions

The end of the financial crisis saw a resurgence in sanctions and a crackdown on corrupt activities. The Foreign Corrupt Practices Act (FCPA), enacted to ensure worldwide accounting transparency and curb bribery of foreign officials, gained momentum, seeing a renewed enforcement and imposition of sanctions on policy defectors. Banks and corporates alike have become more attuned to maintaining accurate books and records and establishing systems of accountability. The U.S. Treasury Department's Office of Foreign Assets Control (OFAC) was designed to enforce U.S. economic and trade sanctions. Mid-last year, in a joint effort with the European Union, OFAC issued new sanctions targeting Russian banks and energy companies due to the ongoing Crimea conflict. Shortly thereafter, the U.S. government lifted many of its economic and travel restrictions on Cuba, some of which date back to the Cold War. In a renewed effort to create a unified global watchdog, in January 2015, OFAC released its sanctions list in a new, advanced format, as part of an effort to create a "universal sanctions list" that enhances sanctions compliance and can be used by governments worldwide.

Lenders now often insist on the inclusion in leveraged loan documentation of representations and covenants relating to compliance with sanction laws and anti-money laundering and anti-bribery legislation, including OFAC and FCPA. Where compliance is a requirement to the drawdown of a loan to fund an acquisition, the underlying acquisition agreement often includes corresponding provisions so as to protect the borrower, should compliance not be met and financing not be advanced.

Sanctions and political instability has led to a drop in leveraged lending to the CEE, according to Thomson Reuters. Similarly, leveraged loans to Russian borrowers dropped significantly in 2014, due in part to the Russian sanctions which make lending by U.S. and UK banks to Russian borrowers more challenging.

10 Dividend Recapitalisations

Dividend recapitalisations remained in vogue in 2014. Despite the tapering of the Fed's asset purchase programme and the large bond outflows (which have reduced liquidity in the market), dividend recapitalisation deals continued to find the room for leverage. Return of capital through dividends, in *lieu* of full exits, has remained attractive to asset owners where exits are not optimal and the cost of debt remains relatively modest on a WACC basis. For those sponsors that have pushed the envelope on leverage and fixed charge coverage ratios, dividend recap deals have, occasionally, led to ratings downgrades, increased negative scrutiny by investors and a scepticism when the credit returns to market for refinancing. This was particularly the case for credits where the equity investors had already received a complete cash return of equity.

In Europe, the popularity of dividend recaps through the issuance of PIK instruments diminished last year, not least because of the recent Phones 4U collapse. Phones 4U issued PIK securities to finance a dividend to its sponsors, which ended up making a reported 30 per cent. return on their equity and subsequently wrote down the equity by over 80 per cent. Phones 4U went into administration just over a year after the PIK issuance, leaving senior secured creditors with an estimated recovery in the region of 11 to 29 per cent., and the PIK noteholders with no prospects of a recovery. The collapse of the business occurred primarily as a result of the company losing its remaining three key network contracts within the 12-month period. It is a matter for debate as to whether the company would have been able to offer terms enabling it to renew any of its key contracts had it not used its surplus cash to pay a dividend and re-levered.

11 Return of Upward Flex

During April 2014, deals were flexed in favour of investors nearly twice as often as they were in favour of issuers. This is a major

reversal from most of the past 18 months, whereby seemingly endless cash inflows and increasing investor appetite for yield put leveraged loan issuers firmly in the driver's seat. In mid-2014, 17 per cent. of leveraged loans brought to the U.S. market were flexed upward (in the investors' favour) while 9 per cent. were flexed downward (favouring issuers). The remainder went through syndication unchanged. This is the highest percentage of investor-friendly flexes since June 2013.

European leveraged deals last year also saw a greater usage of flex in favour of investors, particularly in the choppy markets towards the end of 2014. Publicity suggests that: the pricing for the EURO 483 million facilities for the acquisition of Corialis was flexed and documentation changes introduced; pricing was flexed on Amdipharm as well as Mercury's STG's 985 million financing; and both structure and covenant flex were introduced in Styrolution's EURO 1.25 billion-equivalent financing.

12 Unitranche Facilities

Unitranche facilities, which have been coined the 'it' product of the credit crisis, gained momentum in 2014, both in the European and U.S. mid-market. Unitranche facilities, which combine the senior and junior tranches into one unified layer of debt under a single credit facility, remained popular among ACPs not subject to the same regulatory constraints as regulated banks. The unitranche loan is divided into first out and last out tranches with lenders entering into an agreement among lenders (AAL). Engineered and repeat relationships between certain senior and junior providers of capital have been a continued noteworthy trend in 2014.

13 Syndicate Control

Given the diversity of possible investors, 2014 saw borrowers seeking greater control over the identity of their syndicate lenders through restricting transfers without borrower consent to clearly defined white-listed entities (in Europe) and prohibiting transfers to black-listed entities (in the U.S.), as well as seeking enhanced consent rights. A white list is a common approach in Europe where the universe of acceptable lenders may be smaller.

Borrowers may have a limited right in certain circumstances to update the list of disqualified lenders after closing. It is not unusual for investment-grade borrowers to be able to add competitors post-closing. Blacklisting reduces the number of potential buyers, which in turn makes loans more difficult to trade, and can exclude those investors who are better able to fight for creditor rights on a restructuring. Data gathered by Xtract Research shows that 77 per cent. of all U.S. loan deals in Q314 included provisions giving borrowers the ability to block individual lenders, up from 51 per cent. at the end of 2013. Most lists are kept privately by the administrative agents and those banks that arrange the deals. Some investors only find out that they have been barred when they try to complete a trade and are turned away by broker-dealers. Others never know.

14 ABL Deals

In 2014, ABL deal flow improved dramatically, with a renewed focus on the middle market. ABL facilities allow borrowers to obtain higher leverage at a lower cost compared to cash-flow-based term debt, while also providing certainty of execution and a flexible covenant package. Just shy of USD $90 billion, ABL issuance in 2014 marked the second highest annual total on record since the financial crisis (following the USD $101 billion logged in 2011). Over 32 per cent. of total 2014 ABL lending represented new loan assets.

In contrast, syndicated ABL tranches, as part of cross-border leveraged financing deals, were rare in Europe and Asia last year, due primarily to the rather complex structuring considerations related thereto (e.g., these deals often involve a sale of receivables to an SPV to ensure satisfactory recoveries on a bankruptcy under the less creditor-friendly bankruptcy laws in certain European and Asian jurisdictions). These structures remain generally more expensive and time-consuming to implement than their counterpart U.S. ABL structures. Conversely, U.S. ABL structures, which often involve lending to opcos with monitored, strictly defined borrowing bases and cash dominion mechanisms, demonstrated on average a 97 per cent. recovery rate upon bankruptcy in 2014, according to a 2014 Fitch Ratings report.

15 Regulatory and Political Overhang

Globally, the strong flow in the leveraged finance pipeline and the strong uptick of new money deals in 2014 occurred in an uncertain regulatory environment. Entities regulated under the U.S. banking system suffered the most, with their structuring of credit constricted by regulatory guidance. Pressure was also felt by PE sponsors and leveraged corporates. Non-bank lenders gained traction as providers of liquidity for higher levered credits.

October 2014 saw the release of the long-awaited risk retention rules – controversial rules that prohibit banks from engaging in proprietary trading and from holding certain investments, a measure aimed at curbing the kind of risky behaviour that helped fuel the financial crisis. This rule has faced countless criticisms. In January 2015, in spite of a veto threat by President Obama, a bill was passed in the U.S. House of Representatives attempting to delay the implementation of the Volcker Rule until 2019 (the provision is scheduled to take effect in 2017), in a move that seemed as politically driven as it was economically steered. At the time of publication of this article, this bill had not yet passed through the hands of the Senate or the U.S. President. Banks do not only have the Volcker Rule to contend with, but also the Basel III requirements. This calls for banks around the world to meet several tough new capital requirements, designed to increase bank liquidity and decrease bank leverage. In December of last year, the Fed went a step further, proposing that the 8 biggest U.S. banks (whose failure could threaten financial markets) comply with even more stringent capital requirements, including holding an extra capital cushion.

Basel III requires banks to more than triple their holding of tier one capital to at least 7 per cent. of risk weighted assets to meet new liquidity standards and capital ratios. The Vickers and Likanen reports issued in the UK propose ring fencing of certain lending activities which is likely to further constrain lending in Europe.

The Leveraged Lending Guidance (issued in March 2013 by the Fed, FDIC and the OCC) has posed some of the biggest challenges for transactional bankers and CLO managers. The agencies issued FAQs to clarify some aspects of the Guidance in November 2014. U.S. regulators are carefully scrutinising 'criticised' loans, being loans where a borrower cannot amortise or repay all senior debt from free cash flow, or half of its total debt, in the first 5 to 7 years. U.S. regulators noted that the number of criticised loans had grown. Three quarters of criticised loans were leveraged loans last year although leveraged lending only represented a fifth of all lending in the U.S. In the FAQs, regulators also clarified that if a bank wanted to extend fresh credit to a borrower whose borrowing had previously been a criticised loan, then the financing would need to meet the

same standards as a new loan using additional measures over and above cutting of interest rate margins or extending of maturities.

U.S. regulators also noted that in the 15 months from June 2013, 15 per cent. of loan transactions had a total debt to EBITDA ratio of 8.1x. Leverage ratios for the financing of large corporate LBOs averaged 6.6x last year, according to Thomson Reuters data. Last year saw a heightened scrutiny on highly leveraged loans having a leverage ratio of above 6x. In response to a widespread outcry by banks and PE sponsors alike, U.S. regulators have been quick to point out that this clampdown does not amount to a 'bright line' test. It is yet to be seen whether this statement is mere rhetoric.

In Q4, some regulated lenders, in response to this renewed scrutiny, scaled back on underwriting loans with a leverage ratio exceeding 6x or with limited amortisation, while other less risk-averse banks continued to underwrite highly levered loans (the EURO 3 billion loan package for the acquisition of Combibloc was underwritten at the end of 2014 at a leverage ratio of 6.5x). The FAQs clarified that the Guidance applies both to relevantly regulated U.S. organisations (irrespective of where the loan is booked) as well as applicable foreign institutions having a U.S. charter and originating and distributing loans in the U.S. Many large European leveraged financings are impacted by the approach of the U.S. regulators, as such financings often rely on underwriting by regulated U.S. banks or involve a distribution of debt into the U.S.

Whilst domestic U.S. growth has a bullish outlook, we expect U.S. regulators to continue to enforce the Guidance with vigour. In addition, the Bank of England has recently stated that it too will commence a review of the risks of the leveraged loan market in the UK. The Bank of England does not possess the same regulatory clout as the U.S. regulators but they would be able to take various measures to decrease leveraged finance risk, such as introducing a requirement for banks to hold more capital or linking compliance with stress tests. It is possible that other European national regulators may in the near future consider monitoring leveraged loans more closely, given the interconnectedness of global financial markets.

It will be interesting to see how regulation will shape loan terms and deal structures. It is likely that there will be a reduction in leveraged loans with a leverage of over 6x. We may see intensified lender resistance to a borrower being able to increase leverage under the debt incurrence covenant, particularly where opening leverage is close to 6x. Similarly, the ability of a borrower to make payments to shareholders and participate in dividend recaps may be more restricted in 2015. Given the focus in the Guidance on amortisation, borrowers may also find it difficult to negotiate carve-outs from ECF prepayments (for example, prepayments of junior debt, non-*pro rata* loan buybacks or the use of ECF for certain investments and expenditures). While still a prominent feature of U.S. leveraged financings, the excess cash flow sweep is often absent altogether in larger European leveraged loans, so it will be interesting to see if it makes a comeback in this enhanced regulatory environment.

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Shearman & Sterling's Leveraged Finance Group is a leader in the high yield and leveraged bank market. Noted for their in-depth understanding of the business and legal considerations involved in leveraged credits, their lawyers offer a combination of market experience and a broad range of capabilities in the capital markets and the syndicated lending marketplace. They represent commercial banks, investment banks, mezzanine and second-lien providers, private equity sponsors and corporate borrowers. The team includes lawyers from the global Capital Markets and global Finance teams based in New York, London, Paris, Frankfurt, Milan, Singapore, Hong Kong and Abu Dhabi, working in close collaboration with members of the Bankruptcy & Reorganization and Project Development & Finance teams when needed. Shearman & Sterling's Leveraged Finance team delivers sophisticated, market-recognised advice and deal management for acquisition and other leveraged financings across a wide range of industries, financial sectors and jurisdictions.

Developments in Intercreditor Dynamics

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Introduction

Over the past 10 to 15 years, lien subordination and tiering has moved from the periphery of the finance markets to the very heart of U.S.-based leveraged finance. Whereas the predominant means of distinguishing creditor priorities historically was "secured *vs*. unsecured" or "senior *vs*. subordinated", companies considering a leveraged financing can now choose from a variety of intermediate and hybrid forms, seeking to match investor demand with the credit profile, asset base and other characteristics of the borrower/ issuer. While different forms of lien subordination are routinely discussed in short-hand form, as though each product would produce a predictable result, the truth has proved to be somewhat more complex. As the mix of collateral type and scope has met the interplay of general creditors' rights with imperfectly understood or tested contract provisions in a contested court proceeding – sometimes in unexpected jurisdictions – market participants have come to better understand the limitations and uncertain advantages of different structures and protections. In addition, as the complexity of cross-border financings continues to increase, new issues will arise as others are settled. And, as is often the case where a lesson learned on one set of facts does not apply squarely to another, the agreed means of resolving one issue can often create a new one.

In this article we discuss recent developments in intercreditor rights, including recent U.S. bankruptcy court decisions as they relate to and potentially impact disputes among groups of secured creditors and related proposals by the American Bankruptcy Institute. We consider possible documentary responses to some of these court decisions and responses from the market. We also look at the increasing number of European acquisitions that are being financed with debt raised in the U.S. market under New York law governed finance documentation, discuss current issues in transatlantic intercreditor practice and seek to identify some of the ways in which the efforts to reconcile these emerging issues have themselves further affected the market for tiered collateral financings. Just as market observers in the U.S. have noted for years the convergence of practice and participants in the leveraged loan and high yield debt markets, they are now watching for convergence between the UK and U.S. leveraged finance markets.

Background: The U.S. Bankruptcy Code and Structural Proliferation

Section 510(a) of the U.S. Bankruptcy Code (the "Bankruptcy Code") provides that subordination agreements are enforceable in a U.S. Chapter 11 bankruptcy proceeding to the same extent they would be under non-bankruptcy, state law. As markets have become more comfortable with borrowers incurring higher leverage and credit standards of lenders have become more relaxed, the reliance on tiering of creditor positions in collateral – lien subordination – has increased. One obvious manifestation of this trend is the increased ability of borrowers to incur junior lien debt as part of an initial capital structure, and then to incur additional first lien, second lien or more junior lien debt post-closing, often based on serial incremental secured leverage ratio tests. This is also the case in many "crossing-lien" asset-based deals, where a foundational structure often includes a revolving credit facility secured by a first lien on accounts receivable, inventory, and other "ABL priority collateral" – and a second lien on substantially all other assets of the borrower (the "term priority collateral") – with availability under such facility based on a "borrowing base" calculated by reference to the value of the ABL priority collateral. Term loan lenders are, in turn, secured on a first lien basis by the term priority collateral and have a second lien on the ABL priority collateral.[i]

Typical Features of a U.S. Intercreditor Agreement

Although there are a vast number of subtle differences in wording in U.S. intercreditor agreements, the essence of a collateral intercreditor agreement in a large, leveraged financing may be boiled down thus: the senior lien secured parties' lien in specified "common collateral" is senior to the lien of the junior lien secured parties in such collateral. Typical intercreditor agreements also provide that the senior lien secured parties exclusively control remedies with respect to common collateral (sometimes, subject to a right of the junior lien holders to assume control if the senior lien parties have failed to take action after a specified "standstill" period). Intercreditor agreements further require that, regardless of the party exercising remedies, proceeds of common collateral are to be distributed first to the senior lien holders until the senior lien obligations are paid in full. In a crossing-lien structure, the agreement will typically dictate the application of proceeds of mixed ABL and term priority collateral – if, say, a division or subsidiary is sold in foreclosure or through a "Section 363" sale in bankruptcy – and the ability of ABL lenders to use term priority collateral (e.g., the use of intellectual property or real estate to sell inventory). Finally, such agreements set forth parameters on the junior lien creditors' conduct – rights they may and may not exercise – in any bankruptcy proceeding, including, most importantly: (i) the ability of junior lien creditors to propose a debtor-in-possession ("DIP") financing or object to a DIP financing proposed or supported by the senior lien creditors; (ii) the rights of junior lien creditors to request "adequate protection" (*i.e.*,

cash or other additional collateral granted to a secured creditor to protect it from the diminution in value of its collateral that is being used by the debtor) or contest the senior lien creditors' right to do so; and (iii) the ability of junior lien creditors to vote for or against a plan of reorganisation that is supported by the senior lien creditors.

Because the market-standard collateral intercreditor agreement in the U.S. purports to govern only the relative rights of secured creditors, one often-noted anomaly is that holders of unsecured debt – intended to be junior in the capital structure to junior lien holders – are not party and are not bound. As a result, unsecured creditors are not subject to any of the restrictions described above, and, instead, have the unfettered ability to exercise rights afforded them under the Bankruptcy Code. To address this incongruence, many junior lien creditors have negotiated (i) to retain all rights they would have as unsecured creditors – so long as such rights are not exercised in a manner inconsistent with the other terms of the intercreditor arrangement, (ii) to limit the "waterfall", "turnover" obligation of junior lien creditors and certain other limitations to proceeds of or with respect to common collateral, and (iii) to narrow the prohibition on junior lien creditors challenging the "liens" of senior lien creditors; rather than a broader restriction on challenging their claims. While, on its face, each of these negotiated provisions is consistent with the concept of lien subordination (*vs*. payment subordination), from the perspective of senior lien creditors, these exceptions may well swallow the rule.

Recent U.S. Bankruptcy Court Decisions Concerning Creditors' Rights

Certain of the tensions latent in the scope of common collateral and the overlap of a secured creditor's rights as an unsecured creditor came to the fore in the recent *Momentive* decision[ii] In *Momentive*, holders of first lien notes and "1.5 lien notes"[iii] rejected a plan of reorganisation that would not have paid them a make-whole premium that they asserted was due under the terms of their debt, which plan was supported by holders of second lien debt. The debtors then proceeded with an alternate plan – which was confirmed by the court – that distributed to the first and 1.5 lien creditors (collectively, the "senior lien creditors") replacement "take-back" debt at a below-market interest rate with the second lien creditors receiving substantially all of the equity of the reorganised company. This plan was put in place without the support of the senior lien creditors, in effect "cramming" those creditors with instruments found by the court to constitute fair market satisfaction of their claims.

The risk that a senior lien creditor may be forced to accept take-back debt, and be deemed to have been paid in full by the bankruptcy court, creates a very significant issue for a secured creditor, as it allows a debtor to exit bankruptcy without paying secured creditors in full in cash prior to distributing value to other creditors. From the perspective of intercreditor arrangements, however, perhaps more important was the dispute between the Momentive senior lien creditors, on the one hand, and the second lien creditors, on the other, that followed.[iv] After confirmation of the plan described above, the senior lien creditors sought to recover distributions made to the second-lien noteholders pursuant to the terms of the intercreditor agreement which prohibited second lien noteholders from receiving any recovery from common collateral until the senior lien creditors were "paid in full in cash" and from taking certain actions in opposition to the senior lien creditors. The court dismissed the senior lien creditors' claims, holding that (1) the equity interests of the reorganised company distributed to second lien noteholders did not constitute "'proceeds' of common collateral", and (2) the second lien noteholders' intervention in the make-whole dispute and supporting the debtors' "cramdown" plan did not violate the intercreditor agreement because the second lien noteholders were acting in their capacity as unsecured creditors; simply disputing the amount of the senior lien creditors' claims, not their entitlement to collateral.

Another example of a dispute over scope of collateral arose in *ResCap*,[v] in which a class of junior secured noteholders argued that they were oversecured and, thus, entitled to post-petition interest and fees.[vi] The *ResCap* court held, in relevant part, that intangible assets and goodwill generated in the sale of assets during the bankruptcy proceeding were not identifiable proceeds of collateral and were not subject to the liens of the junior noteholders. The basis for this holding was that the Bankruptcy Code limits secured creditors' interest in property of the estate acquired after the commencement of the bankruptcy proceeding to "proceeds, products, offspring or profits" of pre-petition collateral arising after the petition date. The *ResCap* court found that in order to be entitled to the value of post-petition goodwill, the junior noteholders were required to show that the goodwill was exclusively the product of their pre-petition collateral, and that they failed to meet that burden.

For senior secured creditors in multiple-lien capital structures, the exclusion of post-petition sale proceeds and goodwill from their collateral has a double effect. It simultaneously expands the pool of assets available to unsecured creditors – increasing their recovery at the expense of secured creditors – and reduces the scope of "collateral" subject to the limitations of the intercreditor arrangement, permitting junior lien creditors to claim *pari passu* treatment, exercise remedies and challenge the senior secured creditors' positions with respect to such assets.

The ABI Commission Report

In 2011, the American Bankruptcy Institute organised a Commission to Study the Reform of Chapter 11 of the U.S. Bankruptcy Code (the Chapter under which a typical corporate insolvency takes place) in light of the considerable changes in financial markets, capital structures and participants since the last revision of the Bankruptcy Code in 1978. The report, which addresses certain of the topics raised by the *Momentive* and *ResCap* decisions, is likely to be considered by Congress and may result in changes to the Bankruptcy Code. However, whether or not the Commission's recommendations are ultimately adopted into law, the report will heavily influence the thinking of practitioners, judges, lenders and investors in Chapter 11 cases going forward.

In response to the *Momentive* decision, the report proposes that any take-back paper issued to a crammed-down class of creditors bear interest at a market rate. In addition, the report suggests imposing limitations on the ability of junior lien creditors to entirely waive their plan voting rights in Chapter 11 cases, but, importantly, does not propose to nullify specific limitations to voting rights, including the prohibition on voting for a plan opposed by the senior lien creditors. As such, under the ABI proposal, the senior lien creditors in *Momentive* would have been able to prevent the second lien creditors' intervention in their make-whole dispute with the debtor had the intercreditor agreement expressly prohibited second lien creditors from supporting any plan opposed by senior lien creditors.

In response to *ResCap*, the ABI report also sought to address senior secured creditors' rights to the value that accrues to collateral after commencement of the Chapter 11 process. The report focused on the ability of secured creditors to benefit from the preservation of a debtor's going concern value because of the protections Chapter 11 affords. From this perspective, the ABI report proposes that adequate protection should be determined based on the foreclosure

value of the collateral, measured by the net value that secured creditors would realise in a hypothetical, commercially reasonable foreclosure sale. Also, since the foreclosure value is the value that the ABI considers to require "adequate protection", the protection itself should also be calculated based on the foreclosure value. The report suggests that if the reorganisation value is sufficiently higher than the foreclosure value, this differential alone might constitute sufficient adequate protection. However, the report provides that when reorganisation value is realised in a Section 363 sale or a plan of reorganisation, the secured creditor should be entitled to that full going concern value.

Possible Intercreditor Drafting Responses

Momentive is an example of the attention that must be paid to the drafting of specific provisions in intercreditor agreements. Had the intercreditor agreement barred junior lien holders from supporting a plan of reorganisation opposed by the senior lien holders, the restriction might have been enforceable. This would likely be true even if the ABI report's recommendations were implemented. Similarly, the *Momentive* intercreditor agreement could have been drafted to require the second lien creditors to turn over all distributions received (instead of only proceeds of collateral), including of the equity interest of the reorganised business until the senior lien creditors were paid in full – of course, this could be said to reflect a fundamental business change in the nature of lien priority. Another possibility would be to clarify that sale of assets that derived their value from collateral (which, for example, could be stipulated to include the equity of the reorganised business) should be included in the determination of priority payment.

Another clarification – to attempt to deal with the cram-down of the Momentive senior lien creditors – would be provisions clarifying that payment of the senior lien creditors with below-market take-back paper or other non-cash assets do not result in the senior creditors being "paid in full as a matter of law". Of course, whether or not a bankruptcy judge would determine that the court was bound by such a provision is not clear. Even so, this sort of additional provision could provide the senior lien creditor a better position in seeking to enforce its creditor rights through an ordinary contract action in non-bankruptcy court.

As noted above, though it involved a dispute between secured and unsecured creditors, *ResCap* too has implications for intercreditor agreements, since it provides a second lien creditor with arguments to limit a first lien creditor's claims to asset value generated post-petition. Given the ABI report's suggested treatment of the foreclosure value and the reorganisation value of the collateral, first lien creditors may begin to include specific language in intercreditor agreements that the "common collateral", subject to the waterfall, turnover and limitations on remedies provisions of such agreements, includes the reorganisation value of the debtor.

Many of these provisions are easier for a lawyer representing a senior lien creditor to write than they are to implement a financing transaction. For example, limiting junior lien creditors from supporting a plan opposed by senior lien creditors and requiring junior lien creditors to "turn over" all distributions until the senior lien creditors are paid in full (whether or not such distributions are proceeds of collateral), will be strongly resisted by the junior lien creditors as it puts those secured creditors at a disadvantage to unsecured creditors. As noted above, a broad "turn-over" requirement may amount to payment subordination resulting in more limited – or even no – recovery for second lien creditors.

More generally, secured creditors have long understood and assimilated the rights of unsecured creditors into their credit analysis and pricing of any secured financing. In contrast, as highlighted by the recent decisions discussed above, the market has not yet settled on an appropriate balance for the rights of senior and junior secured creditors. This may be due, in part, to the implicit tension of whether the junior lien creditors are holding a claim that is purely derivative of and secondary to the senior lien creditors, silently accepting whatever remains after senior lien creditors are paid in full. Or, whether junior lien debt is an independent tranche, distinct from both senior secured and unsecured obligations, with both a (residual) entitlement to proceeds of collateral as well as a (limited) right to act independently of, and in opposition to, the senior lien creditors in protection of their interests in collateral.

Junior lien creditors have, in practice, been loath to give up rights they would have had were they unsecured. And the trend in intercreditor dynamics has, perhaps accordingly, been toward incremental expansion of junior lien holders' rights. Whether this expansion was evident to senior lien holders prior to the *Momentive* decision, or whether they now begin to insist on senior-lien friendly revisions to "market-standard" intercreditor terms, is not yet clear. More and clearer language expanding the scope of collateral to include post-petition goodwill and the equity interests in the reorganised debtor, to the extent the equity value reflects in part the value of "Collateral" indirectly disposed of, might have helped the senior lien creditor in each of the *Momentive* and *ResCap* cases, but the inherent contradictions in junior lien debt do not have easy drafting solutions. Given the extremely high demand in first lien term loan B markets for the past several years, the negotiation of intercreditor agreements has often been limited to second lien creditor's pushing for an expansion of their rights, with little or no focus from first lien holders. It appears likely – and we are beginning to see some evidence – that first lien holders are beginning to take a more active role in attempting to arrest, and in some cases reverse, that expansion.

As financing conditions evolve and, especially, as corporate restructurings and insolvencies increase from their historically low levels, the many variations of intercreditor agreement in the U.S. market will no doubt see further tests, and lead to further interesting twists in implementation and interpretation.

Transatlantic Intercreditor Arrangements; Recent Efforts to Reconcile European and U.S. Approaches

One of the key trends of the last few years is the increasing number of acquisitions of European businesses, with little or no presence in the U.S., that are financed with debt raised in the U.S. markets under New York law governed finance documentation. The significant differences in European and U.S. insolvency regimes and in laws relating to the creation and enforcement of collateral give rise to interesting points of comparison and contrast.

In Europe, senior secured creditors (for a number of reasons) prefer a controlled out-of-court restructuring or enforcement to a formal insolvency process. Traditionally this is achieved by structuring the transaction so that there is a single enforcement point at the top of the corporate group at which senior lenders can enforce their security interest in the shares of the top level corporate entity and sell the group as a whole free and clear of any material debt, guarantee or security claims in the disposed group prior to the occurrence of a formal insolvency process, with the proceeds of such sale being applied pursuant to a waterfall agreed among all significant providers of debt. If structured correctly (from the senior secured creditors' perspective), junior creditors should not have any "hold-out" value by virtue of surviving claims in the disposed

group. Maintenance by the senior secured creditors of control over the capital structure of the group, any claims into the group and the enforcement process itself is key to maximising the recoveries of senior secured creditors.

A detailed comparison of the differing intercreditor practices is beyond the scope of this article, but to achieve the objectives stated above, the European collateral intercreditor agreement has given the senior-most secured creditors a great deal of contractual rights against not only the junior secured creditors but significant unsecured creditors as well. A creditor accustomed to a U.S. collateral intercreditor agreement looking at a European agreement might be surprised to find that the first lien creditor has the benefit of full payment subordination, a more comprehensive standstill and payment block, and a right to have junior secured and most unsecured debt claims released upon an agreed form of "distressed disposal". A U.S. creditor will rely on the Bankruptcy Code for some of these outcomes (discharge and satisfaction of junior creditors upon confirmation of an approved plan, for example); and simply will not expect some others (e.g., full payment subordination even after application of collateral proceeds).

If *Momentive* and *ResCap* represented outcomes under U.S. intercreditor agreements that might have been surprising to senior secured creditors in the U.S., in the European market, practice has evolved in a way that anticipates and prevents such outcomes. Though the concepts of payment subordination and other abrogation of fundamental creditor rights are unattractive to U.S. second lien creditors as discussed above, they equate roughly to a position that European mezzanine or junior creditors have largely accepted. But with the emergence of the market for transatlantic deals, even the fairly settled European practice may be reopened for debate and modification. At present, practice varies significantly and is driven by a number of factors including (i) the likelihood of a U.S. bankruptcy filing in respect of the group (which is of course hard to quantify at the outset of a transaction since the jurisdiction of the borrower and "centre of gravity" of the group's total assets are relevant but not necessarily determinative), (ii) the perceived effect on syndication of the approach to intercreditor arrangements including for follow-on financings, not only for first and second lien financings but also for senior unsecured bonds, (iii) the increased influence of U.S.-based financial sponsors and their market expectations, and (iv) the borrower's appetite for complex cross-border intercreditor negotiations often in the context of a compressed timetable. Some deals therefore proceed without a nod to European considerations, whilst others adopt full European intercreditor provisions with barely a nod to the U.S.

The treatment of material unsecured debt is of course a key deciding factor in what rights junior lien creditors will insist upon. Unsecured creditors are not normally party to intercreditor arrangements in the U.S. or in Europe; but in Europe this is because a group's ability, pursuant to the terms of the relevant facilities agreements, to incur material unsecured debt is typically more limited than in the U.S. Where material unsecured debt is permitted, it would be challenging to convince second lien creditors to agree to payment subordination unless there is a requirement that material additional unsecured debt must either be (i) structurally subordinated through issuance at a holding company level (i.e. above the single point of enforcement), or (ii) subject to the intercreditor agreement and the agreement to accept, among other things, discharge upon a qualifying out-of-court enforcement. Of course borrowers and their financial sponsors have a stake in this debate and would be concerned about losing flexibility to incur unsecured debt and paying higher interest rates for second lien debt that is also subordinated in right of payment. Those factors will thus also drive the direction of resolution.

What is clear is that there is still significant variation in the detail of transatlantic intercreditor arrangements. Transatlantic financing deals that have broadly similar capital structures may have fundamentally different intercreditor arrangements, which may result in very different outcomes in an enforcement scenario for similarly situated creditors – just as in the U.S., subtle differences in the scope of the collateral or the turnover provisions may also lead to very different outcomes. While there is not yet agreement on the "right" approach to resolving these challenging intercreditor issues, movement toward a more consistent approach would advance the cause of predictability for the benefit of all stakeholders.

Endnotes

i. Another factor that may affect intercreditor dynamics in any bankruptcy proceeding is the increasingly broad exclusion of categories of assets from collateral in many large-cap, primarily equity sponsor transactions. These exclusions will have consequences not only for the relative positions of secured and unsecured creditors, but also for the interplay among secured creditors, if their relative rights are defined (as they frequently are) by reference solely to the collateral.

ii. *In re* MPM Silicones, LLC, No. 14-22503, 2014 WL 4436335 (Bankr. S.D.N.Y. 2014).

iii. "1.5 lien notes" is a colloquial term used to describe notes with second-priority liens where there are additional secured creditors with further subordinated liens.

iv. *In re* MPM Silicones, LLC, 518 B.R. 740 (Bankr. S.D.N.Y. 2014).

v. *In re* Residential Capital, LLC, 501 B.R. 549 (Bankr. S.D.N.Y. 2013).

vi. While the specific dispute in *ResCap* was between secured and unsecured creditors, the court's holding as to the scope of the collateral may have implications for similar disputes among lien holders.

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"Yankee Loans" – Structuring Considerations; "Lost in Translation" – Comparative Review and Recent Trends

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Introduction

2014 saw a year of record issuance for so-called "Yankee Loans", i.e. US dollar denominated term loans syndicated in the US Term Loan B market to institutional investors and provided to European and Asian borrower groups, based on New York law credit documentation. Yankee Loan issuance volume in 2014 increased to €37.6 billion, up from €30.8 billion in 2013, with at least 20 major deals completing during the year and it is noteworthy that approximately one third of all leveraged loan financings raised by European borrowers in 2014 were placed in the US market. Asian borrowers also continue to look to selectively tap the US market, with at least 9 deals done since the second half of 2012.

Historically, European and Asian borrower groups sourced most of their financing needs through local European and Asian leveraged finance markets and would only seek to raise financing in the US leveraged finance market to match US dollar denominated financing against US dollar revenue streams or in certain more limited circumstances where there was insufficient liquidity in local markets to finance larger transactions.

From around 2010 onwards through the first half of 2013, the depth and liquidity of the institutional investor base in the US Term Loan B market proved to be an attractive alternative source of financing for some European and Asian borrower groups and was a key source of financing liquidity during that period in light of conditions affecting local markets. More recently from the second half of 2013 onwards through the end of 2014, as markets have continued to recover, European and Asian borrower groups have looked to tap US markets on a more opportunistic basis in a search for better pricing and terms (after factoring in currency hedging costs) in leveraged finance transactions, whether new acquisition financings, recapitalisations or repricings.

Market views on the outlook for Yankee Loans in 2015 and beyond are varied but factors that will determine issuance volume in 2015 and beyond will include supply/demand metrics in both the US and European leveraged loan markets, whether US pricing rebounds to become more attractive again, relative to pricing terms available from lenders in Europe and Asia, and whether the institutional investor base in Europe continues to increase in depth and liquidity.

When looking at "Yankee Loan" deals, it is important to remember that there are a number of key structuring issues (driven primarily by location of the borrower(s) and guarantors), that need to be considered carefully, which may not apply in domestic US or in local European or Asian transactions.

It is also important to remember that (1) a number of features that would be considered typical for deals in the US leveraged loan market may not be appropriate to include in a "Yankee Loan" deal, because of the different outcomes in an insolvency or restructuring context depending on location of the borrower group, and (2) there are a number of features that would be considered typical for deals in the European or Asian leveraged loan markets that are not customary, or are treated in different ways, in New York law governed "Yankee Loan" deals.

This article considers, firstly, some of the key structuring considerations for Yankee Loans. Secondly, it looks at how some differences get "lost in translation", by comparing certain key provisions that differ between the US and European and Asian leveraged finance markets and exploring the differences that need to be taken into account for Yankee Loans, focusing on covenants and call protection, conditionality and transaction diligence.

Structuring Considerations

(Re)structuring is key

The primary focus of senior secured lenders in any leveraged finance transaction is the ability to recover their investment in a default or restructuring scenario. The optimal capital structure minimises enforcement risk by ensuring the senior secured lenders have the ability to control the restructuring process, which is achieved differently in the US and in Europe and Asia.

Due to this difference in expectation around how a restructuring is expected to take place, the US and European and Asian leveraged finance markets start from very different places when it comes to structuring leveraged finance transactions.

In the US, a typical restructuring in a leveraged finance transaction is usually accomplished through a Chapter 11 case under the US Bankruptcy code, where the position of senior secured lenders as secured creditors is protected by well-established rights and processes. Chapter 11 allows senior secured lenders to cram down "out of the money" junior secured or unsecured creditors and release their debt claims, guarantee claims and security pursuant to a Bankruptcy Court-approved plan of reorganisation.

A Chapter 11 restructuring is a uniform, typically group-wide, court-led process where the aim is to obtain the greatest return by delivering the restructured business out of bankruptcy as a going concern. Bankruptcy petitions filed under Chapter 11 invoke an automatic stay prohibiting any creditor (importantly this includes trade creditors) from taking enforcement action which in terms of its practical effect has global application, because any person violating the automatic stay may be held in contempt of court by

the applicable US Bankruptcy Court. The automatic stay protects the reorganisation process by preventing any creditor from taking enforcement action that could lead to a diminution in the value of the business. It is important to note that a Chapter 11 case binds all creditors of the given debtor (or group of debtors). Senior secured lenders retain control through this process as a result of their status as senior secured creditors holding senior secured claims on all (or substantially all) of the assets of a US borrower group.

By contrast, in Europe and Asia, it is more usual for a restructuring in a leveraged finance transaction to be accomplished through an out-of-court process[i]; this is typically achieved through enforcement of share pledge security to effect a transfer of equity interests of the top holding company of the borrower group and a sale of the business as a going concern, although in some situations restructurings can be achieved through a consensual out-of-court restructuring process without enforcing transaction security.

The reason for this is that placing a company into local insolvency proceedings in many European and Asian jurisdictions is often seen as the option of last resort. Placing a company into insolvency proceedings in many European or Asian jurisdictions is often viewed very negatively (vendors and customers typically view it as a precursor to the corporate collapse of the business) and often there is no Chapter 11 equivalent restructuring process available in the applicable European or Asian jurisdiction(s), meaning that entering into local insolvency proceedings will usually be value-destructive (in particular because of the lack of an automatic stay that binds trade creditors and, in some cases, because of a lack of clear procedures for cramming down junior creditors).

In order for senior secured lenders to retain control of a restructuring process in Europe or Asia, they traditionally rely on contractual tools contained in an intercreditor agreement. These tools include standstills applicable to junior creditors that are party to the intercreditor agreement that limit or prohibit junior creditors from enforcing their own security interests or forcing borrower groups into local insolvency proceedings, thereby allowing senior secured lenders to control the reorganisation of the borrower group's obligations, and release provisions applicable upon a "distressed" disposal of the borrower group, i.e. upon a trigger event such as enforcement of security after the occurrence of a continuing Event of Default or following an acceleration event.

These provisions are designed to enable a borrower group to be sold as a going concern and, in connection with this, for the guarantee and security claims (and in some cases, the primary debt claims) of junior creditors against the borrower group entities that are sold to be released once the proceeds from such sale have been applied pursuant to the waterfall provisions of the intercreditor agreement. This practice has developed because, unlike the US Chapter 11 framework, there is no equivalent single insolvency regime that may be implemented across European or Asian jurisdictions. While the EC Regulation on Insolvency Proceedings provides a set of laws that promote the orderly administration of a European debtor with assets and operations in multiple EU jurisdictions, such laws do not include a concept of a "group" insolvency filing (and there is no equivalent law in Asia) and most European and Asian insolvency regimes (with limited exceptions) do not provide for an automatic stay on enforcement applicable to all creditors.

The important distinction to note is that while a Chapter 11 proceeding binds all of a borrower group's creditors, the provisions of the intercreditor agreement will only be binding on the creditors that are a party to it. Typically these would be the primary creditors to the group (such as the providers of senior secured credit facilities, mezzanine or second lien facilities lenders and in some instances high yield bondholders), but would not include trade and other non-finance creditors, nor would it include (unless execution of an intercreditor agreement is required as a condition to such debt being permitted) third party creditors of permitted debt (e.g., incremental equivalent debt or ratio debt).

Historically, deals syndicated in the US leveraged loan market were those where the business or assets of the borrower's group were mainly in the US, albeit that some of the group may have been located in Europe, Asia or elsewhere, and these deals traditionally adopted the US approach to structuring: the loan documentation was typically New York law governed and assumed any restructuring would be effected in the US through Chapter 11 proceedings. Similarly, deals syndicated in the European or Asian leveraged loan market were historically those where the business or assets of the group were mainly in Europe or Asia, respectively, and these deals traditionally adopted a European/Asian approach to structuring: the loan documentation was typically English law governed, based on the LMA or APLMA form of senior facilities agreement, and provided contractual tools for an out-of-court restructuring in an intercreditor agreement (typically based on an LMA form).

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

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

Location of borrower and guarantors

Legal/structuring considerations

In US leveraged loan transactions, the most common US state of organisation of the borrower is Delaware, but the borrower could be organised in any state in the US without giving rise to material concerns to senior secured lenders. In Europe or Asia, however, there are a number of considerations which are of material importance to senior secured lenders when evaluating in which European or Asian jurisdiction a borrower should be organised. First, many European and Asian jurisdictions have regulatory licensing requirements

for lenders to borrowers organised in that jurisdiction. Second, withholding tax may be payable in respect of payments made by borrowers organised in many European or Asian jurisdictions to lenders located outside of the same jurisdiction (in particular, many "offshore" U.S. Term Loan B investors are unable to lend directly to a borrowers located in certain jurisdictions without triggering withholding tax or interest deductibility issues). Finally, some European and Asian jurisdictions may impose limits on the number of creditors of a particular nature a borrower organised in that jurisdiction may have.

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

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

As a result, in structuring a Yankee Loan, significant consideration should be given to the jurisdiction of the borrower and guarantors within the borrower group to assess the quality and value of credit support and security that will be available.

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

Investor considerations

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

"Lost in translation" – a Comparison of Key Terms

In addition to the well-known (if not always fully understood or appreciated) difference in drafting style between New York leveraged loan credit agreements and European and Asian LMA and APLMA facility agreements, the substantive terms of loan documentation in the US and European and Asian markets have traditionally differed as well, with certain concepts moving across the Atlantic in either direction over time. Since 2010, Yankee Loan deals have been responsible for some increased flexibility for borrowers in a variety of forms moving slowly from the US market to the European market (and to a lesser extent the Asian market), although these terms are now starting to gain more widespread acceptance in European deals due to a number of factors, including "cross-pollination" and continued expansion of the non-bank investor pool in European markets.

US covenant-lite *vs.* European covenant-lite & covenant-loose

US covenant-lite

Since 2010, the US leveraged loan market has seen the re-emergence of "covenant-lite" facilities (which accounted for over 57%[ii] market share of US leveraged loan issuance in 2014, compared to 22%[iii] of the market share for European leveraged loan issuance in 2014). In these deals, term loans do not benefit from any financial maintenance covenant. Only the revolving facility benefits from a single financial maintenance covenant, normally a leverage-based ratio (and this only applies on a "springing" basis i.e. at the end of a fiscal quarter, on a rolling LTM-basis, if utilisation exceeds a certain trigger percentage, at the time of writing, typically ranging between 25-35%).

More importantly, the negative covenant package for US "covenant-lite" facilities is either fully or partially incurrence-based in nature, similar to what would commonly be found in a high yield unsecured bond covenant package, reflecting the growing convergence between the US Term Loan B and US high yield bond markets.

Incurrence-based covenants typically provide permissions (for example to incur additional debt) subject to compliance with a specific financial ratio which is tested at the time of the specific event, rather than a financial maintenance covenant which would require continual compliance at all times, which traditionally has been required in secured senior bank loans, testing compliance against a projected business plan or base case financial model.

These US "covenant-lite" negative covenant packages tend to provide a borrower group with much more flexibility than 'traditional' European or Asian leveraged finance negative covenant packages, and therefore Yankee Loans have proved very attractive to European and Asian borrower groups. However, senior secured lenders need to consider these features carefully, because they may have different impacts in a Yankee Loan provided to a European or Asian borrower group compared to a loan made to a US borrower group.

In particular, the following is worth noting:

Debt incurrence (including incremental or accordion baskets and ratio debt baskets)

In US deals (including some Yankee Loans) there is no hard cap on debt incurrence (i.e. an unlimited amount of additional debt can be

raised subject to compliance with an incurrence ratio test), which may be equal ranking secured debt incurred pursuant to the credit agreement (as incremental debt) or other incremental "equivalent" debt or "ratio" debt (which may be senior secured debt (either in the form of notes or in some cases in the form of sidecar loans) or junior secured, subordinated or unsecured debt, in each case incurred outside of the credit agreement, subject to a non-guarantor cap).

Debt incurrence flexibility works fine in deals that only involve US borrowers/guarantors because there is generally no material concern about being able to deal with junior secured or unsecured creditors in a restructuring or bankruptcy context.

However, in deals that involve non-US borrowers/guarantors, if comparable debt incurrence flexibility is allowed, issues can arise due to the fact that guarantees provided by non-US entities may be subject to material legal limitations and/or prohibitions and because the collateral provided by non-US entities may be subject to material legal and/or practical limitations resulting in security over much less than "all assets" of the relevant non-US entity, leading to some unexpected results for senior secured lenders in a Yankee Loan deal.

Specifically, the claims of the creditors of such incremental, incremental equivalent or ratio debt, even if junior secured or unsecured, may rank equally, or in some cases even effectively senior, to the guarantee claims of the senior secured lenders who provided the main senior secured credit facilities.

This may be because incremental, incremental equivalent or ratio debt is subject to less stringent guarantee limitations or prohibitions than the guarantee limitations or prohibitions applicable to the senior secured acquisition finance facilities incurred to pay for the acquisition of the applicable European or Asian Borrower group or it may be because the transaction security provided by the applicable European or Asian Borrower group is not fully comprehensive, resulting in a larger pool of unsecured assets, the value of which gets shared equally between senior secured creditors, junior secured creditors and unsecured creditors with equal ranking debt claims.

Additionally, for reasons detailed in the structuring considerations section above, in the event of a restructuring accomplished by means of a distressed disposal and release of claims, providers of incremental, incremental equivalent or ratio debt may not be subject to the contractual standstills or release provisions provided under a European or Asian intercreditor agreement.

"Grower" baskets

It is now common to include "grower" baskets in US deals (including Yankee Loans) set by reference to the greater of a fixed amount and either a percentage of Consolidated Total Assets (more common) or a percentage of Consolidated EBITDA (now becoming much more common in both US and European deals). These have tended to be more generous in US deals and are of particular relevance for intercompany transaction baskets – typically in US deals, unlimited intercompany transactions (investments and asset transfers) are permitted between borrowers/guarantors but depending on location of certain borrowers/guarantors (where either guarantee or security coverage may be weak) this may give rise to credit support value leakage concerns in Yankee Loan deals for European or Asian borrower groups. Historically, a "grower" did not apply to the "fixed" or "free and clear" components for Incremental debt baskets or Available Amount baskets but that is now starting to creep into deals on both sides of the Atlantic.

"Available Amount" (or "Builder") basket for investments and acquisitions, restricted payments and restricted junior debt repayments

This basket builds with Consolidated Net Income (typically 50% CNI minus 100% losses) or a percentage of Retained Excess Cash Flow, plus certain equity contributions and returns on investments made using the Available Amount basket – this basket may be applied subject to certain Event of Default blocker conditions and subject to *pro forma* compliance with a leverage-based incurrence ratio condition (although leverage-based incurrence ratio condition protection may be limited, or even excluded, in some deals). At the time of writing, US deals have tended to set the incurrence ratio condition more loosely than comparable European deals (while the extent of any Event of Default blocker conditions has varied).

Additional unlimited baskets for permitted investments and acquisitions, restricted payments and restricted junior debt repayments

These baskets allow for application of unlimited amounts subject to (in some cases) an Event of Default blocker condition and *pro forma* compliance with an incurrence ratio condition (at the time of writing the range varies from at least 0.5x inside to at least 2.0x inside closing date total net leverage, depending on the intended application/usage) rather than a fixed cap amount. These have become fairly common in US top-tier sponsor deals (including Yankee Loan deals) but have yet to be seen with any frequency in European covenant-lite or covenant-loose deals or Asian syndicated deals.

Investments and acquisitions

It is now typical not to include a fixed cap in US deals (including Yankee Loan deals) but still typical to include a non-guarantor cap (or in some deals a Guarantor Coverage test requirement, more similar to European deals, or a combination of the two concepts). In Yankee Loan deals with little or no US credit support, and weak guarantee/security credit support packages in non-US locations, this normally is the subject of far more detailed negotiation between lenders and borrowers, with tighter baskets and sometimes fixed caps in place of incurrence ratio conditions.

To enable borrower groups to undertake additional acquisitions on a "SunGard" or "certain funds" conditionality basis, while keeping in place existing capital structure, the market is now seeing:

- Limited Conditionality Acquisitions (i.e. acquisitions that are not conditioned on obtaining financing) – satisfaction of conditions to acquisitions and other events occurring now tested at time of acquisition (including *pro forma* debt incurrence) – what happens in relation to further *pro forma* incurrence testing with respect to other transactions in the time between the Limited Conditionality Acquisition test (if tested at signing) and the consummation of that acquisition is subject of negotiation.
- Limit on requirements with respect to Event of Default blocker conditions or bring down of representation conditions.

We expect that this US flexibility will increasingly be introduced into European and Asian deals.

Asset Disposals

In US deals (including Yankee Loan deals), this is now commonly an unlimited basket, subject to no Event of Default blocker condition (although even this protection is excluded in some deals), and provided that 75% of consideration is cash (or designated non-cash consideration), sale is for fair market value and net sale proceeds are applied and/or reinvested in accordance with mandatory prepayment asset sale sweep provisions. By contrast, it is still more common in European and Asian deals to include some form of fixed cap, although European and Asian deals do tend to include more extensive basket carve-outs for certain identified assets (such as the sale of "non-core" assets following the acquisition of new businesses).

Call Protection

In nearly all US deals (including Yankee Loan deals), it is now customary to include "soft call" protection for the benefit of

institutional investors but this protection only applies on a limited basis in relation to repricing transactions and it has become common to carve-out certain exceptions:

- "soft call" protection will not apply in relation to any refinancing or repricing transaction triggered by a Change of Control transaction (or in many cases now, if triggered by an IPO, "transformative" acquisition or 3rd party investment transaction); and
- "soft call" protection will not apply where "primary purpose" is not to reduce yield.

Following the expansion in depth and liquidity in the European institutional investor base, European deals are now starting to include "soft call" protection.

European covenant-lite and covenant-loose

In order to remain competitive, European (and to a lesser extent Asian) lenders have been forced to agree to more flexible covenant packages for borrower groups to retain business and to avoid such borrower groups choosing to do a Yankee Loan transaction and syndicate their debt financing in the US market.

European covenant-lite deals tend to follow the same approach as US covenant-lite deals with respect to financial maintenance covenants. However, although negative covenants are likely to be less restrictive than in a traditional European leveraged financing (1) they are unlikely to include full US-style covenant-lite incurred-based flexibility, and (2) whether the loan is considered covenant-lite is driven purely by the lack of any financial maintenance covenant protection.

We do expect, however, that over time there will continue to be more convergence between the US and European markets, because borrower groups will continue to seek to maximise flexibility through adoption of "best in class" on both sides of the Atlantic, and cross-pollination (i.e. the same underwriting banks and sometimes the same investors will already be familiar with concepts from US or European deals) will make it easier to import new terms into the respective leveraged loan markets. It may take a little longer for convergence to occur to the same degree with Asian markets (because of the smaller volume of Yankee Loan deal flow).

By the same token, in reaction to the changes that have been taking place in the European market as a result of the increase in Yankee Loan deals, we are starting to see more European covenant-loose deals being done. Covenant-loose deals typically include less than the "full suite" of three financial maintenance covenants (ignoring capex covenants) in relation to both term loans and revolving facilities. Some deals have included one leverage covenant only while others have also included an interest cover covenant but no cashflow cover covenant.

Conditionality

Documentation Principles vs. Interim Facilities and "Full Docs"

In acquisition financing, the risk that the purchaser in a leveraged buyout will not reach agreement with its lenders prior to the closing of the acquisition (sometimes referred to as "documentation risk") is generally not a material concern (or at least is a well understood and seen to be manageable concern) of sellers in private US transactions. Under New York law, there is a general duty to negotiate the terms of definitive documentation in good faith and US leveraged finance commitment documents also typically provide that the documents from an identified precedent transaction will be used as the basis for documenting the definitive credit documentation, with changes specified in the agreed term sheet, together with other specified parameters. These agreed criteria are generally referred to as "documentation principles" and give additional comfort to sellers in US transactions that the documentation risk is minimal.

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

Over time, it will be interesting to see if European sellers (and their advisors) become more comfortable with addressing documentation risk by relying on documentation principles, and follow the US practice for commitment documentation, given that the governing law of the finance documents, not the jurisdiction of the seller, is the key factor in evaluating documentation risk. However, until this point becomes more settled, consideration will need to be given to the appropriate form of financing documentation and the potential timing and cost implications that may arise as a result.

SunGard vs. Certain Funds

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

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

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

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

Much like the comparison between documentation principles *vs*. full documents (or an interim facility), a comparison between SunGard *vs*. European "certain funds" reveals that notwithstanding the slightly different approaches taken to these issues on each side of the Atlantic, the substantive outcomes are similar. Thus far, Yankee Loans have approached these issues on a case by case basis, with a slight majority so far favouring the US approach to these issues.

Diligence – reliance or non-reliance

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

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

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

Conclusion

Ultimately, Yankee Loans can be seen as simply US Term Loan B tranches provided by institutional investors to European or Asian borrower groups. However, the fundamental differences between how a restructuring of US and European and Asian borrower groups is likely to occur and the "lost in translation" issues that have arisen and will continue to arise in the future caused by a confusion in differing market practices and the use of different terminology in New York law and English law transactions, means that greater care must be taken when structuring a Yankee Loan.

Endnotes

i. While it is possible in certain European and Asian jurisdictions to restructure through court-controlled processes that achieve a result similar to a Chapter 11 Case, this will depend entirely on the jurisdiction of the borrower(s) and material guarantors.

ii. Source: LCD's online Loan Market Primer, February 17, 2015.

iii. Source: S&P Capital IQ LCD Report, December 19, 2014.

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Commercial Lending in the Post-Crisis Regulatory Environment: 2015 and Beyond

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1 Introduction

Although more than six years have passed since the global financial crisis of 2008, an understanding of the changing regulatory environment becomes ever more important to an understanding of the dynamics of the loan markets worldwide. In the United States, as elsewhere, regulators are continuing their efforts to end "too big to fail" and to ensure that the largest banks are able to survive periods of extreme stress. The related developments significantly affect large financial institutions, particularly those that are internationally active, and will have a profound impact on lending activities.

The measures adopted by U.S. regulators have already had a significant impact on commercial lending, although the impact will in all likelihood continue to increase over time. For example, measures including the Volcker Rule limit the ability of banking organisations to sponsor investment vehicles that can carry commercial loans, and the risk retention rules further constrain the capacity of the regulated institutions to originate, to carry or to market commercial loans. The past twelve months have brought additional regulatory challenges, three of which are highlighted here: (1) increased scrutiny by U.S. banking supervisors of leveraged lending activities; (2) increased capital requirements under Basel III; and (3) the adoption of the new liquidity rule under Basel III. These three additional regulatory measures will undoubtedly affect the commercial lending market in 2015 and beyond.

2 Leveraged Lending: A Moving Target

Although the regulators are increasingly focused on more prescriptive structured prudential requirements, such as the complicated rules underlying Basel III discussed further below, they have not ignored more traditional supervisory tools, such as detailed lending guidance. This focus is perhaps best exemplified by their statements with respect to leveraged lending. While promulgated as "guidance", a category of administrative action that does not require publication and comment under the Administrative Procedure Act and does not take on the force of law, the regulators have nonetheless been forceful in curbing lending practice of which they do not approve.

They published their initial post-crisis guidance in early 2013,[1] although this guidance has been significantly amplified through direct supervisory engagement with large market participants. In November 2014, the regulators issued a statement entitled *Frequently Asked Questions (FAQ) for Implementing March 2013 Interagency Guidance on Leveraged Lending* (**FAQ**). The FAQ, which, in effect, amends the March 2013 guidance, emphasises a substantive rather than a literal approach to the categorisation of covered loans, instructing covered institutions to use the characteristics previously outlined only "as a starting point for developing an institution-specific definition of leveraged loans".

The hallmark of this revision is an instruction to focus on borrower characteristics that would cause them to be recognised in the debt markets as leveraged for each industry to which the institution lends. Mechanical tests, such as simplistic "purpose" tests or simple financial tests are not determinative and the regulators reject interpretations of its earlier guidance that focus on such simplistic tests. Excluding loans from the leveraged lending category solely because they do not meet a purpose test or including them simply because the meet an arbitrary leverage test is not consistent with regulatory expectations. Moreover, the FAQ emphasises that the guidance largely applies to origination of covered loans. The agencies do not consider the purchase of a trading asset that is a preexisting leveraged loan or portion thereof to be an origination or refinancing under the guidance. Nonetheless, trading assets must be assessed as part of the institution's overall assessment of its exposure to leverage loans and loans held or purchased for the available-for-sale or held-to-maturity portfolios are subject to the guidance.

As an example of how institutions should review loans, the regulators discuss loans secured by tangible collateral (for example, accounts receivable, inventory, property, plant and equipment, and real estate) that do not rely on enterprise valuations for repayment, even when leverage is high should not be deemed leverage loans, because the lender has additional sources of repayment beyond the cash flow from the operations of the borrower. Asset-backed loans are appropriately excluded when they evidence the full monitoring typically associated with asset-based financing (such as borrowing base advances, field audits, and enhanced reporting requirements).

The regulators also clarify the distinction between working constructively with borrowers and simply refinancing loans. If a lender can demonstrate that action is being taken to correct or mitigate structural or credit-related concerns, then the regulators will be receptive to a more favourable characterisation than simply lowering the pricing structure (or interest rate) or extending the maturity date of a loan. In particular, an extension of additional credit is likely to be viewed as a new origination unless the institution can clearly show how the extension of new funds mitigates existing risks.

Insofar as new originations are concerned, the designation of a loan as "covenant-lite" would not automatically result in a non-pass rating. Potential weaknesses in one aspect of a transaction structure (such as covenants, maturity, or repayment structure) should assess along with the financial aspects of the borrower in determining the

final supervisory assessment. Loans with relatively few or weak loan covenants should have other mitigating factors to ensure appropriate credit quality. During the coming year, a clearer understanding of the details of the guidance and its impact on the market is likely to emerge. For now, there can be no question that leveraged lending is very much a moving regulatory target.

3 Basel Redux: Yet More Capital

Capital is one of the cornerstones of the regulatory response to the crisis. Regulators are insisting that the amount of high-quality capital held by banks must be sufficient to absorb losses generated during periods of crisis. There is also a perception that some non-common stock capital instruments included in the highest category of capital did not absorb losses to the extent previously expected. Finally, inconsistencies in the implementation of capital requirements across jurisdictions contributed to difficulties in evaluating a financial institution's capital strength.

Yet this is nothing new: since the first Basel Capital Accord was entered into in 1988, regulators have spent the last nearly three decades tinkering with the capital rules. Many contend that the deficiencies of the highly complex yet imprecise framework embodied in what has become known as Basel II incentivised risky behaviour on the part of banks and lowered the requisite level of capital buffers maintained by them against potential losses. The global regulatory response, commonly known as Basel III, is designed to improve the quality and quantity of regulatory capital and build additional capacity into the banking system to absorb losses in times of market and economic stress. U.S. regulators will require banking organisations to comply with the higher minimum capital ratios.

Certain large, internationally active financial institutions will be required to comply with advanced approaches and to satisfy total leverage exposure ratio requirements, as well as maintaining appropriate capital conservation buffers. In addition, regulators are exploring new kinds of capital instruments that will more effectively absorb losses, while at the same time increasing funding costs for affected institutions

The regulators have expressly acknowledged that overall economic output might be adversely impacted by the new framework, although they are persuaded that, as banks replaced debt with higher-cost equity to the extent needed to comply with the new requirements, there was no reduction in the cost of equity despite the reduction in the riskiness of financial institutions' funding mixes. Moreover, regulators anticipate that the increase in funding cost will be passed almost entirely on to borrowers. In light of these conclusions, the regulators anticipate only a slight increase in the cost of borrowing and a slight decrease in the growth of gross domestic product, and that these costs would be more than offset by the benefit to gross domestic product resulting from a reduced likelihood of prolonged economic downturns associated with a banking system whose lending capacity is highly vulnerable to economic shocks.

This regulatory optimism is reinforced by the conclusion that, after a period of sustained asset reductions and capital growth, the overwhelming majority of banks already have sufficient capital to comply with the core final rule. In other words, the regulators intend to require financial institutions to maintain the high capital levels attained in the relatively early stages of the recovery from the crisis. Whether such capital levels would be optimal, assuming the recovery becomes more robust remains an open question.

Under the new rule, the regulators will recognise an expanded range of financial collateral as credit risk mitigants that may reduce the risk-based capital requirements with collateralised transactions. Basel III also permits a substitution approach for eligible guarantees and eligible credit derivatives. Under the substitution approach, if the protection amount of an eligible guarantee or eligible credit derivative is greater than or equal to the exposure amount of the hedged exposure, a bank substitutes the risk weight applicable to the guarantor or credit derivative protection provider for the risk weight applicable to the hedged exposure. If the protection amount of the eligible guarantee or eligible credit derivative is less than the exposure amount of the hedged exposure, a banking organisation must treat the hedged exposure as two separate exposures (protected and unprotected) to recognise the credit risk mitigation benefit of the guarantee or credit derivative.

4 Basel III: A Brand New Liquidity Rule

While the enhanced capital requirements of Basel III are in many ways merely a redux of a decades-long question to improve the quality and quantity of capital, Basel III's liquidity rules represent a first attempt to promulgate uniform liquidity (as opposed to simply capital) standards globally. The liquidity coverage ratio (**LCR Rule**), the first of two liquidity rules from Basel III, was finalised in the United States at the end of 2014.[2] It requires covered institutions to maintain a minimum ratio of specified "high quality liquid assets" (**HQLA**) (e.g., high quality deposits, government securities, etc.) to the institution's "total net cash outflows" over a 30-calendar-day period designed to be available during periods of extreme financial stress.[3] Of course, HQLA buffers must be maintained at all times, with the result that exposures associated with relatively high cash outflow rates become comparatively expensive. The terms and pricing of liquidity coverage attracting exposures are certain to be influenced materially by the LCR Rule.

The rationale for the LCR Rule is relatively simple, although the consequences may be complex. U.S. federal banking agencies view certain types of funding as particularly prone to being withdrawn or withheld in the event of significant financial distress. Consequently, the "outflow rate" under the LCR Rule for certain such funding sources is as high as 100% for a given calculation date. This means that a covered entity is required to assume that the entire amount of the funding in question will be drawn or withdrawn over the course of thirty calendar days, and the organisation must have assets that it can reliably liquidate to fund the draw or withdrawal and its other requirements for cash without suffering material financial distress (such as refusing to roll over or make new extensions of credit or by disposing of assets in a "fire sale"). The higher the assumed outflow rate for a class of obligations, and the higher the amount of such obligations held by a covered entity during a given calculation period, the higher the denominator will be for the ratio above, and the larger the stock of HQLA that the covered entity must hold against the class of obligations to comply with the rule. Commercial lending may therefore be significantly affected by implementation of the LCR rule.

Where and how to draw the lines around various funds or various assets based on these regulatory distinctions is unclear, as the LCR Rule is relatively new, its terms are complex, and the agencies have as yet not provided interpretative guidance as to any number of definitions and operative provisions in the rule text.

The LCR Rule requires banks to assess liquidity inflows and outflows over 30-calendar-day periods[4] and seeks to calibrate the net cash outflow requirement for a covered company based on the composition of the financial institution's balance sheet, off-balance sheet commitments, business activities, and funding profile. To that end, a bank is required to calculate its outflow and inflow amounts by applying the final rule's standardised set of outflow and inflow

rates to various asset and liability balances, together with off-balance-sheet commitments. What these requirements bode for lenders and how they might they affect the pricing and structure of credit exposures consisting of unfunded commitments and letters of credit, is yet to be seen.

The category of outflows consisting of various kinds of commitments under the proposed regulation would have included the undrawn portion of committed "credit facilities" and "liquidity facilities" provided by a covered company to its customers and counterparties that could have been drawn down within 30 calendar days of each calculation date on which the LCR Rule requires the institution to assess the sufficiency of its HQLA. Commitments that could have been drawn down within 30 calendar days of the calculation date and of a kind that are considered less likely to be affected at a time of a liquidity stress are assigned significantly lower 30-calendar-day outflow rates. The types of commitments that, in the view of the agencies, are historically vulnerable to liquidity stress events, are assigned higher outflow rates.

Under the proposed rule, a "liquidity facility" would have been a binding agreement to extend funds at a future date to a counterparty expressly for the purpose of refinancing the debt of the counterparty when it is unable to obtain a primary or anticipated source of funding. A "liquidity facility" would have included an agreement to provide liquidity support to asset-backed commercial paper by lending to, or purchasing assets from, any structure, programme, or conduit in the event that funds are required to repay maturing asset-backed commercial paper. A "credit facility" would have included a general working capital facility, such as revolving credit facilities for general corporate or working capital purposes. A facility that consists of both would have been deemed to be a "liquidity facility". Given the sensitivity of special purpose entities (SPEs) to emergency cash and backstop needs in a short-term stress, the agencies also proposed a 100 percent outflow rate for the entire exposure to SPEs, not just the undrawn amount of such facilities that could legally be withdrawn during the 30 calendar days after the calculation date. The special rules for SPEs potentially capture many entities established to isolate assets from related credit parties, seeking to enhance creditworthiness, particularly in times of stress.

The LCR Rule clarified that a "liquidity facility" would not be limited to commitments made "expressly" for the purpose of refinancing debt. Instead, "liquidity facilities" would consist of all commitments (including letters of credit) that could be used to refinance debt or to provide liquidity support to asset-backed commercial paper by lending to, or purchasing assets from, any structure, programme or conduit in the event that funds are required to repay maturing asset-backed commercial paper. Thus, a "credit facility" intended to qualify for more favourable treatment would presumably need to provide expressly that it may not be drawn to refinance debt or lending to, or purchasing assets from, any structure, programme or conduit in the event that funds are required to repay maturing asset-backed commercial paper. Because the outflow rates apply only to outflows that could be drawn down within 30 calendar days of each calculation date, a "liquidity facility" could potentially be structured into a series of subfacilities designed to ensure that only a portion of the liquidity facility could be drawn in any 30-calendar-day period.

The LCR distinguishes broadly between retail customers and wholesale customers (i.e. everyone who is not a retail customer). "Retail customers" include (1) individuals, and (2) business customers, but solely if and to the extent that transactions with the business customer are managed in the same way as transactions with individuals, and aggregate funding is less than $1.5 million.

The agencies also modified provisions of the proposed rule to provide greater nuance with respect to SPEs. Unwilling to ignore the character of the obligor – the agencies noted that SPEs are potentially highly susceptible to stressed market conditions during which they may be unable to refinance their maturing securities and commercial paper – the agencies instead sought to define them with greater particularity. First, however, it is useful to note the term SPE potentially includes vehicles designed to improve creditworthiness by allowing the borrower to borrow against a pool of bankruptcy remote assets in circumstances that possibly leave the lenders less exposed to counterparty credit risk than a traditional revolving facility because the amount drawn on such facilities in a stressed environment would be wholly limited by a borrowing base derived from the underlying eligible financial assets. Some commenters argued, for example, that commitments to SPEs established to ring-fence the liabilities of a real estate development project did not merit a 100 percent outflow rate because in practice, the drawdowns (in crises and in normal times) could only amount to a modest portion of the overall unfunded commitment over a 30-calendar-day period due to contractual milestones reflected in the loan documentation (e.g., obtaining permits, completing a certain percentage of the project, selling or renting a certain percentage of units, or that a certain stage of the real estate development project has been completed).

For purposes of determining the appropriate amount of the cash outflow rate, the covered company must determine whether a particular SPE is exposed to the highest degree of liquidity risk. To that end, the agencies are clarifying that certain SPEs can be treated with an approach similar to the treatment for the other referenced commitments. The application of the 100 percent outflow rate for committed credit and liquidity facilities is mandatory in the case of SPEs that issue or have issued securities or commercial paper to finance their purchases or operations. For all purposes, the undrawn amount of a committed credit facility or committed liquidity facility is the entire unused amount of the facility that could be drawn upon within 30 calendar days of the calculation date under the governing agreement, less the amount of those portions of HQLA consisting of very high quality and intermediate high quality liquid assets securing the facility.

On the whole, financial institutions are confronted with a dilemma under the LCR when a commercial client proposes to make a large deposit: accept the deposit and accept sharply reduced spreads (and greater capital pressure) based on new liquidity requirements; or refuse the deposit (or discourage it by imposing account fees) and watching the funding shift to a non-bank intermediary or a competitor. A similar dilemma exists for a bank lender wishing to provide a traditional liquidity facility under which large amounts of funds could be drawn in any 30-calendar-day period. In both cases, traditional commercial lending and deposit-taking incentives have been changed by the LCR. Indeed, news reports have identified efforts by some of the nation's largest banks to reduce institutional deposits. Financial institutions with large commercial lending businesses are also rethinking their provision of liquidity facilities.

5 Conclusion

Increased regulatory scrutiny has been a persistent feature of the post-crisis world and will be in 2015 and beyond. The three developments highlighted above will unquestionably impact commercial lending – leading to increased costs, increased pricing and greater scrutiny of resulting credit exposures. The changes also threaten fee income resulting from the use of CLOs and other

secondary market vehicles to carry credits that banks are no longer easily able to carry on their own balance sheets. Moreover, growing regulatory concern with the reputational risk associated with the origination of paper for third parties is likely to exacerbate these consequences. All of these changes enhance the opportunities for the so-called shadow banks not subject to the jurisdiction of U.S. banking regulators nor otherwise forced to operate under Basel III; yet, they are also beginning to attract attention from U.S. and international regulatory bodies, such as the Financial Stability Board. Commercial lending may be moving to the shadows beyond regulation, but perhaps not for long.

Endnotes

1. *Interagency Guidance on Leveraged Lending*. 78 Fed. Reg. 17766 (March 22, 2013).
2. FRB, OCC, FDIC, Final Rule, *Liquidity Coverage Ratio: Liquidity Risk Measurement Standards*, 79 Fed. Reg. 61,440 (October 10, 2014).
3. One of the paradoxes of the LCR Rule is that reduced participation by banking organisations in providing liquidity in secondary markets may indirectly increase required HQLA holdings due to the resulting increases the number of days required to liquidate a portfolio of high quality securities.
4. The rule will ultimately require the assessment to be made daily.

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Acquisition Financing in the United States: Boomtime is Back

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2015: M&A is Back as a Growth Strategy

2014 was a very strong year for mergers and acquisitions in the United States and globally. All indicators suggest the trend will continue through 2015.

M&A activity in 2014 exceeded expectations and 2014 may be the year that signalled the end of the market hangover from the recession. Thomson Reuters reports that global M&A was valued at over $3.5 trillion in 2014: a 47% increase over 2013. In the United States, M&A volume returned to pre-recession levels.

Mega deals, valued at over $5 billion, accounted for much of the volume. This included Comcast's announced $70 billion acquisition of Time Warner Cable, Medtronic's announced $47 billion acquisition of Covidien and Facebook's $19 billion acquisition of WhatsApp. U.S. middle market M&A also exploded to pre-recession levels of over $315 billion of deal value, according to Thomson Reuters.

2014 M&A growth was seen across sectors, with healthcare, energy, technology and media showing strong growth. A significant portion of the activity was cross border.

Macro-economic and other indicators show that 2015 M&A should be even stronger. KPMG in their 2015 M&A outlook survey reports that 82% of respondents expect to consummate at least one acquisition in 2015, with an unprecedented level of respondents expecting to consummate multiple acquisitions.

As M&A volume continues to grow in 2015, so will the need for acquisition financing. It is important to review the fundamentals of U.S. acquisition financing using secured loans and monitor trends in this regularly changing area of financing.

The Commitment Letter is Key

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

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

Who Drafts the Commitment Letter?

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

The question of who drafts the commitment papers is one area where sponsors are often treated more favourably than other borrowers. While lenders in most cases want to draft commitment papers, the larger sponsors are now regularly preparing their own forms of commitment papers and requiring the lenders to use them. From the sponsors' perspective, controlling the drafts can result in standardised commitment letters across deals and a more efficient and quick process to finalise commitment letters. To get the best

terms, the sponsors often simultaneously negotiate with separate potential lenders and then award the lead role in an acquisition financing to the lender willing to accept the most sponsor-favourable terms.

Conditionality

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

Conditions Precedent, Covenants and Defaults

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

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

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

Form of Loan Documents

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

Many acquisition financings, particularly in the middle market, involve multiple classes of loans with complex intercreditor arrangements. These financings include 1st/2nd lien, split-collateral, *pari-passu* collateral, subordinated, holdco and unitranche financings. In complex and technical intercreditor agreements, lenders agree on many issues relating to their respective classes of loans, including priority of liens, priority of debt, control of remedies and certain technical bankruptcy issues. Negotiation of these agreements among different classes of creditors can be lengthy and frustrate closing time frames. As middle market M&A continues to grow, and more deals have complex intercreditor arrangements, some sponsors are also requiring lenders to use a specified form of intercreditor agreement.

Representations and Warranties

Loan agreements typically require that the included representations and warranties 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 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:

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

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

Company MAC

Company material adverse change (MAC) is a type of representation included in some acquisition agreements and loan agreements. This is a representation that no material adverse change in the business

of the target has occurred. Inability to make the representations in the acquisition agreement typically permits the buyer to terminate the acquisition agreement and in the loan agreement it excuses the lenders from their funding obligations. A customary MAC definition in an acquisition agreement differs from that in a loan agreement. Acquisition agreement MAC clauses are often more limited in scope and time frame covered, and have more exceptions (including for general market and economic conditions impacting the target). Like other representations, buyers and sellers often require that the MAC definition in loan agreements mirror the definition in acquisition agreements, but solely for purposes of the initial funding of the acquisition loans (and not for ongoing draws under a working capital revolver, for instance).

Market MAC and Flex

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

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

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

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

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

Perfection of Liens

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

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

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

The Acquisition Agreement Matters

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

Structure of the Acquisition

The structure of the acquisition is important to the lenders as it will dictate a number of issues for the financing, including collateral perfection, identity of the guarantors and borrowers and timing of the acquisition (i.e., how long the lenders need to have their commitments outstanding). There are a number of common acquisition structures. While the specifics of those structures are beyond the scope of this article, 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. Acquisition agreements typically contain anti-assignment and transfer provisions. It is important that those provisions expressly permit the lenders to take a lien on the acquisition agreement.

Purchase Price Adjustments and Earn-Outs

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

Xerox Provisions

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

Xerox provisions (named for a financing with Xerox where these clauses were seen) give lenders this protection in the form of an acknowledgment by the seller in the acquisition agreement that the seller's sole remedy against the buyer and its lenders for termination of the acquisition is the breakup fee specified in the acquisition agreement. If the acquisition terminates because the lenders fail to fund their commitments, the lenders may be subject to a breach of contract suit brought by the buyer. But the lenders in any termination scenario often seek to restrict suits brought against them by the seller. Conversely, 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.

Efforts to Obtain the Financing

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

Cooperation with the Financing

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

Amendments to the Acquisition Agreement

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

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

Conclusion

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

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A Comparative Overview of Transatlantic Intercreditor Agreements

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Introduction

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

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

Assumptions

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

Overview

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

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

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

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

1. Parties to the Intercreditor Agreement

U.S. second lien intercreditors are generally executed by the first lien agent and the second lien agent and executed or acknowledged

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

By contrast, the parties to European second lien or mezzanine intercreditors generally include a longer list of signatories. In addition to the first lien agent and lenders, the second lien agent and lenders and the obligors, the obligors' hedge providers, ancillary facility lenders, the lenders of intra-group loans, the lenders of shareholder loans and the security agent will execute a European-style intercreditor agreement. The longer list of parties to European second lien or mezzanine intercreditors is largely driven by the senior creditors' need to ensure that, after giving effect to the senior lenders' enforcement, the borrower group is free and clear of all claims (both secured and unsecured) against the borrower and guarantors coupled with a desire to ensure that any enforcement action by creditors is choreographed in a manner which maximises recoveries for the senior secured creditors (and thus indirectly for all creditors). Until recently, European second lien or mezzanine intercreditors did not typically expressly permit refinancings and traditionally did not include additional classes of first lien or second lien debt. With an increased number of incurrence-based TLB deals having been executed in the past year or so, it has become fairly common for refinancing and incremental debt (under an incurrence ratio or starter basket, e.g.) to be permitted. European intercreditors would require such debt to be subject to the intercreditor agreement even if it is unsecured.

Hedge obligations are generally included as first lien obligations (and sometimes also as second lien obligations) under U.S. second lien intercreditors, but hedge counterparties are not directly party to U.S. second lien intercreditors. By accepting the benefits of the first priority lien of the first lien agent, the hedge counterparties receive the benefits of the first priority lien granted to the first lien agent on behalf of all first lien secured parties (including the hedge counterparties) and the hedge counterparties are deemed to agree that the first lien security interests are regulated by the intercreditor agreement and other loan documents. The hedge counterparties under U.S. second lien intercreditors in syndicated bank financings generally have neither the ability to direct enforcement actions nor the right to vote their outstanding claims (including any votes in respect of enforcement decisions).

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

2. Enforcement

a. Enforcement Instructions

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

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

b. Enforcement Standstill Periods

U.S. second lien financings involve lien subordination as opposed to payment (also referred to as debt or claim) subordination. The result of lien subordination is that only the proceeds of shared collateral subject to the liens for the benefit of both the first lien secured parties and second lien secured parties are applied to repayment in full of the first lien obligations before the second lien secured parties are entitled to receive any distribution of the proceeds of the shared collateral, but the second lien secured parties may receive other payments (such as payments of principal and interest and payments from other sources, e.g., unencumbered property) prior to the first lien obligations being paid in full. In the context of U.S. obligors, it is unlikely, in practice, that there would be substantial property that is unencumbered, since the security granted would likely pick up most, if not all, assets – in contrast to a number of European obligors whose unencumbered assets may be significant due to local law limitations.

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

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

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

agreement, (ii) a period of 120 days (in most cases) following notice of financial covenant default under the senior credit agreement, and (iii) a period of 150 days (in most cases) following notice of any other event of default under the senior credit agreement, plus (in some cases) 120 days if the security agent is taking enforcement action. In European second lien or mezzanine intercreditors, the senior creditors firmly control enforcement. In addition, the senior agent is entitled to override the junior agent's instructions to the security agent, leaving the second lien or mezzanine lenders only able to influence the timing of enforcement action after the standstill period.

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

3. Payment Blockages

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

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

4. Releases of Collateral and Guarantees

In order to ensure that the junior lien creditors are unable to interfere with a sale of the shared collateral, both U.S. second lien intercreditors and European second lien or mezzanine intercreditors contain release provisions whereby the junior lenders agree that their lien on any shared collateral is automatically released if the first lien creditors release their lien in connection with a disposition permitted under both the first lien credit agreement and the second lien credit agreement and, more importantly, in connection with enforcement by the first lien creditors.

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

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

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

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

5. Limitation on First Lien Obligations

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

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

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

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

6. Amendment Restrictions

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

7. Purchase Options

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

The European version of the purchase option is similar but also includes a buyout of the hedging obligations, which may or may not be included in U.S. second lien intercreditors.

The triggering events for the purchase option in U.S. intercreditors vary. They generally include acceleration of the first lien obligations in accordance with the first lien credit agreement and the commencement of an insolvency proceeding. Other potential trigger events include any payment default under the first lien credit agreement that remains uncured and unwaived for a period of time and a release of liens in connection with enforcement on common collateral. The triggering event for the European version of the purchase option also varies and may include acceleration/ enforcement by the senior creditors, the imposition of a standstill period on second lien or mezzanine enforcement action or the imposition of a payment block.

8. Common U.S. Bankruptcy Waivers

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

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

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

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

9. Non-cash Consideration/Credit Bidding

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

to distribute equity to senior creditors as payment of the senior debt or to consummate a pre-pack where the senior debt is rolled into a newco vehicle.

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

10. The Holders of Shareholder Obligations and Intragroup Obligations

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

Blended Approach Taken in Recent Transatlantic Intercreditor Agreements

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

- the parties typically have included the holders of intra-group liabilities and shareholder loans, following the European approach, and have embedded restrictions on payment of the intra-group liabilities and shareholder loans under certain circumstances;
- the enforcement instructions are typically required to come from a majority of the first lien loans and unfunded commitments in the U.S. style while the actual exposures of hedge counterparties (plus mark to market positions post-credit agreement discharge) are taken into account in calculating that majority in the European style;
- the European-style release provisions discussed above generally have been included either as the primary method of release or as an alternative method in the event that a U.S. bankruptcy process is not pursued;
- in certain deals, enforcement standstill and turnover provisions have been extended to cover all enforcement actions and recoveries (broadly defined), rather than just relating to collateral enforcement actions;
- payment subordination of the second lien facility has typically ***not*** been included;
- the full suite of U.S. bankruptcy waivers from the second lien creditors generally have been included; and
- it is increasingly the case, based on the underlying rationale and practice in European intercreditors, that secured or unsecured incremental and refinancing debt (whether *pari passu* or subordinated) is required to be subject to the intercreditor agreement.

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

Conclusion

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

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

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

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While there are many broad similarities in the approach taken in European and U.S. leveraged loan transactions, there are also still a number of significant differences in commercial terms and general market practice. The importance of having a general understanding of these differences has been highlighted in recent years as an increasing number of European borrowers have turned to the highly liquid U.S. syndicated leveraged loan market as an attractive alternative source of funding. The pace at which this trend will continue is still unclear, especially given the mounting U.S. regulatory scrutiny of leveraged loan transactions and the prospect of increasing benchmark interest rates, but it seems likely that it is here to stay for at least some time.

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

This chapter is intended as an overview and a primer for practitioners. It is divided into four parts: Part A will focus on differences in documentation and facility types, Part B will focus on various provisions, including covenants and undertakings, Part C will consider differences in syndicate management and Part D will focus on recent legal and regulatory developments in the European and U.S. markets.

Part A – Documentation and Facility Types

Form Documentation

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

Market practice in Europe has evolved through the influence of the Loan Market Association (or the "LMA") and the widespread membership it attracts from those involved in the financial sector: the LMA is comprised of more than 500 member organisations, including commercial and investment banks, institutional investors, law firms, service providers and rating agencies. While the LMA originated with the objective of standardising secondary loan trading documentation, it now plays an essential role in the primary loan market by producing, updating and giving guidance on key provisions in their recommended forms of English law documents for, amongst other things, investment grade loan transactions, leveraged acquisition finance transactions, real estate finance transactions and most recently, the growing European private placement market.

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

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

Facility Types

The basic facility types in both U.S. and European loan agreements are very similar. Each may typically provide for one or more term loans (ranking equally but with different maturity dates,

amortisation profiles (if amortising) and interest rates) and a *pari passu* ranking revolving credit facility. Of course, depending on the nature of the borrower's business, there could be other specific, standalone facilities, such as facilities for acquisitions, working capital and letters of credit.

In the United States, as in Europe, revolving and term loan facilities typically share the same security package (or liens in U.S. loan market parlance) and priority. However, in the United States, some revolving loan facilities may be structured as "first-out-revolvers" to make such loans more attractive to potential investors. First-out-revolvers are secured by the same liens granted to all *pari passu* creditors but provide for payment priority to the first-out-revolvers in respect of collateral proceeds. This feature is not so common in European loans except for standalone "super senior" revolving credit facilities used in conjunction with a high-yield bond issuance.

U.S. Term B loans are typically made by U.S. based institutional investors (historically, there has not been much European investor appetite for this type of debt). As many of the U.S. Term B loan investors are also high-yield bond investors and, consequently, familiar and comfortable with high-yield bond terms, many of the U.S. Term B loan terms bear a striking similarity to high-yield bond terms, especially in the relaxed business undertakings, incurrence (rather than maintenance) financial covenants and absence of loan amortisation. The *quid pro quo*, however, is a higher margin and other economic protections (such as "no-call" periods) not commonly seen in Term A loans. Term A loans are syndicated in the United States to traditional banking institutions.

While in Europe, some very strong sponsors and borrowers have been able to negotiate similarly relaxed terms for some time in their European loan agreements, for certain other European sponsors and borrowers, U.S. Term B loans (and/or the U.S. high yield bond market) have provided an increasingly popular alternative means of achieving a similar outcome.

Certainty of Funds

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

The concept of "certain funds" has also permeated the private buyout market in Europe, so that the lenders in a private acquisition finance transaction are, in effect, required to confirm satisfaction of all of their financing conditions at the signing of the loan agreement and disapplying any drawstop events (subject to limited exceptions) until after completion of the acquisition.

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

Part B – Loan Documentation Provisions

Covenants and Undertakings

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

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

Restrictions on Indebtedness

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

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

The credit agreements of large cap and middle market U.S. borrowers also typically provide for an incremental facility allowing the borrower to incur additional debt (on top of any commitments the credit agreement originally provided for) under the credit agreement, or in the case of certain large cap U.S. borrowers, allowing the borrower to incur additional *pari passu* or subordinated secured or unsecured incremental debt outside credit agreement under a separate facility (known as "sidecar facility" provisions). Traditionally the incremental facilities were limited to a fixed dollar amount, referred to as "free and clear" tranches, but the recent trend is to permit borrowers to incur an unlimited amount so long as a *pro forma* leverage ratio is met. Most incremental facilities have a most favoured nations clause that provides that, if the margin of the incremental facility is higher than the margin of the original loan, the original loan's margin will be increased to within a specific number of basis points (usually 50 bps) of the incremental facility's margin.

The restriction on financial indebtedness undertaking typically found in European loan agreements is broadly similar to its U.S. covenant counterpart and usually follows the same construct of a general prohibition on all indebtedness, followed by certain "permitted debt" exceptions (both customary ordinary course type exceptions as well as specifically tailored exceptions requested by the borrower). Historically, ratio debt exceptions and reclassification provisions were not commonly seen in European leveraged loan agreements. However, recent European deal activity has revealed a movement towards U.S. style permissions, such as "permitted debt" exceptions based on a leverage ratio test combined with a general permitted basket, as well as incremental facilities along the lines of those permitted in U.S. loan transactions.

Restrictions on Granting Security/Liens

U.S. loan agreements will also invariably restrict the ability of the borrower (and usually, its subsidiaries) to incur liens. A typical U.S. loan agreement will define "lien" broadly to include any charge, pledge, claim, mortgage, hypothecation or otherwise any arrangement to provide a priority or preference on a claim to the borrower's property. This lien covenant prohibits the incurrence of all liens but provides for certain typical exceptions, such as liens securing permitted refinancing indebtedness, purchase money liens, statutory liens and other liens that arise in the ordinary course of business, as well as a general basket based on a fixed dollar amount to secure a specified amount of permitted indebtedness. In some large cap deals, both in the U.S. and in Europe, borrowers are able to secure permitted indebtedness based on a total leverage ratio or senior secured leverage ratio.

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

Restriction on Investments

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

The "builder basket" concept, typically defined as a "Cumulative Credit" or an "Available Amount", represents an amount the borrower can utilise for investments, restricted payments (as discussed below), debt prepayments or other purposes. Traditionally, the builder basket begins with a fixed-dollar amount and "builds" as retained excess cash flow (or in some agreements, consolidated net income) accumulates. Some loan agreements may require a borrower to meet a *pro forma* financial test to use the builder basket. If the loan agreement also contains a financial maintenance covenant (such as a leverage test), the borrower may also be required to satisfy a tighter leverage ratio to utilise the builder basket for an investment or restricted payment. Some sponsors have also negotiated loan documents that allow the borrower to switch between different builder basket formulations for added flexibility. In another example of convergence with high-yield bond indentures, recently builder baskets that use 50% of consolidated net income (including the proceeds of equity issuances and equity contributions) rather than retained excess cash flow and an interest coverage ratio rather than a leverage ratio have become more common. This approach gives borrowers more flexibility because a basket using consolidated net income is usually larger and an interest coverage ratio is usually easier to comply with than a leverage ratio.

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

Restricted Payments

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

In European loan agreements, such payments are typically restricted under separate specific undertakings relating to dividends and share redemptions or the making of certain types of payments, such as management and advisory fees, or the repayment of certain types

of subordinated debt. As usual, borrowers will be able to negotiate specific carve-outs (usually hard capped amounts) for particular "permitted payments" or "permitted distributions" as required (for example, to permit certain advisory and other payments to the sponsor), in addition to the customary ordinary course exceptions.

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

European loan agreements typically have not provided this broad flexibility. However, some strong sponsors have been able to negotiate provisions permitting payments or distributions from retained excess cash flow, subject (typically) to satisfying a certain leverage ratio and, illustrating further convergence of terms, some transactions have adopted the U.S. approach outlined above.

Call Protection

In both European and U.S. loan agreements, borrowers are commonly permitted to voluntarily prepay loans in whole or in part at any time. However, some U.S. loan agreements do include call protection for lenders, requiring the borrower pay a premium if loans are repaid within a certain period of time. While "hard call" premiums (where term loan lenders receive the premium in the call period for any prepayment, regardless of the source of funds or other circumstances) are rare, "soft call" premiums (typically 1%) on prepayments made within the first year, or increasingly, the first six months, and funded from a refinancing or re-pricing of loans are common in the U.S. loan market. In some recent large cap deals, though, lenders waived call protection premiums in connection with a refinancing to consummate a material acquisition.

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

Voluntary Prepayments and Debt Buybacks

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

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

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

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

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

Mandatory Prepayments

U.S. borrowers are typically required to prepay loans incurred under their loan agreements using the net proceeds of certain asset sales, incurrences of new *pari passu* debt and issuances of equity. Recently, though, mandatory prepayment provisions relating to asset sales have provided greater flexibility for borrowers by carving out more types of dispositions from the definition of asset sale, expanding the duration and scope of reinvestment rights, increasing the threshold amount under which the borrower need not use the proceeds to prepay and allowing the borrower to use asset sale proceeds to ratably repay *pari passu* debt.

While the mandatory prepayment triggers are broadly similar in European loan agreements, a notable trend in Europe has been the rise of "portability" provisions, which allows a change of control to occur, without the usual mandatory prepayment obligation found in European loan agreements. While portability is not a common feature in European loans, stronger European borrowers and sponsors have been increasingly able to achieve this flexibility subject to certain restrictions (typically, a one-time use limit and a requirement that the buyer be on an approved white list of "acceptable buyers"). In U.S. loan agreements a change of control triggers an event of default rather than a mandatory prepayment. A handful of deals in the United States have included "precapitalised" or "precap" provisions that permit the sale of a borrower to a qualified purchaser without causing a change-of-control event of default but the concept has not taken off and "precap" provisions remain rare.

Financial Covenants

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

In the United States, "covenant-lite" loan agreements containing no maintenance or on-going financial covenants now comprise more than 60% of outstanding S&P/LSTA loans and have found their way into many middle market deals (although the volume of covenant-lite middle market deals receded substantially in the fourth quarter of 2014 as compared to earlier in the year, reflecting the pullback in the market as a whole from the trend in 2013 and the first half of 2014 toward increasingly scarce financial covenants and climbing leverage ratios). In certain transactions, the loan agreement might be "quasi-covenant-lite" meaning that it contains only one maintenance financial covenant (usually a leverage covenant) which is applicable only to the revolver and only when a certain percentage of revolving loans are outstanding at the testing date (15-25% is fairly typical, but has been as high as 37.5%). Covenant-lite (or quasi-covenant-lite) loan agreements may nonetheless contain financial ratio incurrence tests – such tests are used merely as a condition to incurring debt, making restricted payments or entering into other specified transactions. Unlike maintenance covenants, incurrence based covenants are not tested regularly and a failure to maintain the specified levels would not, in itself, trigger a default under the loan agreement.

European loan agreements traditionally included a full suite of on-going financial maintenance covenants with a quarterly leverage ratio test being the most common. However, deal activity in 2014 revealed that the European market has become more accepting of the covenant-lite and covenant-loose deal structures more typically seen in deals in the U.S. market, especially where it is intended that the loan will be syndicated in the U.S. market in addition to the European market. Whilst structures containing no term loan maintenance covenant and a single springing leverage covenant applicable only to the revolving facility have become more common in the European market, it is fair to say they are still not as prevalent as in the United States.

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

In the event a U.S. loan agreement contains a leverage covenant, it invariably uses a "net debt" test by reducing the total indebtedness (or portion of debt tested) by the borrower's unrestricted cash and cash equivalents. Lenders sometimes cap the amount of cash a borrower may net out to discourage both over-levering and hoarding cash. The trends with regard to netting over the past few years illustrate borrowers' rapidly increasing success in pushing for greater flexibility. The LSTA[1] reported that, in the third quarter of 2013, a sample of leveraged credit agreements revealed that nearly half had a fixed capped and the rest had unlimited netting – only a year later, in the third quarter of 2014, credit agreements with a fixed cap had dropped to only a quarter of the sample.

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

With strong sponsor backing, borrowers have increasingly eased the restriction of financial covenants by increasing the amount of add-backs included in the borrower's EBITDA calculation. Both U.S. and European loan documents now include broader and more numerous add-backs including transaction costs and expenses, restructuring charges, payments to sponsors and certain extraordinary events. Recently many borrowers have negotiated add-backs (generally to the extent reasonably identifiable and factually supportable) for projected and as-yet unrealised cost savings and synergies. The Leveraged Lending Guidance and supplementary commentary from federal regulatory agencies (discussed further in Part D), though, suggest that regulators may apply heightened scrutiny to definitions of EBITDA that provide for add-backs without "reasonable support". While lenders have accommodated savings and synergies add-backs, increasingly such add-backs are capped at a fixed amount or certain percentage of EBITDA (15% in the United States, 5-20% in Europe).

Equity Cures of Financial Covenants

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

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

Sanctions, Anti-Money-Laundering and Anti-Bribery Provisions

A recent trend in credit agreements involving U.S. borrowers, whether the bank is American or European, is the increasing expansiveness of the representations, warranties and covenants relating to anti-bribery, anti-money laundering and sanctions laws in the U.S. or abroad (the "Anti-Corruption/Sanctions Laws") coupled with lenders' increasing rigidity and resistance to negotiation with regard to these expansive Anti-Corruption/Sanctions Laws provisions. Negotiation of these provisions may focus on whether it is appropriate to limit these provisions by materiality and/or by knowledge. Borrowers often are concerned about their ability to fully comply with broadly drafted provisions without some form of knowledge, scope and/or materiality qualifiers.

Part C – Syndicate Management

Voting Thresholds

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

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

Yank-a-Bank

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

Snooze-You-Lose

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

Transfers and Assignments

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

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

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

In the U.S. market, exclusion of competitors and their affiliates is also negotiated in the DQ List. In European loan agreements, the LMA recommended form assignment and transfer language provides that existing lenders may assign or transfer their participations to other banks or financial institutions, or to trusts, funds or other entities that are "regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets". This language has the practical effect of limiting the potential range of investors in the loan, including competitors of the borrower.

Part D – New Regulatory and Legal Developments in the Loan Market

Leveraged Lending Guidance

U.S. federal bank regulators indicated during the third quarter of 2014 that they would more carefully scrutinise leveraged lending issuances following their determination that a third of leveraged loans they reviewed did not comply with the Leveraged Lending Guidance (the "Guidance") issued in March 2013 by the Federal Reserve, the OCC and the FDIC. The Guidance provides, among other things, that a leverage level in excess of 6x total debt over EBITDA will raise regulatory concern for most industries and may result in the loan being criticised. In addition, the Guidance provides that a borrower should be able to amortise its senior secured debt or repay half its total debt with five to seven years of base cash flows.

Supplementary regulatory commentary provides that failure to adhere to these requirements is not a bright line bar to an issuance if there are other mitigating factors. The lack of a bright line rule may permit some loan issuances that do not achieve complete compliance, but it also introduces significant uncertainty into the process of underwriting a loan issuance for sponsors, borrowers and lenders alike. Increased concern from banks regarding regulatory approval likely contributed to the pull back in the second half of 2014 from the ballooning volume of leveraged lending issuances

and the increasingly sponsor/borrower-friendly documentation that characterised leveraged lending in 2013 and the first half of 2014. The Guidance and the heightened regulatory attention may result in more borrowers electing to obtain financing in the high-yield market instead of the leveraged lending market or electing to use non-regulated institutions rather than traditional banks as agents and lenders.

Restrictive Auditor Selection Clauses in Europe

Both U.S. and European loan agreements traditionally contain provisions restricting the accountancy firm that may be engaged by the borrower for the purposes of examining and auditing its financial statements to a “big four” firm (that is, E&Y, KPMG, PwC or Deloitte). However, the European Parliament and the Council of the European Union have recently passed an audit market reform package that, amongst other things, seeks to prohibit such restrictive auditor choice clauses in any contract, including loan agreements. The legislative package consists of a regulation and a directive, which European Union Member States are required to incorporate the provisions into their respective national law by 2016. The prohibition on “big four” auditor clauses will apply to both existing and future loan agreements and will come into effect in June 2017. Significantly, the regulation also requires borrowers that are public-interest entities (for example, listed companies and insurance entities) to inform authorities of any attempt by any third party, such as a lender, to impose such a contractual clause or to otherwise “improperly influence” the decision of the general meeting of shareholders or members on the selection of a statutory auditor or an audit firm. Restrictive auditor clauses are still permitted in the United States. The Public Company Accounting Oversight Board, implemented by the Sarbanes-Oxley Act of 2002, considered a mandatory auditor rotation requirement to promote independence but abandoned the proposal upon pressure from legislators.

Changes in LIBOR Administration

In response to the LIBOR-rigging scandal that was exposed in 2012, extensive LIBOR reforms were adopted, including discontinuation of certain rates and the addition of confidentiality restrictions on each bank’s LIBOR submission. One documentation issue the reforms have raised is determining LIBOR for interest periods that have been discontinued. Some U.S. credit agreements have taken the approach of approximating LIBOR for an interest period for which it is not available by interpolating on a linear basis the rates for the next longest and next shortest interest period for which LIBOR is available. Others have taken the approach of using an alternative benchmark in the event that a particular LIBOR rate is unavailable. Some use a hybrid of the two approaches – if the requisite LIBOR rate is unavailable, then an alternative benchmark is to be used and, if that is not available, an interpolated rate is to be used. The LMA’s suggested provision uses linear interpolation. Banks have also questioned whether the new confidentiality rules could affect reference banks or restrict the provision of internal rates. The opinion of the LMA is that this is not an issue, but some banks remain concerned about liability for quoting their internal rates or acting as a reference bank.

Conclusion

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

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Endnote

1. *Credit: Just the Stats (Well, Maybe a Little Commentary),* Loan Syndications and Trading Association Week in Review, Nov. 7, 2014, available at http://www.lsta.org/news-and-resources/lsta-newsletter (accessed Feb. 26, 2015).

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Our Banking Group represents lenders and borrowers in complicated financing transactions. Our clients include some of the world's largest commercial and investment banks, insurance companies, finance companies, institutional lenders and investors, as well as LBO sponsors, private equity funds, hedge funds, strategic buyers, borrowers and issuers of securities.

The Global Subscription Credit Facility and Fund Finance Markets – Key Trends and Emerging Developments

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Introduction

Subscription credit facilities (each, a "***Facility***") built upon their recent momentum and once again had an excellent year as an asset class, from both a credit performance and a growth standpoint.[1] Consistent with experience before, during and after the financial crisis, limited partner (each, an "***Investor***") funding performance on calls ("***Capital Calls***") on their unfunded capital commitments ("***Uncalled Capital***") was nearly perfect. As a result, Facility credit performance was excellent, and we are not aware of the occurrence of any Facility payment events of default last year. In addition to the extremely positive credit performance, the Facility market expanded significantly in 2014. Multiple Facility lenders ("***Lenders***") active in the market report double digit growth for the year. Mayer Brown LLP represented Lenders and private equity funds (each, a "***Fund***") in new money transactions reflecting in excess of $25 billion of Lender commitments in the aggregate without taking into account any accordion upsizes or increase amendments. This chapter explores the drivers behind this positive credit performance and growth as well as the key trends likely to be relevant in the Facility market in 2015.

Facility Growth and Credit Prospects

Fundraising in 2014

2014 was another strong year for Funds. Fundraising, although down slightly from the marks set in 2013, was relatively robust. Globally, 994 Funds held their final close last year, raising $495 billion in capital commitments ("***Capital Commitments***") from Investors. This surpassed the fundraising levels seen in 2008-2012 but was down slightly from the 1,203 Funds raising $528 billion in 2013. The "flight to quality" trend that emerged during the crisis has continued, with fewer Funds being formed but on average raising more capital. In fact, the average Fund size in 2014 was $544 million, the largest average ever recorded.[2]

Facility Growth

While the Facility market still lacks an industry-accepted data reporting and tracking service to pinpoint numbers, the market undoubtedly expanded by a significant margin in 2014. Multiple Lenders report growing their portfolios extensively, with several reporting growth in revolving commitments in the 40-50% range. We believe this growth rate is, at a minimum, consistent with, and likely in excess of, that experienced in 2013.

While the robust Fund formation market of the past two years has certainly been a primary growth driver for Facilities, we continue to believe that Facility growth is also substantially attributable to increased market penetration; that is, Fund families that in the past have not used Facilities are awakening to their utility. In 2014, we saw several prominent sponsors (each, a "***Sponsor***") obtain their first Facility for a Fund and then look to procure additional Facilities across their platform. This market penetration has clearly seeded Facility growth over the past few years and, in our view, explains how substantial Facility growth resulted in a year of modest fundraising decline.

Looking forward, we continue to forecast outpaced growth for Facilities in 2015. However, we do expect the rate of growth to slow somewhat from the double-digit and perhaps unsustainable growth rate of the recent past (especially in the United States). Absent news of a Facility payment default becoming public or the occurrence of a major macro-economic event, the data is trending quite favorably. For example, at the beginning of 2015, a record 2,235 Funds were on the road fundraising. This is an all-time high. Dry powder increased by $128 billion in 2014 to a record $1.2 trillion.[3] If you assume that the Facility market has reached $200 billion in global Lender commitments (a reasoned but unsubstantiated assumption), that translates to a global advance rate of less than 17% on aggregate Uncalled Capital. Many Lenders have an average blended advance rate of 25% to 30% of Uncalled Capital across their entire portfolio, which suggests there is still a fair amount of market penetration opportunity remaining. Furthermore, the combined record levels of distributions to Investors in 2013 and 2014 and the continued positive investment performance of Funds as an asset class forecast a very robust fundraising environment in 2015. These trends undoubtedly suggest Facility growth for the upcoming year.

Short Term Credit Forecast

Fund Investment Performance. There is an abundance of data that forecasts continuing positive Facility credit performance on the macro level for the near term. Preqin data shows net returns to Fund Investors ahead of all other asset classes over three- and five-year periods, and a one-year return of 19.9% as of June 30, 2014.[4] While positive Fund investment performance enhances Facility repayment prospects in its own right, Investors in performing Funds with demonstrable NAV are likely to be happier and highly incentivized to fund future Capital Calls and avoid the often harsh default remedies typical in a Fund partnership agreement (each, a "***Partnership Agreement***"). Setting aside the well-established, enforceable contractual obligations of the Investors, it is difficult to foresee widespread Investor funding defaults in the near term when the vast majority of existing Funds have generated positive returns.

Harvest Events and Investor Distributions. Additionally, there is generally positive liquidity data at virtually every level of the Fund structure relevant for Lenders. Private equity-backed investment (each, an "***Investment***") exits in 2014 have continued and built upon the robust harvest activity in 2013. Exit events of course lead to Investor distributions, and distributions have been at record levels. In 2013 and 2014, distributions back to Investors amounted to $580 billion and $450 billion respectively (in both years nearly $200 billion in excess of Capital Calls).[5] Investors receiving significant distributions in excess of outflows forecasts well for their ability to fund future Capital Calls.

Secondary Funds. The fundraising success of secondary Funds, Facility borrowers in their own right, has created an unprecedented volume of dry powder available to offer exit opportunities to any Investor that experiences liquidity challenges and needs to exit a Fund position. Secondary Funds raised $23 billion in 2014, building slightly on the $23 billion raised in 2013.[6] This significant growth in secondary Fund dry powder creates a readily available market for any Investor wishing to transfer, whether for diversification purposes or because of financial distress. If the Facility market performed extremely well during the financial crisis when the secondary Fund market was a fraction of what it is today, then today's secondary Funds market with its extensive dry powder certainly provides Lenders with an additional buffer to initial collateral deterioration.

Energy Sector Watch. While 2014 represented a strong year in terms of Fund performance generally, falling crude oil and related commodity prices in the latter part of the year has stressed certain Investments in energy Funds. We expect an active 2015 in the energy space, with Investment write downs, recapitalizations and Fund acquisitions. While it is quite likely that the sharp downward movements to date have and will create meaningful losses on existing Investments for certain Funds, the speed of the downturn may also create distressed pricing and attractive Investment opportunities for the very same Funds incurring the recent losses. The energy sector warrants considerable attention in 2015.

Facility Market Trends

Extensive Refinancing Activity

As predicted, amend-and-extend volume was robust in 2014 and that trend has continued thus far in 2015. Facilities of the 2011-12 vintages are increasingly coming up for renewal. In some cases, Funds are renewing early to lock in the lower pricing that is generally available in the market. While older Facilities are reducing in commitment size, very few are being repaid and terminated. Facilities extending long into the Fund's harvest period are increasingly common.

Umbrella Facilities

Facilities encompassing multiple sub-facilities for unrelated Funds advised by the same Sponsor continue to gain increased traction in the market. We expect the efficiencies created by these structures to support their continued expansion.

Emerging Side Letter Issues

Investor side letters ("***Side Letters***"), amendments to the Partnership Agreement as between the Fund and a particular Investor, continue to evolve in ways impactful for Lenders. In the past six months, new forms of Investor cease-funding rights have emerged, challenging the Lender's fundamental premise that the Investor is contractually obligated to fund its Capital Calls. For example, one state governmental Investor has recently negotiated a new cease-funding right in its Side Letters which permits the Investor to cancel its Capital Commitment within three years of joining the Fund without penalty if any person significantly involved in negotiating the Capital Commitment on behalf of the Investor is or becomes an employee of, or a consultant to, the Sponsor. Similarly, another new cease-funding right permits a governmental Investor to cease making Capital Contributions to the Fund if the Sponsor of the Fund fails to timely complete an annual questionnaire certifying that they are in compliance with their fiduciary and statutory duties related to conflicts of interest. We also continue to see evolving forms of cease-funding rights related to the use and disclosure of placement agents and the making of political contributions by Sponsors. While the above cease-funding provisions all cut against the expectations of Lenders and must be thoroughly diligenced and underwritten, there are numerous examples of Side Letters that thoughtfully balance the equities between the Investor, the Fund and the Lender. For example, an agreement requiring the Investor to fund a Capital Call upon its withdrawal sufficient to repay its ratable share of amounts outstanding under the Facility permits the Investor to exit the Fund after the triggering event but allows the Lender to be repaid.

Hedging Mechanics

Lenders and Funds increasingly want to secure trading activities with Facility collateral and several Lenders have been successful in accommodating this construct in syndicated Facilities. We expect that these secured hedging mechanics, embedded within the Facility documentation, will continue to be a popular request in 2015.

Facility Structural Evolution and Emerging Derivative Structures

Separate Accounts

Separate Accounts and parallel funds of one Investor have continued to permeate the market as Investors (frequently sovereign funds and large institutional Investors) seek Investment flexibility, lower fees, greater control and structuring alternatives for regulatory and tax relief. Many Lenders have gotten comfortable with these single Investor exposures and the Separate Account Facility market is growing rapidly.

Open-End Fund Facilities

Facilities for open-end Funds, which permit Investors to redeem their equity interests at their election (typically following a "lock-up" period and sufficient notice to the Fund), are increasingly seeking Facilities. While Facilities for open-end Funds have not to date been as popular as we originally forecast, there are a number of prospective opportunities for open-end Fund financings in the market currently.

Hybrid Facilities

Funds that are approaching or have passed their investment period often have ongoing liquidity needs. Lenders have historically offered "after-care" Facilities for seasoned Funds, but these Facilities offer

little borrowing base availability if a Fund has nearly exhausted its Uncalled Capital. Hybrid credit Facilities ("***Hybrid Facilities***") are structured on a case-by-case basis but typically include a pledge of whatever Uncalled Capital remains, as well as some form of a pledge of the Fund's Investments. The hybrid borrowing bases are typically structured as the sum of (i) the standard advance rates multiplied by Uncalled Capital, plus (ii) a much lower advance rate on the NAV of the Investments. Each Hybrid Facility is bespoke, and the facility structures and the Investment component of the collateral package differ based on the specific assets comprising the Fund's Investments.

NAV-Based Facilities

To address the liquidity and leverage needs of Funds whose Uncalled Capital is exhausted or otherwise unavailable as collateral, certain Lenders have been structuring financing solutions for Funds based on the equity value in their Investment portfolios ("***NAV Facilities***"). Of course, lending against a Fund's Investments is a far different credit underwrite than a traditional Facility, so Lenders have historically been cautious in their approach. NAV Facilities may take different forms based upon the structure of the Fund and its Investments. Availability is traditionally limited to an amount equal to the "Eligible NAV" of the "Eligible Investments," multiplied by an advance rate. The "Eligible NAV" typically equals the NAV of the Eligible Investments, less any concentration limit excesses deemed appropriate by the Lender under the circumstances. Typically the advance rates for these facilities are low in comparison to other asset-based facilities, which is reflective of both the lack of immediate liquidity of the Investments and the Lender's view of the Investments' likely cash flow, related value and ease of liquidation. "Eligible Investments" will typically be defined as those Investments that are not subject to any liens or any specific adverse credit events, such as the underlying portfolio company being bankrupt or in breach of any of its material contractual obligations, etc. NAV Facilities are typically not directly secured by all the underlying Investments because of the practical difficulties of such a grant, but instead are structured with a collateral package that does provide the Lender with a certain acceptable level of comfort. The collateral varies depending on the nature of the Investments, but typically includes: (1) distributions and liquidation proceeds from the Fund's Investments; (2) equity interests of holding companies through which the Fund may hold such Investments; and/or (3) in some cases, equity interests in the Investments, or a pledge of the Investments themselves, generally for certain large Investments or where perfection of the security interest is not unduly burdensome.

Equity Commitment Financing

Another structural variation becoming more popular are credit facilities to portfolio companies (each, a "***Company***") where the Lender underwrites a Fund's equity commitment to the Company instead of the cash flow or assets of the Company (such facilities, "***Equity Commitment Facilities***"). In Equity Commitment Facilities, the Fund commits to invest in the Company but defers funding the Investment until it receives a Capital Call from the Company. This funding obligation is embedded in either the constituent documents of the Company or in a separate equity commitment agreement. The Company pledges the right to call and enforce the equity commitment to the Lender. The Lender advances against the equity commitment, effectively underwriting the credit wherewithal of the Fund (and typically the Fund's Investors on a look-thru, but unsecured, basis). The covenant package typically emphasizes the Fund's liquidity and may include a minimum NAV covenant and a minimum coverage ratio of Uncalled Capital (after deducting Fund level debt) in excess of the amount of the equity commitment. There are typically no or little operating company-type financial covenants. Equity Commitment Facilities have a host of benefits, including a typically less expensive and less covenant-intensive source of financing for the Company. They also create a funding deferral for the Fund and in most cases appear simply as a deferred purchase price obligation, and not as a guaranty or Fund level indebtedness, on the Fund's financial statements. We anticipate this form of financing to gain popularity in 2015.

Conclusion

We forecast continued growth of the Facility market in 2015, riding a projected positive wave of fundraising for Funds, further penetration into new Fund families and expanded use of Facilities by Funds late in their tenors. Facility structures are likely to continue to evolve commensurate with the growth of Separate Accounts, Open-end Funds and similar alternative investing structures. We also anticipate growth in Hybrid Facilities, NAV Facilities and Equity Commitment Facilities, as Lenders search for yield and utilization and Funds seek leverage and liquidity later in their lifecycle. Of course, there are a fair number of material uncertainties in the greater financial markets currently, especially in the energy sector, the Middle East and Eastern Europe, all of which could potentially spook Investors and quickly change the fundraising landscape. But while these risks are real and should be monitored closely, absent a significant macro-economic event, we expect the Facility market to trend favorably and comparably to 2014.

Endnotes

1. Facilities, also often referred to as 'capital call' or 'capital commitment' facilities, are loan and letter of credit facilities extended to real estate, buyout, infrastructure, energy, debt and similarly focused, typically closed-end, private equity funds. Their defining characteristic is their collateral package: they are secured by the uncalled capital commitments of the private equity fund's limited partners (and related rights pursuant to the fund's partnership agreement including the collection and enforcement of such capital commitments) and typically not secured by the fund's investments.
2. See, *2015 Preqin Global Private Equity and Venture Capital Report* ("Preqin PE 2015"), p.4. Fund statistics do vary by source and are likely still somewhat preliminary for 2014.
3. See, Preqin PE 2015, p.4.
4. See, Preqin PE 2015, p.4; p.59.
5. See, Preqin PE 2015, p.4.
6. See, Preqin PE 2015, p.131.

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Mayer Brown's Fund Finance team has represented the lead agent and lenders in more than 275 subscription credit facilities since 2007. We have led transactions funded by balance sheet lenders and commercial paper conduits as well as large syndicated facilities to accommodate various types of insurance companies. We also have one of the premier private equity fund sponsor-borrower side practices; representing a broad range of national and international general partners and sponsors in connection with the formation of more than 230 debt, infrastructure, private equity, real estate and secondary funds over the last five years. Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Recent Trends and Developments in U.S. Term Loan B

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Introduction

2014 was another strong year for the U.S. leveraged loan market, with overall syndicated loan issuance of $2.1 trillion falling just short of the $2.14 trillion record set in 2013. However, 2014 was also the first full year in which banks were required to comply with the Interagency Guidance on Leveraged Lending (the ***Leveraged Guidance***) and market practice and activity were significantly impacted as banks grappled with how to apply the new regulations.

In recent years, unrelenting investor demand has enabled borrowers and sponsors to continually test the U.S. TLB market's tolerance for looser terms. The continuing prevalence of 'cov-lite' loan agreements affords borrowers significant flexibility to, among other things, change their capital structure, make investments and return capital to investors. This article examines some of these trends, including areas where the U.S. TLB market continues to borrow from the technology of high yield bonds.

Key Market Developments

Investment banks in today's U.S. TLB market operate an originate-to-distribute model, arranging the financing package before distributing all or a significant portion of the TLB to investors (although they will usually retain a portion of the revolving or other liquidity facility, which is still the domain of traditional banks). The ultimate holders of TLB are more likely to be non-bank lenders, i.e. institutional investors such as hedge funds and CLOs. Much of the resilience of the loan market last year has been credited to the liquidity provided by CLOs. 2014 surpassed pre-crisis levels with a record $120 billion of new CLO issuance. CLOs will face additional regulatory challenges of their own over the next few years with implementation of rules imposing risk retention or 'skin-in-the-game' requirements on CLO managers.

Institutional investors take a different approach to their participations in a loan syndicate from their traditional bank counterparts, viewing them as liquid, tradable and impersonal investments, rather than part of a broader institutional banking relationship with that borrower. They invest as part of an overall portfolio in which they will invest in high yield bonds as well as loans. Accordingly, these loan investors have familiarity with high yield incurrence-based covenants. This, coupled with the fact that these investors buy and sell loans opportunistically instead of holding them to maturity, means that they are less reliant on the protection that a more traditional TLB covenant package affords. This change in attitude has been seized upon by opportunistic sponsors and borrowers in order to push for greater flexibility in terms, in the knowledge that investors will tolerate 'cov-lite' structures as long as the debt is sufficiently liquid. The increase in secondary market activity, absence of a close relationship between a borrower and its lenders and increasing syndicate sizes mean that covenant flexibility becomes even more important for a borrower, as amendments to loan documentation can no longer be easily or cheaply obtained.

Against that backdrop, the Leveraged Guidance was jointly issued on March 22, 2013 by the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System and Federal Deposit Insurance Corporation (collectively, the ***Agencies***). Banks are required to report all leveraged loans to the Agencies for *post-hoc* review and the Agencies have the power to find that banks under their supervision are engaged in unsafe and unsound banking practices. For U.S. banking organisations, the Leveraged Guidance applies on an enterprise-wide basis. For foreign institutions with U.S. charters, the Leveraged Guidance applies to all leveraged loans that are both originated and distributed in the U.S. The Leveraged Guidance maintains that additional scrutiny will apply to transactions where leverage levels exceed 6.0x and the Agencies will focus on, among other things, the ability of the borrower to repay all senior debt or at least half of total debt within five to seven years. The Leveraged Guidance provides general guidance for banks to follow, which the Agencies have further clarified in public statements and Q&A sessions, but does not provide a bright-line test for leveraged loans that could place a bank in danger of sanction by the Agencies.

In early 2014, the impact of the Leveraged Guidance on the U.S. TLB market was still unclear and the market adopted varying interpretations of the rules. However, as the Agencies then issued further clarification and guidance (adopting an increasingly bellicose tone as lending standards continued to loosen), the market began to slow down during the second half of 2014 (albeit somewhat masked by the unprecedented levels of CLO activity), which has continued into early 2015. This slowdown will, of course, have been exacerbated by other external factors, including volatility in the oil and gas markets and regional political factors. What has become clear, however, is that regulated investment and commercial banks have become more cautious when underwriting highly leveraged transactions, regardless of market appetite, and are beginning to apply greater scrutiny to other deal terms, including the flexibility to incur incremental debt and to make restricted payments.

Economic Terms

Pricing

Attitudes towards TLB pricing have changed over recent years with a wider range of factors to consider rather than just the margin. LIBOR and other base rate 'floors' (typically set at 1%) are common

features of U.S. TLB. While TLB facilities are traditionally floating-rate instruments, the historically low interest rates of recent years have resulted in TLB effectively becoming fixed-rate with a rate of interest equal to the floor plus the applicable margin. We may see this change in 2015 with interest rates projected to increase. Original issue discount (***OID***), i.e. the discount from par value at the time that the loan is issued, has also become a standard component of TLB economics.

The increasing importance of LIBOR floors and OID in both syndicating and trading TLB has led to a broader approach when calculating or considering pricing of TLB. Loan agreements will typically refer to the more inclusive concept of 'all-in yield' (particularly in connection with 'soft call' repricing protection and the 'most-favoured-nation' pricing restriction governing the incurrence of incremental facilities) which takes each of these factors into account.

Call protection

Investors still generally accept that TLB is a prepayable instrument. However, the depth and liquidity of the TLB investor base continue to drive pricing as much as the credit fundamentals of a particular borrower. This has allowed borrowers to take advantage of high demand in the market to reprice (either by way of an amendment to a loan agreement or a refinancing of outstanding loans) even within a few months of initial issuance. As a result, investors now demand that some limited pricing protection be included in TLB facilities from the outset.

This protection usually takes the form of a 'soft call' – a prepayment premium of typically 1% payable in connection with repricings of TLB occurring within 6 to 12 months following the original issuance of the loan. Recently, even these soft calls have experienced erosion, with carve-outs for prepayments made in connection with a change of control, with IPO proceeds and increasingly, if loans are repriced in connection with a permitted acquisition or major acquisition or if the repricing of the loans is not the 'primary purpose' of any relevant refinancing.

However, there are examples, particularly in the second lien TLB market but also recently in the first lien TLB market, of 'hard calls' – a prepayment premium of typically 1% to 3% payable in connection with any voluntary and certain mandatory prepayments of TLB within one to three years following the closing date. In some cases these financings have incorporated non-call periods (often with 'make-whole' calls permitted) analogous to the call protection found in high yield bonds. In the limited deals where we have seen first lien TLB with hard call protection and non-call periods, the borrowers have frequently had high yield bonds outstanding and including bond-like call protection was necessary in order to attract investors to the TLB instead of the high yield bond.

Mandatory prepayments

In keeping with the move away from a delevering model, mandatory prepayment requirements have become less onerous. Many TLB facilities no longer contain a requirement to prepay debt with the proceeds of equity offerings. More recently, we have begun to see the elimination of the excess cash flow (***ECF***) sweep and the inclusion of leverage-based step-downs in the asset sale covenant more typically associated with the ECF sweep.

The requirement to prepay TLB with the net proceeds of dispositions is subject to many carve-outs, including per-transaction and aggregate materiality thresholds (below which the prepayment requirement does not apply) and permissive reinvestment rights during 12- to 18-month periods following the receipt of the relevant net proceeds. In addition, where TLB facilities permit a borrower to incur additional *pari passu* senior secured indebtedness, asset sale prepayment covenants now often permit the borrower to share asset sale proceeds ratably with such other *pari passu* secured creditors, if required under the terms of the relevant documentation. More recently, the asset sale prepayment requirement has been further eroded through leverage hurdles, which if met, require a declining percentage of net proceeds to be applied in prepayment.

Similarly, there are numerous carve-outs on which a borrower can rely when calculating the amount of ECF that is required to be swept. These carve-outs include anticipated expenditures and investments, as well as prepayments of other indebtedness and certain restricted payments, in each case made within the relevant period. The ECF sweep will also frequently be reduced dollar-for-dollar by voluntary prepayments or repurchases of debt, even if made non-*pro-rata* among the TLB lenders. TLB facilities often afford each lender the right to decline mandatory payments, which may then be retained by the borrower, if not taken up by other lenders.

Restrictive Covenants

The framework governing the covenants in TLB facilities has remained roughly stable, despite the significant loosening of terms. For the most part, TLB facilities have not adopted the form of high yield covenants. However, the substance of the covenants in 'cov-lite' and even in facilities with maintenance covenants provides much more flexibility, akin to high yield bond 'incurrence' covenants, where many corporate actions are permitted subject to the meeting of certain ratios. For example, most TLB facilities keep payments to shareholders (or restricted payments), investments and prepayments of subordinated debt as separate covenants but have builder baskets and general baskets that net across the three covenants. This bond-like flexibility allows borrowers to enter into strategic transactions and incur or refinance debt without seeking the consent of their lender syndicate and without incurring the associated costs of doing so.

As in high yield bond indentures, TLB facilities now typically include the concept of restricted and unrestricted subsidiaries, where the borrower may designate certain subsidiaries as 'unrestricted subsidiaries'. Unrestricted subsidiaries are not subject to guarantee and security requirements, compliance with covenants and events of default and are excluded from the calculation of financial definitions and ratios.

However, while this concept has been imported from high yield bonds, it has in some cases, particularly in 'cov-lite' deals, become looser than the high yield standard, which requires *pro forma* compliance with a minimum fixed charge (i.e. interest) coverage ratio (***FCCR***) (typically set at 2.00:1.00) at the time the borrower seeks to designate a subsidiary as unrestricted. In recent TLB deals, the only condition that must be met at the time of designation is *pro forma* compliance with any springing financial covenant, which would typically be set at or above closing date leverage and, in some deals, there is no requirement to meet any financial ratios at the time of designation. In this case, the only conditions to designation are that the subsidiary is also designated as unrestricted for the purpose of other material indebtedness and that the borrower has sufficient capacity under the investments covenant, as the designation of a subsidiary as an unrestricted subsidiary constitutes the making of an investment in such subsidiary.

Financial maintenance covenants

The trend of having either no maintenance covenants or, more commonly, a springing maintenance covenant continued in 2014,

with only around 1/3 of deals including any financial maintenance covenants (e.g. maximum leverage ratios and minimum interest coverage ratios) tested each quarter throughout the life of the loan. In a 'cov-lite' TLB, maintenance covenants are limited to a springing maintenance covenant applicable only to, and controlled by, the revolving or ABL lenders or no covenants at all. In these deals, the discipline to delever that tightening financial maintenance covenants instil is gone.

Debt incurrence

TLB facilities continue to allow broad flexibility to incur additional debt, whether on a first-lien, junior-lien or unsecured basis, inside or outside the credit facility and/or in the form of loans or bonds. Broadly, there is a distinction between refinancing or replacement loans, which may be incurred within certain parameters (relating to maturity, identity of the issuer, etc.) and additional debt, which are subject to similar parameters but also to *pro forma* compliance with a financial ratio.

In practice, there have been a wide – and sometimes inconsistent – variety of approaches to documenting such flexibility, with debt being categorised in a number of different and often overlapping ways: incremental facilities; incremental equivalent debt; acquisition-related debt; permitted ratio debt; refinancing facilities; replacement loans, amend-and-extend provisions; and others. Similarly, there is not a consistent approach as to what type of financial ratio should govern the incurrence of a specific category of debt: first lien leverage, total secured leverage, total leverage or FCCR.

A limited number of TLB facilities now permit the incurrence of unsecured debt subject to satisfaction of a minimum FCCR (in many cases set at 2.00x) instead of a maximum total leverage ratio, aligning the standard to incur unsecured debt with high yield bonds. Even where a FCCR test for debt incurrence applies, in TLB facilities, additional secured debt is only permitted subject to satisfaction of a maximum leverage ratio (either first lien or total leverage). TLB facilities typically still include more stringent parameters around the terms of secured debt, including limitations on borrowing entity, final maturity, weighted average life, prepayments and, sometimes, more restrictive terms (for example, to require a 'MFN' with respect to the inclusion of any/more stringent financial covenant in any *pari passu* debt).

One recent development has been increased flexibility to facilitate using incremental facilities to finance acquisitions where sellers may expect prospective purchasers to demonstrate availability of funds on a European-style certain funds basis or subject only to SunGard conditionality. We have also seen facilities which allow the testing of the conditions to drawing an incremental facility (including projected compliance with any ratios and whether a default or event of default has occurred, other than specified major defaults) to be tested only at the time of signing the related acquisition agreement.

There is an increased focus on the levels at which the incurrence of incremental 'ratio' debt is permitted (regardless of whether such additional debt is incurred as part of the facilities or outside, in the form of bonds or loans). In some instances, these levels are becoming more conservative as a result of the Leveraged Guidance. Many borrower-friendly TLB facilities allow incremental borrowings in an unlimited amount subject to a ratio – frequently set at closing date leverage plus an additional dollar-capped basket (which itself may sometimes be increased dollar-for-dollar by the amount of loans voluntarily prepaid). This level of permissiveness, where the facilities build in the ability to leverage up beyond closing date leverage has become an area of increasing concern, given the Leveraged Guidance which, significantly, includes untapped baskets in calculating total leverage.

An increasing number of TLB facilities are importing from high yield the ability of a borrower to reclassify debt from one basket or exception to another, including from fixed dollar baskets to ratio-based exceptions. Any such reclassification has the effect of 'replenishing' the fixed dollar basket, which can then be used in the future at a time at which the borrower can no longer meet the incurrence ratio.

Another common feature of high yield bonds which is now frequently seen in TLB facilities is the contribution debt exception. This exception allows the borrower to incur debt in the same amount as any equity contributed to the borrower since the closing date, the theory being that the recapitalisation of the business should allow a certain amount of relevering without any significant deterioration of credit. The formulation has in some cases been tighter than found in high yield bonds, with time limits placed between the timing of the equity contribution and any related incurrence of debt. However there are no constraints on the use of proceeds of the initial equity contribution, other than excluding it from counting towards the available amount or other purposes which would lead to double-counting.

Available amount/cumulative credit

Flexibility to make restricted payments, investments and to prepay subordinated debt has come in the form of an 'available amount' or 'cumulative credit' basket. When first introduced, this basket was almost always built from a basis of retained ECF and could only be used subject to satisfying a certain leverage level. While retained ECF remains the basis in the majority of deals, an increasing number of TLB facilities calculate the available amount based on 50% of consolidated net income (or in a small number of deals, other formulations, such as the greater of retained ECF and 50% of consolidated net income) and, if the test for incurring unsecured debt is a FCCR condition and not a leverage test, replacing the leverage ratio condition with a FCCR condition.

Typically, the use of the builder basket is subject to meeting a leverage ratio condition and the absence of any continuing defaults. In some TLB facilities, these conditions now only apply to the making of restricted payments, not to investments. In addition, the builder basket may also benefit from a 'starter' basket, a fixed amount which is available from the closing date and can be used without satisfying any of the other conditions to the use of the builder basket, effectively disguising the true size of the fixed-dollar general basket capacity for restricted payments and investments.

Permitted acquisitions and investments in non-loan parties

The conditions for making acquisitions continue to loosen, with the only conditions frequently being the absence of any continuing event of default and a cap on the acquisition of entities that do not become loan parties. However, in some instances, particularly where a borrower has significant non-U.S. operations or a non-U.S. growth strategy, permitted acquisitions of entities that do not become loan parties as well as investments by loan parties in non-loan parties are uncapped. The borrower remains subject to the overriding requirement that any restricted subsidiary which becomes a material subsidiary must become a guarantor and grant security.

However, the requirement to provide guarantee and security does not apply to 'excluded subsidiaries', often defined to include all 'controlled foreign corporations' or in some cases, all foreign

subsidiaries. For borrowers with a more international presence or growth strategy, an alternative to the blanket exclusion of all foreign subsidiaries from the guarantee and collateral requirement is a requirement for non-U.S. subsidiaries to grant guarantees and security in favour of the obligations of any existing or future non-U.S. borrowers. This may mitigate any lender concerns around value leakage to non-loan parties while avoiding the adverse tax consequences that can result from 'controlled foreign corporations' granting guarantees and security in favour of obligations of U.S. borrowers.

Additional notable covenant flexibility

In addition to the flexibility to use the available amount, many recent deals have also included a separate carve-out giving unlimited ability to make restricted payments and investments and to prepay junior secured debt, subject only to compliance with a maximum leverage ratio. The leverage ratio is typically set at a lower level than required for use of the available amount or the incurrence of ratio debt, but is now a feature of many top-tier sponsor deals.

Many fixed-dollar general baskets now include a grower concept so that the basket is sized at the greater of the fixed dollar amount and a set percentage of the borrower's total assets or increasingly, EBITDA. If more appropriate for the relevant business, other metrics such as net revenues or net tangible assets may be referenced instead. While this feature is more commonly accepted in debt and investment covenants, with the rationale that as a result of organic growth or bolt-on acquisitions, a fixed basket based on the size of the business at the closing date may not be appropriate. However, grower baskets are increasingly being seen in the restricted payments general baskets as well.

Financial definitions

The flexibility afforded by TLB covenant structures is enhanced further by the generous terms of the financial definitions that govern the ratios and baskets. In particular, the definition of EBITDA includes broad add-backs for items including any extraordinary, unusual or non-recurring items, the latter two of which are not defined under U.S. GAAP and which have no fixed definition, and for actual restructurings and business optimisation expenses. The definition will also include an 'add-back' for projected cost savings and synergies (including those relating to initiatives with respect to which actions are only expected to be taken within 12 to 24 months) which are sometimes capped at a percentage of actual EBITDA of the group for the relevant period or in many cases are uncapped. It is standard for these projected cost savings to be reasonably identifiable and factually supportable as determined by the borrower with no requirement for independent verification. In addition, many leverage covenants are calculated on a net basis – reducing the debt by the amount of unrestricted cash of the borrower (often without any cap).

Assignments and Consents

Assignments

Despite the active trading market in TLB and investor focus on liquidity, some constraints on assignments remain customary. In general, a borrower's consent to assignments (not to be unreasonably withheld) is required. However, the consent requirement falls away while certain events of default (typically limited to payment and bankruptcy) are continuing. Consent will also be deemed to be given if the borrower fails to respond within a specified period. The length of such period has been a recent point of negotiation, with borrowers resisting the LSTA recommended position of five business days. Assignments to 'disqualified institutions' (i.e. competitors and other identified institutions) are also prohibited. The list of disqualified institutions is typically frozen at the start of primary syndication (other than as to competitors, which can be updated over the life of the TLB) and must be disclosed to all potential and existing lenders.

Consents

The thresholds for amendments have historically been set at a simple majority of lenders for most amendments, with changes to fundamental rights (including economic rights and release of substantially all guarantees and security) requiring consent of all lenders. These thresholds have evolved in order to accommodate increased flexibility for the borrower to partially refinance TLB and to incur additional debt. Matters that used to require unanimous consent commonly now require consent only from 'each affected lender'. This would, for example, allow a borrower to extend the maturity of a loan with only the consent of the lenders who agree to extend, while lenders who do not agree to be extended do not have any blocking right. While the standard is frequently expressed to be 'each affected lender', in practice some amendments (e.g. the release of collateral) will still require unanimous consent.

Separately, TLB facilities now include provisions to make it possible in practice for borrowers to take advantage of the more permissive debt covenant. No lender consent is required for consequential amendments that are necessary in order to allow the incurrence of permitted debt, for example, amendments to the TLB facilities to include incremental or replacement loans or amendments to an intercreditor agreement to provide for a new class of creditors.

Conclusion

The TLB covenant package continues to evolve away from a traditional bank model with covenants that require delevering and engagement with lenders for significant transactions. It remains to be seen whether 2014 represents a high water mark in this regard. Clearly the Leveraged Guidance will continue to significantly impact the U.S. TLB market. In the first part of 2015, average leverage multiples for large LBOs have fallen below 6.0x to a two-year low of 5.9x, almost a full turn of leverage inside the near 7.0x peak in the third quarter of 2014. At the start of 2014, less than 20% of surveyed institutions thought that the Leveraged Guidance would have a significant impact on leveraged lending activity. Going into 2015, that number has risen to 50%.

For the time being, investor appetite in the U.S. leveraged loan market remains healthy, particularly at the stronger end of the credit spectrum, so large, highly-leveraged deals are still achievable. However, borrowers may find themselves needing to approach a wider number of banks and non-bank lenders, including those not subject to the Leveraged Guidance or analogous regulations in their home markets in order to secure financing. M&A-driven lending remains healthy but there has been significantly less refinancing activity in 2015 so far and it is possible that borrowers of leveraged loans issued prior to the Leveraged Guidance taking effect may need to adopt a tighter covenant package in order to refinance in the near future or else find an alternative solution (e.g. high yield bonds).

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Real Estate Finance: Trends Around the Globe and the Outlook for 2015 and Beyond

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According to Walt Disney, "it's a small, small world". Hillary Clinton took over 350 pages to espouse the existence of the global village and, according to the century-old adage, if X location sneezes, [*insert place with which you need to make a tangential link*] catches a cold. Economies around the world are inextricably linked, and financial contagion from one financial centre quickly spreads across the globe: one only has to look at the domino effect of the collapse of Lehman Brothers for a very recent and very relevant demonstration of this interconnectivity.

Real estate, however, is literally and figuratively anchored to the realities of local economies. Whilst global events can shape the overall state of economies, and even mask or compensate for structural imbalances, regional real estate is a sound barometer of local financial conditions. The media is full of coverage of the global recovery, focusing on rising employment and industrial output, oil and gas consumption, wage levels and other indicators of growth, but how does this play out on real estate around the world?

It is instructive to review the state of the real estate finance markets around the world to identify common themes and trends but equally to see the fundamental differences in conditions and prospects for real estate through 2015 and beyond.

The United States

As with so many things in the US generally, the real estate finance market is one of contrasts and contradictions. Whilst the entire market suffered terribly in 2008/9, the recovery of property values over the past 18 to 24 months has been less consistent.

Prices and sales volumes on both seaboards are now at around pre-crisis levels, with the major cities (Los Angeles and San Francisco on the West Coast and New York and Boston on the East) booming. In these cities asset prices are far exceeding predictions and, in certain cases, seeming to bear little connection to the yields which those assets can generate. There are several reasons for this. First, it is a consequence of the flight to quality that was witnessed during the financial crisis. Investors retreated to the major cities where asset prices remained robust, underpinned by fundamentally sound local economies. In addition, spiralling prices in the major cities is a reflection of the huge influx of overseas money from sovereign wealth funds and other foreign investors into the US. As has happened in Europe, cash-rich Middle Eastern and Asian investors have shown huge appetite for real estate in the US, snapping up many landmark buildings: for example the Waldorf Astoria in New York was purchased by China's Anbang Insurance Group in 2014. In all markets, including where Western investors invest in China or Asia Pacific or the Gulf, the tendency is for overseas investors to put money into well-established, mature cities. This has had the effect of accelerating the recovery on both US seaboards.

The position in in-land America is less consistent. As a knock-on effect of the runaway prices in the coastal cities and the resultant downward impact on returns, the search for yield has prompted, mainly US, investors to again look at secondary US cities and regions. Prices are being pushed up, and in the Northeastern and Western US, are within touching distance of pre-crisis highs. The South and Midwest are still languishing in the doldrums, with anaemic growth and prospects not especially appealing even to the boldest investor.

Real estate values are therefore broadly reflective of the US economic recovery: strong headline growth masking some profound regional differences. This is likely to continue for 2015 and the foreseeable future.

A further trend in the US over the past few years has been the emergence of non-bank lenders (NBLs). Immediately following the financial crisis, bank liquidity dried up almost instantly. Banks, many of which were brought to their knees or beyond by exposure to residential and commercial real estate, stopped or severely restricted lending, even to strong borrowers. NBLs stepped in to exploit this liquidity gap, providing much-needed funds to prevent the spluttering US real estate machine coming to a complete halt. NBLs have remained, taking advantage of a lighter-touch regulatory regime and far more streamlined internal approval systems to provide an agile and proactive alternative to the mainstream lenders. Whilst banks are now lending again, in many cases aggressively, NBLs are exploiting niches such as development finance where traditional banks are less keen to lend. NBLs will continue to be of importance (funds raised by NBLs for investment are running at record levels) but a challenge for them will be increasing regulation. So-called 'shadow banking' is being reviewed by regulators on both sides of the Atlantic, and it is inevitable that regulation will increase, eroding NBL's competitive advantage to some extent.

A further significant trend in the US is the increased level of equity circulating in the market, much of it from overseas. The property boom of 2004 to 2008 was debt-fuelled, with colossal amounts of cheap debt acting like gasoline on an already incendiary market, where investors themselves had comparatively little or nothing at risk. This time around, or so the optimists hope, the increase in asset values is equity-driven, with investors having much more 'skin in the game'. Much more of the liquidity that is sloshing around the US real estate market is equity-derived, with huge amounts of money being injected from external sources such as Middle Eastern sovereign wealth funds and China. Banks are lending lower percentages of values, meaning that investors need to contribute more equity. This increased investor exposure should

lead to more prudence and responsibility in both borrowing and lending and the general improvement in the US economy should also help bring stability. Employment is rising, as are wages, and the general sentiment is increasingly positive. This has an influence on investors' appetite.

Several of the economic fundamentals required for sustainable growth in any market seem to be in place in 2015 in the US real estate market. There is (relative) macro-economic stability, plentiful availability of cheap finance and improving consumer and investor sentiment. Deloitte, in its 2015 Commercial Real Estate Industry Outlook states:

> *"In many ways, the commercial real estate industry is on more solid footing than it has been for quite some time. The US economy continues to progress and investors are generally seeing robust performance across most property types and markets. Could 2015 be the year for growth for the industry?"*

This, it is argued, provides a more sustainable platform for rising asset values which will help avoid a 2000s-style boom and bust. The question of whether the recovery in real estate values is embedded and sustainable is undoubtedly the key area to watch in the US in 2015.

Europe

Otto von Bismarck, the 'Iron Chancellor' of Prussia, famously stated: "whoever speaks of Europe is wrong: it is a geographical expression". If that was true in a nineteenth century geopolitical context, it is just as accurate in describing the contemporary real estate finance market. Whilst there is a common market, the status of real estate in Europe is fractured, ranging from cities and regions where values are increasing at breakneck speed to whole countries where prices are still falling.

United Kingdom

Real estate in many parts of the UK is booming. Buoyed by huge amounts of overseas equity, property prices in 2015 in many cities are already at or above pre-crisis levels. Trophy assets such as the Canary Wharf estate are being sold, often to sovereign wealth funds, at eye-watering prices with the ripple effect marked on prices in secondary cities such as Birmingham and Manchester. Reflecting investors' desire for safety in the US during the financial crisis, prime London was seen as a haven for real estate post-2008. However, as prices in London started to accelerate and yields fall, investors started looking outside of London and the South East of England. This has continued, and prices for all commercial asset classes across the UK have increased strongly and are, on the whole, at or about pre-crisis levels.

There is now a perceived lack of value in the UK real estate finance market, but unlike the US where the sheer size of the country provides secondary investment opportunities, UK investors have looked outside of the UK for yield. Initially this was to Western European countries such as Portugal, Spain, Ireland, The Netherlands and Italy, where the economic shock had created opportunities for investment. Latterly, investors have been looking further afield to Central and Eastern Europe in the search for better yields. This trend looks like continuing.

NBLs, as in the US, have had a significant impact in the UK and have helped provide liquidity to deal types which traditional bank lenders have shied away from. Whilst many of the banks badly affected by the credit crunch have repaired their balance sheets, jettisoned huge amounts of loans secured against real estate and are again actively lending, NBLs have retained a significant and growing portion of the market for lending. NBLs appeal to investors in the UK for the same reasons as in the US: perceived flexibility and appetite to share risk and quicker decision-making processes. They will remain a fixture. The tightened banking regulatory regime has also had the effect of capping LTVs of senior bank debt at somewhere around the 70% mark – NBLs are able to push this up into the 85%+ mark in the right circumstances.

Germany

Germany is Europe's economic heavyweight, and predictably its real estate market is robust. The 7 main cities (Berlin, Frankfurt, Munich, Hamburg, Dusseldorf, Cologne and Stuttgart) are still seeing greater price increases than other cities, but with the market becoming more diversified. In a bid to increase returns, investors are increasingly buying shopping centres, retirement homes and hotels. However, as with the UK and US, in the hunt for yield investors in Germany are also looking at riskier asset classes and/or outside of the main cities. The strong overall economic condition of Germany – good growth, low unemployment, low interest rates – has led to a construction boom, with year-on-year increases in construction permits granted since 2009.

It is generally accepted that the 2008 crash was largely caused by over-exuberant bank lending, and regulators the world over have spent the intervening time in tightening (or over-tightening) banking regulations. Increased capital adequacy requirements have in Germany seen the level of debt senior banks are prepared to lend fall from 85% loan to value to closer to 60%. In Germany at least, investors have been used to contributing up to 20% of overall costs, so a financing gap has arisen. NBLs have moved to exploit this opportunity. To date, these have primarily been US-originated specialised debt investment vehicles, though Asian, and in particular Chinese, investors are also being seen. These NBLs avoid the need for a German banking licence and other regulatory consents by partnering with local banks or structuring lending to originatesoutside of Germany. Bafin, the German banking regulator, is renowned for its vigorous approach, so these NBLs have to take particular care to remain within the regulations.

In addition, German insurance and pension funds are increasingly lending into the real estate market, attracted by longer term returns better than government bonds. Allianz AG, one of Germany's biggest insurance companies, has a stated investment strategy of lending and holding debt for periods of up to 10 years. These debt providers compete at the higher end of traditional senior debt / lower end of mezzanine debt in terms of loan to value levels.

A final indication of the direction of travel in the German real estate market is the negotiating strength of borrowers and investors. Whilst covenant-lite structures have yet to enter the market, the power of borrowers to influence pricing, structure and loan conditions is palpable and likely to become even more apparent over the next 18 to 24 months.

Real estate in Germany and, to a lesser extent the UK, is therefore in a purple patch. By contrast, Europe is physically book-ended by two very different propositions: France and Greece.

France

Due to a combination of economic and political factors, France's real estate market has had a torrid time. The state of domestic real estate is for the most part turgid. Residential property in a few, key cities – Paris, Toulouse, Bordeaux or Lyon, for example – has

remained stable, with new housing having shown some modest price increases since pre-crisis. Elsewhere, volumes and prices remain depressed.

In commercial property, there is a binary contrast across the country. Paris remains the stand-out location for investment: in 2014 around two-thirds of investment volume in France was within the central Paris region. This statistic puts into context other figures regarding increasing overall investment volumes in 2014. Whilst in other markets investors moved out of the capital city in the search for better returns, in France they have remained in Paris. This has resulted in stable or increasing prices in Paris whilst other cities and regions remain subdued.

Demand for trophy assets in Paris has had the effect of driving prices up and yields down. Foreign investment in France accounts for about 60% of overall investment, with over half of this money coming from outside of Europe. Paris is one of the top four cities in the world for direct real estate investment, but this status does not seem to be benefitting other parts of France in the way that booming assets values on the US seaboards are feeding through to real estate prices in other less desirable American regions. There is nothing to suggest this is going to change in 2015.

Political elements have had an impact on the real estate market, with investors skittish at the prospect of changes to the tax regime and occasional quasi-jingoism from the government. Deliberate legislative action has also had an impact, with strict regulations on environmental and security issues making commercial property built before 2005 extremely difficult to sell. In addition, the costs and protracted time frames for doing deals in France, allied with the very debtor-friendly banking and insolvency regimes, deter new entrants from the French market.

France's banking system is closed when compared to the US or UK, so there is less opportunity for new market entrants, equity investment funds and NBLs. That said, insurance companies are making inroads into the lending markets, and US private equity funds are making a splash: Lone Star acquired Coeur Defense for a headline €1.3 billion in what was the second largest real estate finance transaction in 2014.

France's real estate market, then, is enjoying a recovery of sorts but it is very localised in nature, focused as it is on Paris. The residential market remains weak and the outlook for the non-Parisian parts of France seems muted. Many of the trends from the US, UK and Germany are simply not visible here, and 2015 appears to be a year of at best consolidation for the majority of the country with increasing activity in the capital.

Greece

And then we have Greece. Real estate prices in Greece during the period 1994 to 2007 increased by a whopping 238%, buoyed by Euro membership, an influx of foreign capital and a surge in GDP. The ongoing financial crisis in Greece ravaged asset values and led to huge drops in the value of property, with a 52% peak to trough fall in the retail sector and 40% in the office sector. Construction activity has been decimated and demand for property, both commercial and residential, has collapsed with a 90% decrease in residential building work. Further uncertainty is added by the nature of parts of the Greek economy: the Bank of Greece acknowledges it is difficult to accurately track property values because the actual prices paid for real estate are impossible to verify.

One would like to continue with a 'but...' and explain how the outlook is stabilising with an upward trajectory predicted. However, the massive uncertainty surrounding the political and economic situation in Greece makes predictions exceedingly difficult. Foreign investors returned to Greece during 2013 and 2014, buying distressed and other assets with a value in excess of US$1.5 billion. A liberal visa programme, which effectively allows someone to purchase European residency in return for retaining an investment in Greece of €250,000, was introduced in 2013. This, combined with planned changes to the tax regime, is predicted to help stabilise the real estate market in 2015 and encourage growth after that. The Bank of Greece stated in a recent report that: "*as a whole, the real estate market is projected to start recovering gradually in 2015, provided that the present trend is not reversed by exogenous factors*". It is these exogenous factors which make calling the direction of the Greek market impossible. The new government, elected in early 2015, continues to play brinkmanship with the European Central Bank, the EU and the IMF over its bail-out. Will Greece leave the Euro (the feared 'Grexit' scenario)? Will investors, who were becoming attracted to prospects of enhanced value in Greece, be spooked and divert their money to less volatile areas? Will the huge back book of non-performing loans, which amounts in aggregate to €77 billion, simply prove too much for the banking system and suffocate any recovery? 2015 is a crucial year for Greece and what is clear is that few of the factors and trends impacting other European and Western economies in 2015 are going to be as significant here. The position of Euro membership would appear to trump all other considerations in the Greek real estate market.

United Arab Emirates

The story of the UAE property market over the past decade is a little like that of Greece, though in the UAE's case we are able to add, after the statistics of cataclysmic falls in property values: 'but since then...'. Peak to trough UAE real estate shed around 40% of its value, culminating in the well-documented US$10 billion+ bailout of Dubai World. Frenzied speculation, price increases that did not mirror the underlying realities of the local economy and the availability of cheap and plentiful financing all contributed to a bubble that ended in a nasty burst. But since then prices have rebounded to around their pre-crash levels and steps have been taken to prevent another bubble. These have included caps on mortgage lending, fewer off-plan developments, reduced debt as a percentage of overall deal costs (UAE investors now need to take a greater share of deal risk) and a marked decrease in foreign investment leading to investors with a far superior understanding of the region. Whether these things do actually prevent another crash or whether everyone is being naively optimistic, only time will tell. However, the Central Bank is alive to the possibility of a bubble and has stated that "*the UAE real estate markets and the banks' exposure to it remains a core financial stability priority*". This resulted in the capping of banks' exposure to real estate lending.

That said, a significant regional risk factor is the price of oil. Whilst the UAE economy is more diversified and robust than it was in 2008, the current slump in oil prices could have knock-on consequences for the economy generally and real estate values in particular. The oil industry still accounts for about 25% of UAE GDP and with economists forecasting that oil prices will remain low for the medium term, 2015 will be the year that its impact will become clearer.

Hong Kong

Q3 2008 saw a drop of 18% in the value of real estate in Hong Kong, but subsequent to that prices have rocketed, increasing strongly year-on-year. The headline issue of real estate in Hong

Kong is of the struggle of the authorities to moderate price inflation. Several measures have been introduced since late 2010 to support this, including tightening of mortgage policy and increased property taxes. Although these have led to temporary slowdowns in price rises, overall the trajectory has been firmly upwards. Prices are at record highs and certain parts of the residential sector experienced 15% price increases from June to December 2014, which by any normal criteria must be unsustainable.

The main driver of price acceleration is lack of land combined with consistently strong demand resulting from strong economic growth. The government has pledged to make additional land available for development (including 29 residential sites during 2015), but the basic lack of supply is clearly geographical. There are genuine fears of a bubble, and Hong Kong is now the most unaffordable place in the world to live: average property prices have reached 17 times the gross annual median household income. High prices and rentals have restrained industrial and commercial growth.

The Hong Kong dollar is pegged to the US dollar, so monetary policy is dictated indirectly by Washington. With the Federal Reserve expected to increase interest rates in 2015, Hong Kong's interest rates will likely follow suit. This could have a dampening impact on real estate values.

In relation to the finance market, a series of steps have been taken to help cool the market. Caps on loan to values for self-use residential and second properties have been introduced, and the Hong Kong Monetary Authority now has the power to introduce countercyclical capital buffer rates if excessive credit growth gives rise to systemic risks. Banks' exposure to real estate will undoubtedly be factored in to these considerations. However, despite the high cost of property and the fact that nearly every purchase is funded by a mortgage, the Hong Kong property market remains one of the most under-leveraged markets in the world compared to those markets with laxer banking controls.

For Hong Kong, 2015 is going to be a year of trying to keep a lid on the bubbling cauldron of property prices whilst having an eye on developments in the US to see what impact changes in monetary policy there have locally.

China

China, as one might expect, has taken more overt control of its real estate markets during the period since the credit crunch. In response to the global economic crisis in 2008, the government introduced a RMB4 trillion (*circa* US$588 billion) stimulus programme, a significant proportion of which went into the real estate sector. As a direct consequence of this, the real estate finance market in mainland China soared from 2008 to 2013. Since 2014 a combination of specific economic policy and a general softening of GDP growth led to a slow down in the real estate finance market.

However, reflecting the position in the US and other Western economies, China's market is polarising into robust, popular destinations for investment (Beijing, Shanghai, Guangzhou and Shenzhen) with the remainder of the country left trailing. Local policies and other factors also impact investor appetite, but the expectation is that it is the key industrial and commercial hubs that will attract the most investment and drive-up prices.

As mentioned in the context of other countries, another key trend in China is the increasingly outward-looking nature of investors, whether state-owned or not. Chinese investors are deploying huge amounts of capital in real estate and other assets around the world, having a marked influence on many of these markets. Outward-bound real estate investment grew more than 200-fold to nearly US$34 billion between 2008 and 2014. It is expected that this trend will continue and is a key factor for the global real estate market.

In relation to the financing of real estate, bank lending has traditionally been the main channel of funding. However, recently imposed tightening of lending regulations have forced banks to become more cautious in real estate lending. Banks are focusing more on larger developers and investors which are able to satisfy more demanding credit standards. Property trusts, funds and bonds are becoming more visible, providing an alternative to bank lending, but these types of financing are very much in their infancy. There would appear little chance of foreign investment becoming a major source of funding, but the government is supportive of these alternative lenders. How these new funders develop in China will be interesting to observe during 2015.

The global village

In the context of real estate at least, it would seem that Hillary Clinton was partially correct: it is a global village to an extent. Certain common trends do bind the international real estate market. The sustainability of the global economic recovery frames prospects for growth in real estate everywhere, whilst overall economic conditions heavily influence the countries like Greece that are being buffeted by 'exogenous factors'. In addition, events in Syria, Ukraine and Russia and the price of oil and gas have the capacity to impact economies around the world and shift real estate values. Additional factors such as the consequences of the ending of quantitative easing programmes in the US and UK, whilst the EU simultaneously commences one, all throw up challenges and risks, the effects of which should start to become apparent over the next 12 to 18 months. Throw in an unexpected military conflict here, a surprise financial catastrophe there (the media is awash with rumours of the return of subprime mortgages and its attendant risks of excess), and there is the potential for the global recovery to be derailed.

The economies which seem to be recovering best from the crash of 2008/9 seem to have the closest similarities. The US, Germany and the UK have increasing real estate prices supported by local and overseas demand, competitive debt markets with new market entrants and regulatory regimes which seem alive to the risk of another bubble. The UAE and China broadly fall into this category, though with domestic investment more locally based and an enormous amount of outwards investment being undertaken.

In the middle there are countries like France which, whilst more or less recovering from their recessions, appear to be walking a tightrope where a tiny amount of over-regulation or political interference could put the economy into reverse. At the far end are countries like Greece which have got so many political, economic and social factors to contend with that the coming year could mark a brilliant dawn or be the period in which their political leaders reverse decades of relative stability and diplomacy and undermine the nascent recoveries in their real estate markets.

2015 is therefore a crucial year for real estate the world over. It will show whether the world is experiencing a sustained recovery or just a temporary uptick, and political events in Greece, Ukraine and elsewhere will come to a head, for better or worst. It will also show whether the recent general upwards movement in real estate values will continue. Alternatively, regionalised factors could cause contrasting fortunes for real estate, with some cities and countries racing away, whilst others lag behind. Or, to put it another way, less Walt Disney and more Fleetwood Mac, who firmly believed "you can go your own way".

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Albania

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1 Overview

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

Lending activity in Albania is a regulated activity and performed by local banks, non-bank financial institutions, savings and loan associations and other microfinance institutions.

However, lending activity can also be seen in cross-border lending transactions made by international financial institutions, foreign commercial banks and other finance companies which lend directly to local companies and/or operations of other international companies in Albania.

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

The significant lending transactions in the recent years are between international financial institutions and local banks/non-bank financial institutions. The local banks and non-bank financial institutions have borrowed money from international financial institutions in order to boost their domestic lending 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)?

An individual managing a single member company may not enter into a contract with another company concerning loans and guarantees.

Otherwise there are no explicit restrictions that a company can guarantee the borrowings of one or more other members of its corporate group.

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

Regardless of the extent of a benefit, if it is deemed unjustified by law, company members and shareholders including managing directors and members of the Board of Directors who act, or fail to perform required actions, shall be jointly and severally liable for company commitments (including company guarantees) to the extent of their total assets:

1. If they abuse the company form (i.e. limited liability) for illegal purposes.
2. If they treat company assets as if they were their own assets.
3. If they fail, with respect to the type of activities, to ensure that the company has sufficient capital at a time when they know or must have known that the company will not be able to meet its commitments toward third parties.

2.3 Is lack of corporate power an issue?

If the company will incur contingent debt from the guarantee amounting to more than 5% of the company's annual turnover of the last business year, the legal representative (i.e. managing director) would normally seek an approval from the Board of Directors of the company.

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

There are no requirements in respect of governmental or other consent or filings. The shareholders' approval is required if it is provided specifically or generally in the Articles of Association of the company.

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

There are no net worth, solvency or similar limitations imposed on the amount of a guarantee.

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

There is no exchange control or similar obstacles to enforcement of a guarantee provided between resident companies.

In principle, the same is deemed for cross-border guarantees provided from a resident company to the benefit of the other members of its corporate group abroad, but cross-border transfers due from such guarantee must be in accordance with the rules of foreign exchange transfer imposed by the central bank.

3 Collateral Security

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

The collaterals available for secured lending obligations are immovable properties, tangible and intangible personal properties including property rights (i.e. usufruct rights), account receivables, financial instruments, etc.

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

It is not possible to give a general security agreement.

It is advisable to provide either an agreement in relation to a specific asset or to a group of assets similar to their nature as provided under the Albanian law (i.e. mortgage over immovable property 1, immovable property 2, etc.).

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

According to Albanian legislation, security can be taken either over real (immovable) property (land) or over movable property (i.e. machinery and equipment).

Mortgage (security taken over immovable assets, usufruct or emphyteusis rights) can be taken/given not only over present or future immovable assets as well as present and/or future fixtures related thereto, but also easement rights over immovable property. It is created upon an agreement made in writing before a Notary Public, which in turn is perfected by registering it with the immovable properties registry kept by the local Real Estate Registration Office.

The Law on Securing Charges provides as an instrument of security a non-possessory pledge which is an alternative to the possessory pledge provided by the Albanian Civil Code. Therefore, a non-possessory security securing charge is given/taken only over present or future movable, tangible assets (i.e. machineries and equipment), for securing either a present or a future debt. In order to create a securing charge a written agreement is needed. The securing charge is then perfected through registration with the securing charges registry.

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

The collateral security can be taken over receivables. Collateral security over receivables can be created by a written agreement. The collateral security over receivables is then perfected through registration with the securing charges registry (when securing charge is applicable) and provided to a local bank for 'possession' of the receivables (when financial collateral is applicable) while there is a collateral security.

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

Collateral security can be taken over bank accounts. As in question 3.4 above, collateral security over bank accounts can be created by a written agreement. The collateral security over receivables is then perfected through registration with the securing charges registry (when securing charge is applicable) and provided to a local bank for 'possession' of the receivables (when financial collateral is applicable) while there is a collateral security.

3.6 Can collateral security be taken over shares in companies incorporated in Albania? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Collateral security can be taken over shares in companies incorporated in Albania. Collateral security over shares in companies incorporated in Albania can be created by a written agreement as a pledge under the Albanian Civil Code and financial collateral under a specific law.

In case of a pledge under the Albanian Civil Code, collateral security over shares in companies incorporated in Albania is perfected through registration in the company's own share ledger and with the Company Registration Centre.

In case of financial collateral provided to a local bank acting as a custodian while taking 'possession' of the shares in companies incorporated in Albania.

Such security cannot be validly granted under a New York or English law governed document.

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

The Law on Securing Charges provides as an instrument of security a non-possessory pledge which is an alternative to the possessory pledge provided by the Albanian Civil Code.

Therefore, a non-possessory security securing charge is given/taken only over present or future movable, tangible assets (i.e. inventory), for securing either a present or a future debt. In order to create a securing charge a written agreement is needed.

The securing charge is then perfected through registration with the securing charges registry.

3.8 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 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 of obligations under a credit facility.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

It is not mandatory that the securing charge agreement be made in writing in the form of a notary deed; however in practice the document is drawn up by a Notary Public and the notarisation fee may vary from ALL 1,500 (approx. EUR 11) to ALL 4,000 (approx. EUR 29), depending on the guaranteed amount to be repaid by means of the securing charge agreement.

It is mandatory that the mortgage agreement be made in writing in the form of a notary deed. For a mortgage agreement it may vary from ALL 2,000 (approx. EUR 14) to ALL 15,000 (approx. EUR 107).

The registration fee with the securing charges registry is ALL 1,400 (approx. EUR 10). Additional fees will be charged depending on the pages of the extract and how many additional collaterals, chargees/chargors, etc. shall be registered under the same registration number.

The fees applicable for registration with the Real Estate Registration Office of mortgage agreements depend on the amount of the loan.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The filing, notification or registration requirements in relation to security over different types of assets involve a reasonable amount of time or expense.

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

No, there are not.

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

No, there are not.

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

No, there are not.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Albanian company law does not provide rules on financial aids. Despite that, a joint stock company must not subscribe for its own shares, unless specifically provided under the law.

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

Albanian company law prohibits a joint stock company from purchasing shares of its parent company.

(c) Shares in a sister subsidiary

There are no specific rules in Albanian company law regarding this issue.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Albania recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

No. Albanian law does not 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.

5.2 If an agent or trustee is not recognised in Albania, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

There is no alternative mechanism available.

5.3 Assume a loan is made to a company organised under the laws of Albania and guaranteed by a guarantor organised under the laws of Albania. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Pursuant to the Albanian legislation (the Civil Code), the lender may transfer the loan to another lender even without the prior debtor's consent, except for the cases provided by the Albanian Civil Code.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

a) According to Albanian tax legislation, the interest payable on loans is subject to a withholding tax of 15%. In cases of a Double Taxation Treaty between the Republic of Albania and a foreign country, the provisions of the treaty are to be applied.

b) There are no specific rules in Albanian tax legislation regarding this issue.

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 rules regarding tax incentives or other incentives and taxes applied to foreign lenders.

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

No, because pursuant to Albanian tax legislation only incomes which have their source in Albania can be taxable in Albania.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Foreign lenders may bear the notarial fees, the cost for the Apostil seal and translation costs which are to be determined *mutatis mutandis*.

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 a borrower in cases where some or all of the lenders are organised under the laws of a jurisdiction other than the Albanian jurisdiction.

7 Judicial Enforcement

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

The law "On International Private Law" defines rules for the law that applies in civil legal relations, which have foreign elements, jurisdiction and procedural rules of Albanian courts.

The Albanian courts may enforce contracts with foreign elements according to the rules provided in the Civil Code.

7.2 Will the courts in Albania recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

As a general principle, foreign judgments are recognisable and applicable in the Republic of Albania in accordance with the rules provided by the Code of Civil Procedure. The foreign judgment is enforceable after its recognition by a decision of the Appeal Court. These decisions shall not enter into force only when they do not comply with the rules provided by the Code of Civil Procedure.

In cases of recognition and enforcement of foreign courts the Court of Appeal does not judge on the merits of the case. It only examines whether or not the court decision contains provisions that are contrary to the aforementioned.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Albania, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Albania against the assets of the company?

If the loan/guarantee agreement regulated under foreign law is considered an enforceable title, the lender can initiate the enforcement procedure by immediately obtaining an enforcement order by the court. Then, the enforcement order can be forwarded to the Bailiff's Office for the execution.

If the loan/guarantee agreement regulated under foreign law is not considered an enforceable title, the lender must file a suit against the company in a court in Albania, obtain a final and binding judgment, and enforce the judgment against the assets of the company. This procedure may last approximately 2 years.

Enforcing a foreign judgment in a court in Albania against the assets of the company may take approximately 2-3 months

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

The procedure is enforced by the Bailiff's Office as according to specific steps and criteria listed in the Albanian Civil Procedure.

Before the enforcement is initiated, the Bailiff Officer shall invite the debtor to settle the obligations to the creditor within 10 (ten) days.

In case when the debtor does not pay the debt sum, the bailiff initiates the enforcement procedure by seizing the collateral. The property is appraised by the bailiff according to that value specified in the Real Estate Registry, and if not registered, the property is then appraised by an appraiser.

During this process the collateral is generally kept in custody by the debtor, and if it is found that the debtor is not taking care of its condition (thus affecting its value) then the bailiff appoints a third party to keep it until the auction takes place.

Following the 10 (ten)-day grace period which the debtor is given to repay any outstanding amount to the creditor, the property is put forward for sale by auction. In the case when that there are no bidders in the first auction or if the proposed prices have not exceeded the minimum price set out in the first auction, a second auction will be held in conformity with the rules of the first one. This second auction can only be held after 3 months of the termination of the first one.

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

There are no specific restrictions applicable to foreign lenders.

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

The collateral security and securing charge should not be considered under the bankruptcy estate.

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

With reference to foreign arbitral awards, with Albania being a contracting state to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, foreign arbitral awards are recognised and may be enforced in Albania. The Court of Appeal does not judge on the merits of the case in cases of recognition and enforcement of foreign courts judgments.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The lenders that have a collateral security are entitled to enforce their rights through the execution of the collateral out of bankruptcy proceedings, but subject to the following exceptions: Chargees or Lessors may not raise claims related to rent or financial lease payments to a period of 12 months prior to the opening of the bankruptcy proceedings, or any other claims on damages relief, as a consequence of the termination of the lease.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The bankruptcy administrator may treat as invalid transactions that "disadvantage bankruptcy creditors" occurring within specified periods prior to opening the bankruptcy proceedings or after a request to open a bankruptcy proceeding. A transaction may be treated as invalid if it has occurred within 3 months prior to the request to open the proceeding or after the opening of the proceeding when, at the time of transaction the other party to the transaction was aware or as a result of gross negligence was unaware of the illiquidity of the debtor or the request to open the proceeding. Moreover, a transaction may be treated as invalid when the debtor has entered into a transaction with the intention to disadvantage his/her creditors occurring within 10 years before the date of the request to open the proceeding if the other party was aware of this intention, the debtor's illiquidity or the effect of the transaction on creditors.

With regards to the preferential creditors' rights, the Albanian Civil Code sets out the following order of preference, with some exemptions including cases otherwise provided for by the Albanian Civil Code and other specific laws.

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

Yes. The following entities are excluded from bankruptcy proceedings:

a) the State and its bodies;

b) the strategic sectors; and

c) local government and its bodies.

The bankruptcy proceedings applicable to banks and other financing institutions are not governed by the Bankruptcy Law but by specific laws.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

There are no processes other than out-of-court proceedings available for the creditor to seize assets subject to enforcement.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Albania?

There are specific matters where the Albanian courts have exclusive jurisdiction i.e. ownership rights and/or real rights over immovable properties if the immovable property is within the territory of the Republic of Albania.

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

With regard to this issue, Albanian legislation does not provide for the waiver of sovereign immunity.

10 Other Matters

10.1 Are there any eligibility requirements in Albania for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Albania need to be licensed or authorised in Albania or in their jurisdiction of incorporation?

Lending activity in Albania is regulated. The resident lender must be licensed and supervised by the central bank.

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

Please make reference to the answers above.

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Tonucci & Partners

Tonucci & Partners is a leading law firm and has operated in Albania since 1995. The firm also has offices in Italy (Rome, Milan, Padua, Prato, Florence) and in Romania (Bucharest).

Its Tirana office includes a team of Albanian and expatriate lawyers that combine the firm's leading international experience with local expertise, language skills and knowledge of local market practices.

Our clients in Albania are small, medium and large companies, associations, financial institutions, banks, Governmental agencies and other state-owned organisations which turn to Tonucci & Partners – Albania for advice on legal issues concerning their Albanian activities or international transactions.

The firm assists its clients in every aspects of their business in Albania, providing a full range of legal services in the area of: corporate and commercial law; banking and finance; contracts; energy; power and utilities law; natural resources; real estate and construction law; administrative law with particular regard to public procurements and concessions (EU IPA funds); telecommunication; antitrust; multimedia and IT; environment; IP, employment and immigration; tax and customs; international law; foreign investments; and litigation and arbitration.

Andorra

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1 Overview

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

Andorra is still a rather conservative jurisdiction in terms of secured lending structures. However, the recent opening up of the Andorran economy to foreign investment by the implementation of the Foreign Investment Act 2012 will probably stimulate the lending markets in the future.

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

In recent years, there have been several significant transactions involving both domestic and foreign lenders. The collateral securities structures have involved pledges over shares and receivables and mortgages over real estate properties in Andorra as well as personal guarantees granted by the borrowing party. The details of such transactions are confidential.

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, without prejudice of the restrictions commented on the section regarding financial assistance and the considerations contained in the answer 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?

According to the Andorran Companies Act, the directors have a duty of diligence towards the company. Furthermore, a resolution passed by the general meeting might be challenged if it is considered that it prejudices the company's interests for the benefit of one or more shareholders or of a third party. In such events, the resolution might be annulled.

2.3 Is lack of corporate power an issue?

Yes, in Andorra the representative of a party to a contract must be duly empowered to act on its behalf.

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

In general terms, there are not specific requirements concerning governmental authorisations or consents. For transactions outside the ordinary course of business of a company, the authorisation of the general meeting is customarily obtained.

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

No, without prejudice of the restrictions commented on the section regarding financial assistance and the considerations contained in the answer to question 8.2 concerning guarantees granted by an insolvent company or person.

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

No, there are not.

3 Collateral Security

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

The most common types of collateral to secure lending obligations are classified into: (i) personal guarantees, such as bails granted by a third party that acts as guarantor or guarantees on first demand, on which there is not express regulation but that have been admitted by the Andorran courts; and (ii) *in rem* security interest, being the most common the mortgages over real estate property and the pledges over movable assets with transfer of possession.

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 Andorran law, it is not possible to give asset security by means of a general security agreement. In order to create security over specific assets, it is necessary to constitute mortgages or pledges in accordance with the nature of the asset that will be granted as security. With respect to the mortgages, it is required to constitute them by means of a public deed. With respect to the pledges, even if their constitution is not required to be done by means of a public deed, it is highly advisable to do so in order to ensure their efficacy in front of third parties. Furthermore, the pledges normally require the transfer of the possession over the collateral.

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

In Andorra, mortgages cover the land and the buildings built on it. According to the doctrine, and by virtue of the principle of freedom of contract, a mortgage can be extended to other properties physically bounded with the main mortgaged asset.

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

Andorran doctrine and practice recognise the possibility of taking a security over receivables. Furthermore, there is a judicial precedent in which this type of security has been implicitly recognised.

A security over receivables could be taken by means of a pledge, constituted through the granting of a public deed in front of an Andorran notary.

In accordance with the Andorran practice, the notification to the debtor is required, in order for the pledge to be perfected.

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

Yes, this type of collateral security can be taken by means of a pledge over the bank account, which, as in the case of the security over receivables, must be constituted by means of a public deed granted in front of an Andorran notary. In this case, it is also necessary to notify the depositary bank about the existence of the pledge.

3.6 Can collateral security be taken over shares in companies incorporated in Andorra? 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 collateral security can be taken over shares of Andorran companies. Such collateral must be constituted, as well, by means of a public deed granted by an Andorran notary.

In accordance with article 15 of the Companies Act, the shares can be documented by means of nominative titles.

This type of security must be granted under Andorran law governed documents.

Besides the notarisation above referred, the pledge must be registered in the relevant public deeds of acquisition of the shares affected by the pledge and in the Registry Book of Shareholders.

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

To our knowledge this type of security is not used in Andorra considering the nature of securities available and the lack of transfer of possession.

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, without prejudice of the restrictions mentioned in the section regarding financial assistance and the considerations in the answer to question 2.2.

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?

The notarisation fees are fixed by the Andorran Government. The current notarisation fees were fixed on the year 2000 and are established through a scale applicable over the amount of the document to be notarised. In the case of securities, the fees are generally calculated over the amount of the secured liability.

The scale contemplates a percentage that varies progressively from 3% (applicable to relatively small amounts) to 0.1%. The Andorran equivalent of value-added tax is applicable to notarisation fees.

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 general terms, the amount of time required in order to notarise a security is not significant. The related expenses depend on the amount of the secured liability, as mentioned in the answer to question 3.9 above.

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

No, in general terms there are not.

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

No, there are not.

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

Please see the answer to question 3.2. Power of attorney must also 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?

(a) Shares of the company

Andorran companies, excluding banking institutions and other entities that integrate the Andorran financial system allowed to enter into credit transactions with third parties, may grant financial assistance to acquire their own shares or to accept them as security within the limit of the ten per cent of the share capital of the company and as long as: (i) the assistance is charged against distributable profits and unrestricted reserves; (ii) the general meeting authorises the transaction and the maximum amount of shares that can be acquired and their maximum price; and (iii) the company establishes a reserve in its balance sheet equivalent to the amount of its credits or to the value of the shares accepted as security.

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

Even if the Companies Act does not provide for a specific prohibition for this type of financial assistance, the prohibition of establishing reciprocal participations in a percentage higher than the ten per cent leads one to believe that the restrictions referred to in the paragraph above can be equally applicable to this scenario.

(c) Shares in a sister subsidiary

Please see (b) above.

5 Syndicated Lending/Agency/Trustee/ Transfers

5.1 Will Andorra 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 are no precedents that may confirm whether such figures would be recognised by the Andorran courts under secured lending structures.

5.2 If an agent or trustee is not recognised in Andorra, 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?

Even if there are no judicial precedents that confirm its validity under Andorran law, and following recent trends in the neighbouring countries, a parallel debt clause under the loan – which should be subject to a governing law that recognises such figure – could be used as a way to grant Andorran securities directly to the trustee acting on behalf of the lenders.

5.3 Assume a loan is made to a company organised under the laws of Andorra and guaranteed by a guarantor organised under the laws of Andorra. 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?

Given the ancillary nature of securities with respect to the secured obligation, the assignment of a loan will normally entitle the transfer of the securities attached to it. However, considering the formal requirements applicable to securities in Andorra, and in particular, to mortgages and pledges, it would be necessary to formalise such assignment by means of a public deed in order to ensure its efficacy in front of third parties.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest payments made to foreign lenders may be made without deduction of or withholding on account of the Andorran Non-Resident Income Tax given that the relevant law establishes a general exemption over interests when the payer is a resident of Andorra or when the interest arises from capital used in Andorra. Concerning interest payments on loan made to domestic lenders, if the lender is: (i) a company, there are no applicable deduction or withholding tax requirements (although interests are taxable); or (ii) an individual, and the paying party (a company or an individual acting in the course of its business) resides in Andorra, there is a withholding requirement for personal income tax at a rate of 10 per cent.

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

Please see the answer to question 6.1 above. There are no taxes for the purposes of effectiveness or registration.

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

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.?

Please see the answer to question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

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

Yes, considering that there is no specific prohibition which bans the contracting parties from submitting disputes arising from a contract to a specific law (except when a law provides the specific designation of Andorran law such as disputes arising from rights *in rem* over immovable properties located in the Principality of Andorra, lease contracts over properties located in the Principality of Andorra, and labour disputes, among others).

The Andorran courts would enforce contracts subject to a foreign governing law as long as (i) they are not related to matters which are submitted to the Andorran law by a mandatory rule, (ii) the foreign law does not contradict the Andorran public policy, and (iii) the claiming party proves during the trial the content and validity of the applicable foreign law.

7.2 Will the courts in Andorra 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, as long as it is not considered by the Andorran courts that there is a lack of reciprocity between the Principality of Andorra and New York or England.

In this sense, under the *Llei Qualificada de la Justícia*, dated 3rd September 1993, the enforceability of foreign judgments in the Principality of Andorra is subject to a prior judicial proceeding of recognition (the exequatur proceeding) which falls into the domain of competence of the Andorran High Court of Justice – the highest level of authority in the Andorran judicial system – and which is based on the criteria of reciprocity.

In accordance with article 49 of the *Llei Transitòria de Procediments Judicials* dated 21st December 1993, the Andorran court shall verify that the foreign judgment complies with each one of the following conditions: (i) the competence of the jurisdiction that has rendered the foreign judgment; (ii) the regularity of the trial procedure followed; (iii) the accordance of the foreign judgment to national and international public order laws; and (iv) the absence of any type of fraud to the Andorran 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 Andorra, 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 Andorra against the assets of the company?

a) It will depend on the complexity of the matter. The enforcement of a security in Andorra is subject to the determination that a breach of the main obligation has occurred (an average between 12 and 18 months is required in matters that do not present a special complexity) and to a second procedure of foreclosure over the secured assets which normally requires several public auctions.

b) As commented under question 7.2, the enforcement of a foreign judgment is subject to the *exequatur* procedure. The average resolution of this type of procedure is between 6 and 12 months. Once recognition of the foreign judgment is obtained, it is necessary to initiate a foreclosure procedure which is as well subject to public auctions.

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 Andorran law a creditor cannot appropriate a secured property without commencing enforcement proceedings; which, in general terms, imply the sale in public auction of the secured assets. A specific foreclosure proceeding has been recently regulated by the Foreclosure Act, dated 18th December 2014. On the same date an Act was passed regulating the figure of the bailiff with the aim of accelerating the enforcement of judicial resolutions.

The Foreclosure Act provides two public auctions, the starting price being determined by an appraisal (which in certain events of disagreement between the parties must be established by an independent appraisal) of seventy per cent of the appraisal for the first auction and of fifty per cent of the appraisal for the second auction. The direct award of the collateral is only contemplated in exceptional cases and in the event that the public auctions are declared deserted. If a foreign secured party is finally awarded with real estate property, a foreign investment authorisation might be required.

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

There are no restrictions for foreign lenders to file a suit in Andorra against an Andorran company. In the event of foreclosure and direct awarding of real estate property, the Foreign Investment Act might be applied and a previous authorisation might be required.

7.6 Do the bankruptcy, reorganisation or similar laws in Andorra 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 below.

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

The recognition of foreign arbitral awards is subject to the *exequatur* procedure on the same terms as described in the answer to question 7.2. Furthermore, the Andorran Arbitration Act, dated 18th December 2014, establishes that the *exequatur* on arbitral awards is subject to the New York Convention 1958, notwithstanding any more favourable international treaty on the matter.

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 Andorran Decree on Insolvency, dated 4th October 1969, a declaration of bankruptcy or the establishment of a judicial agreement of a person would imply that: (i) its creditors would not be allowed to demand their credits individually; (ii) their credits would be part of the insolvency estate represented by the administrator appointed by the court; and (iii) all individual actions in process at the time would be suspended.

However, if the creditor's rights are secured by means of *in rem* securities, such as pledges and/or mortgages, their credits would receive the consideration of privileged securities, and any enforcement action initiated by them would not be suspended as a result of the declaration of bankruptcy. Furthermore, their credits would not be part of the insolvency estate, except in the event that the securities were not sufficient to cover the secured liability.

Under an insolvency procedure, the administrator appointed by the court may require the secured creditor to cancel any pledge it may hold on a previous payment of the amount secured.

Concerning mortgages, if no action has been initiated in order to execute them before the declaration of insolvency, the administrator, with the court's authorisation, is entitled to realise the sale of the mortgaged properties within the following three months after the declaration of insolvency. Notwithstanding, the secured creditor, within the two-month period after the relevant notification from the court, may initiate the relevant proceeding in order to enforce its security. All of such sales shall be realised under the public auction proceeding carried out by the competent authority.

In both cases, if the amount recovered is insufficient to cancel the amount of the debt secured, the creditor's credits will be part of the insolvency estate, for the outstanding amount of the debt as ordinary 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?

Under the Andorran Insolvency Decree, the creditors' rights are qualified in privileged or in ordinary. The law contemplates a general privilege in favour of the employees of the debtor over its properties. However, the Andorran courts have determined in several occasions that the employees' privilege does not affect the privilege granted by *in rem* securities.

The Andorran Decree on Insolvency provides as well the unenforceability of certain acts carried out by the debtor after the date of the declaration of insolvency against the mass of creditors, and particularly: (i) gratuitous dispositions and all the contracts in which debtors' obligations notably exceed from the counterpart's obligations; (ii) payments made concerning debts non-fallen due at the moment of declaration of insolvency; (iii) mortgages or securities granted after the date of the declaration of insolvency, for previous debts; and (iv) debtor's acts challenged by the administrators or by the creditors on the basis of simulation. The court declaration of insolvency must determine the date from which the debtor is considered to be insolvent. Such date must not be previous to the eighteen months preceding the court's declaration. As a result, the third party involved in the rescinded act would be obliged to restitute the goods or services, plus interests and fruits, if any.

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

According to the Insolvency Act, bankruptcy proceedings are solely applicable to commercial companies and individuals that carry out commercial activities.

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, extrajudicial procedures are available to the parties as long as they are agreed upon by them. Such procedures are normally carried out by Andorran notaries and are subject to the celebration of several auctions. It is highly advisable to determine the procedure to follow in the security document.

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 Andorra?

Andorran Courts have exclusive jurisdiction over certain matters where a specific law so provides, for instance in claims related to the Andorran nationality; in disputes arising from rights *in rem* over immovable properties located in the Principality of Andorra and lease contracts over properties located in the Principality of Andorra; in disputes related to the validity, invalidity or dissolution of Andorran companies or their resolutions, among several others. Therefore, if the matter in question is not affected by an exclusive jurisdiction clause, the submission to a foreign jurisdiction made by the parties to a contract would be enforceable under the laws of Andorra.

Under Andorran Law, the competent jurisdiction to resolve a dispute is the jurisdiction in which the defendant is domiciled, whenever there does not exist a specific provision in the Law that attributes the exclusive jurisdiction to the Andorran Courts, or whenever the parties have not agreed to submit the claim to any other jurisdiction. Additionally, the doctrine considers that, as

regards the resolution of disputes in contractual matters, the first rule on the attribution of jurisdiction is the autonomous will of the parties. In the absence of designation by the contracting parties, the jurisdictional competence corresponds to the jurisdiction in which the defendant is domiciled.

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

A part of the doctrine admits the possibility to waive the sovereign immunity. Regarding the immunity of execution, the restriction to waive is considered to be related to the nature of the assets, being understood that for certain type of assets the immunity is absolute.

10 Other Matters

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

There are no restrictions in that sense. However, if an entity carries out financing activities on a regular basis in Andorra it must be duly authorised and it will be subject to the regulation on financials activities.

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

The majority of the matters have been mentioned in the previous answers.

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Montel&Manciet Advocats

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Argentina

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1 Overview

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

The main issues at hand are those triggered by three current forces that have proved to be disruptive in the local financial market: (i) inflation; (ii) foreign exchange restrictions limiting the ability of local residents and non-Argentine residents to acquire foreign currency; and (iii) lack of long-term financing. In a nutshell, current interest rates in connection with secured financing in Pesos (but also in dollars) are priced at a rate that, at some points, is even lower than inflation. In other words, inflation has trumped interest rates in terms of percentage and, therefore, interest rates have sometimes even proven to be negative.

In light of this issue, the most significant trends have been those aimed at structuring transactions that could mitigate the adverse effects of these situations. As an example of these features, we can mention:

(i) dollar-linked transactions, i.e. financings which are denominated in foreign currency but for which disbursements and repayments are made in local currency. This feature has been included in most recently issued securities (by private entities but also by publicly owned companies) and in some syndicate and bilateral loans. In addition, there are specific regulations issued by the Central Bank of the Republic of Argentina (the "Central Bank") that could be construed as supporting this mechanism;

(ii) transactions on which the conversion of local currency into foreign currency and *vice versa* is made at a rate which does not reflect the official foreign exchange rate but an implicit rate arising from the quotation of dual currency securities trading in local currency and foreign currency; and

(iii) transactions including terms which allow the lender to request payment of principal and interest in a foreign currency, local currency at a specific exchange rate, or payment in kind.

Finally, since the re-enactment of foreign exchange restriction in 2001, most of the financings received by local companies are trade-related financings, the proceeds of which are used by local companies to either finance production of commodities or other exportable goods or finance the acquisition of equipment or other goods. This type of transaction is afforded preferential treatment from a foreign exchange perspective.

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

- In 2014, the Parisian branch of Deutsche Bank and Credit Agricole granted Axion Energy Argentina a US$ 73 million loan agreement, its first international financing. The loan was backed by French credit insurer Compagnie Française d'Assurance pour le Commerce Extérieur.
- In 2014, Banco de Servicios Financieros (BSF) issued notes worth US$ 150 million.
- In 2014, Corporación Andina de Fomento granted Aceitera General Deheza S.A. an A/B loan for the aggregate amount of US$ 100 million. Corporación Andina de Fomento participated in the Tranche A loan for the amount of US$ 50 million and Rabobank Nederland participated in the Tranche B loan for the amount of US$ 50 million. The loan is secured by a mortgage and a registered pledge.
- In 2014, Latin American development bank Corporación Andina de Fomento granted Argentine oil and gas producer Pan American Energy a US$ 238 million loan.
- During 2013 and 2014, the Provinces of Neuquén, Chubut, Mendoza, Buenos Aires, and Entre Ríos issued notes for US$ 330 million, US$ 264 million, US$ 219.9 million, US$ 200 million, and US$ 63.7 million, respectively. The City of Buenos Aires also issued notes for US$ 216 million.
- In 2013, Argentine downstream oil company, Axion Energy, secured two loans worth 800 million argentine pesos (US$ 150 million) in total.
- In 2013, Argentina's local wheat and oilseed milling company, Molino Cañuelas SA, obtained a 200 million argentine pesos (US$ 38 million) loan from a syndicate of banks.
- In 2012, Exal Argentina S.A. and Exal Packaging S.A., together with other members of the Exal Group as borrowers, executed a 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 million.
- In 2012, Synthon Argentina (and other subsidiaries) secured a US$ 123 million revolving loan facility granted by ABN AMRO Bank, Rabobank, Deutsche Bank Netherland and ING Bank to Synthon International Holding.
- In 2011, Energía Argentina S.A. issued securities through two financial trusts, for the amounts of US$ 690 million and US$ 350 million.
- In 2011, NASA Trust launched the second bond offering, raising US$ 407 million for financing the Atucha II nuclear power plant.

2 Guarantees

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

Yes, it is possible to secure the borrowings of other members of the corporate group. The company acting as a guarantor should receive

proper benefits or consideration in return. Otherwise, it may be considered that the granting of the guarantee derives no benefit for the securing company and, hence, other creditors could challenge such transaction.

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

These requirements should be strictly defined when the guarantee is up-stream (a controlled entity acting as guarantor of an obligation of its direct or indirect parent company or an affiliate).

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

In case the securing company does not have any financial corporate purpose, nor receives a consideration or benefit, the guarantee may be deemed out of the scope of the securing company's corporate purpose (*ultra vires*) and, consequently, may be declared void.

Besides, pursuant to Argentine law, directors must act loyally towards the company and its shareholders, loyalty which includes the director's responsibility to perform its duties with the diligence of a "good businessman" and in the interest of the company. Any failure to comply with these standards results in directors' unlimited liability for the damages arising therefrom.

To be released from any such liability, the director must timely file written objections to the company's resolution that caused the damages, and, if applicable, give notice thereof to the company's statutory auditors or file proceedings for challenging the decision.

Therefore, although it is not specifically provided, if a guarantee is deemed out of the scope of the securing company's purpose, it might be understood as a breach of the director's duties and, consequently, the director would be deemed responsible for negligence.

2.3 Is lack of corporate power an issue?

Yes. Corporate power is required to grant guarantees.

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

No governmental authorisation, consent or approval is required to grant a guarantee. However, it is advisable that the Board of Directors or the shareholders' meeting previously approves the transaction, particularly if the guarantee is for a significant amount considering the net-worth of the guarantor and there is no specific provision in the by-laws of the guarantor. A unanimous approval of the shareholders' meeting is also advisable.

Also, if the security consists of a mortgage over real property located in a security zone (close to borders and other strategic zones), upon execution, transfer of land will require prior approval from the Security Zone Commission, unless the transferee is an Argentine individual.

Besides, third parties' consents may be required for the assignment of agreements to a trust. As a general rule, since contracts involve both rights and obligations, the transfer of the obligations is not allowed unless an express consent of the counterparty is obtained (see questions 3.1 and 3.4).

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

As long as the company operates within its corporate purpose, as explained in question 2.1, Argentine law does not provide limitations on the amount of a guarantee; however, deduction of interest may be limited under certain thin capitalisation rules. Please refer to question 6.5.

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

Assuming that the enforcement of a guarantee implies an international transaction (i.e. a payment from an Argentine resident to a non-Argentine resident), it will be subject to foreign exchange regulations.

Foreign exchange rules allow access to the Argentine Foreign Exchange Market (the "FX Market") to purchase foreign currency to make payments abroad under the items "*Commercial guarantees for export of goods and services*" and "*Financial guarantees*", subject to compliance with applicable requirements in each case. Argentine foreign exchange rules do not affect a foreign lender's ability to exercise its rights against a foreign guarantor.

If the guarantee is established over a local asset and its enforcement implies the collection of Argentine Pesos, the foreign lender is able to purchase foreign currency for repatriation purposes, subject to compliance with certain specific requirements.

Also, proceeds obtained from a bankruptcy proceeding can be transferred abroad through the FX Market, provided that the creditor accessing the FX Market is the same creditor that filed for recognition of the credit in the insolvency proceeding.

Besides, although not expressly regulated, the Central Bank has been imposing certain *de facto* restrictions that may delay or, in certain cases, prevent access to the FX Market for means of purchasing foreign currency.

3 Collateral Security

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

In general terms, Argentine law recognises two kinds of guarantees: the "personal" guarantees; and the "asset-backed" guarantees.

"Personal" guarantees are granted by a person or a legal entity committing its property to assure the performance of one or more obligations of the debtor. Upon the debtor's default, the creditor may eventually take legal action over the debtor's property and the guarantor's property. This guarantee, unlike asset-backed guarantees, does not create a lien or a privilege in favour of the creditor.

"Asset-backed" guarantees are granted over a specific property owned by the guarantor. In this kind of guarantee, either the debtor or a third party may be the guarantor. Unlike personal guarantees, asset-backed guarantees grant the creditor (i) the rights of "persecution" and "preference" over the asset in question, which means that the creditor has the right to pursue the guarantor's property, even if the guarantor sells or transfers his/her property, and (ii) the right to execute the guarantee and receive the corresponding payment with preference over other creditors, even in the event of insolvency or bankruptcy of the debtor or the guarantor.

The most common guarantees are:

a) Mortgage: The mortgage is the most frequently used security over immovable property. Also for certain movable property which has significant value the law specifically demands the constitution of a mortgage instead of a pledge (i.e. airplanes). For further details, please refer to question 3.3.

b) Pledge: A pledge may be constituted over movable property, including but not limited to, machinery, vehicles, patents and trademarks. For further details, please refer to question 3.3.

c) Trust in Guarantee: A trust may secure both movable and immovable property. Goods held in trust form an estate separate from that of the trustee and the trustor. If the property given in trust is registered in a public registry, the relevant registry will record the property in the trustee's name. Therefore, they should not be affected by any individual or joint actions brought by the trustee's or trustor's creditors, except in the case of fraud. The beneficiary's creditors may exercise their rights over the proceeds of the goods held in trust and be subrogated to the beneficiary's rights.

   Any individual or legal entity may be appointed as a trustee of an ordinary trust. Although there is no ruling on the issue, it is advisable that the trustee be a different person from the secured creditor (although there is no obstacle if the trustee is a controlled or controlling entity of the secured party).

d) Security Assignments: Assets may also be assigned as security. One of the differences with a trust is that, in the case of security assignments, assigned assets are typically limited to rights or credits including, without limitation, receivables.

The creditor may demand payment of the credit to either the assignor or the debtor of the assigned credit. If the assignor pays the amounts owed, then the assigned credit should be assigned back to the assignor.

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

Although it is not possible to execute a general security agreement, including different types of collateral securities, it is possible to execute a general agreement including more than one asset of the same type, for example, a pledge may include machinery and vehicles.

In relation to the procedure, a security is executed by means of an agreement between parties.

Besides, Argentine law allows the pledge over an inventory of goods ("floating pledge"). Please refer to question 3.3.

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

Collateral security can be taken over real property (mortgage) or over machinery and equipment (pledge).

a) Mortgage: A mortgage generally secures the principal amount, accrued interest, and other related expenses owed by the debtor. To be valid, the following conditions should be met:

   (i) The mortgagor must own the property to be mortgaged.

   (ii) The mortgagor must have the capacity to transfer its assets.

   (iii) In certain cases, prior consent of the spouse is required.

   (iv) The mortgage must be granted over a specific property and the amount and the obligation secured must be certain and determined. Conditional, future or undetermined obligations are permitted to be secured, provided that an estimated value of the obligation is determined upon creation of the mortgage. Additionally, the mortgage over real property extends to: (i) all its accessories as long as they are attached to the principal property; and (ii) the supervening improvements made to the property.

   Mortgages must be executed in writing by means of a public deed, which must be registered with the Land Registry of the jurisdiction where the property is located to be valid *vis-à-vis* third parties.

   A mortgage remains in full force and effect until all amounts secured have been paid or the mortgage is otherwise cancelled. The registration of a mortgage will automatically expire 20 years after the date upon which it was registered, unless renewed.

b) Pledges: The debts secured by a pledge can be conditional, future or indeterminate, or otherwise uncertain in amount.

   Pledges in Argentina are governed by the Argentine Civil Code and by the Argentine Commercial Code. Nevertheless, as from August 1st, 2015 both the Civil and Commercial Code will be replaced by the new Unified Civil and Commercial Code under the Law 26,441 (the "New Code") which amends the provisions regarding pledges.

   According to the provisions of the current legislation, there are several classes of pledges, including:

   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 registration of a fixed pledge involves the filing of the petition to the Pledge Registry of the jurisdiction in which the personal property is located.

   The pledge agreement is legally binding between the parties from the date of execution. Upon registration, the agreement is opposable *vis-à-vis* third parties. It shall be opposable *vis-à-vis* third parties from the execution date if the petition to register the pledge is filed before the corresponding Registry within 24 hours of its execution.

   The registration of a pledge expires 5 years after the date on which it was registered, unless renewed. Once perfected, a pledge remains in full force and effect until all amounts secured have been fully paid or the pledge is otherwise cancelled.

   The floating pledge may be created through a notarised private document, using the form provided by the Registry of Pledges for such purposes (a public deed is not required).

   Notwithstanding the above, the New Code does not distinguish between the Civil and Commercial Pledge. Therefore, the new legislation provides that the pledged assets can be delivered to the creditor or placed in the custody of a

third party. Upon default, the creditor may sell the pledged asset through a public auction. Nevertheless, the New Code provides that parties may agree upon the following:

i) that the creditor may obtain ownership of the asset for the estimated value of the debt. This value will be established by the expert appointed by the parties. In the event that parties fail to reach an agreement, the expert shall be appointed by the judge; or

ii) by means of a special sales proceeding.

Furthermore, the New Code does not amend the "Registered pledge".

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

Yes. Collateral security can be taken over receivables. In order to have effect *vis-à-vis* third parties, a private assignment agreement must be executed and the assigned debtor must be notified by a notary public.

Alternatively, a trust structure may be used. Please refer to question 3.1.

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

Argentine law recognises the validity of a pledge over cash. In this case, the pledge shall have full effects upon delivery of the amounts pledged to the pledgee. These guarantees are not usual, though.

As for the procedure, please refer to question 3.3.

3.6 Can collateral security be taken over shares in companies incorporated in Argentina? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes. To be valid, the shareholder must inform the company about the terms and conditions of the pledge and the Board of Directors must record the existence of the pledge (i) in the Registry of Shares Book, and (ii) with a notation at the back of the share certificate.

Pursuant to Argentine law, movable assets which are permanently situated in a place and are not intended to be moved to a different jurisdiction are governed by the rules of the place where they are located. Thus, a guarantee agreement over the shares of a local company shall be governed by the rules of Argentina.

Parties in a loan agreement may freely agree on the law applicable to the contract (see question 7.1), but Argentine law must rule the content, conditions and effects of a security over the shares of the company.

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

Yes, under a "floating pledge".

Please refer to question 3.3.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

(i) Yes, debtors may guarantee their own obligations. Please refer to questions 3.1 and 3.3 above.

(ii) Yes. It is a guarantee of a third party, different from the debtor. Please refer to questions 3.1 and 3.3 above.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notarisation, registration and other fees vary depending on the jurisdiction in which the agreement is executed.

The following chart details the main costs applicable to different securities:

Security	Fees
Real Property (Mortgage)	Notary Fees: 1% of the principal amount. Stamp Tax: 1% of the economic value of the agreement. Registration Fees: 0.2% to 0.3% of the guaranteed obligation.
Chattel Personal Property (Pledge)	Notary Fees: low, depending on the characteristics of the pledge. Registration Fees: 0.2% of the guaranteed obligation. Stamp Tax: 1% of the economic value of the agreement.
Accounts Receivable / Debt Securities	Notary Fees: low, depending on the characteristics of the security. Registration Fees: 0.2% of the guaranteed obligation. Stamp Tax: 1% of the economic value of the agreement.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Registration before the applicable registry may take approximately between 1 and 6 months, depending on the type of assets involved.

As to expenses, please see the table 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 able to deduct interest (for income tax purposes) as long as the expenses were incurred to generate taxable income.

The Argentine Tax Authority has challenged the deduction of interest in cases of a leverage buy out to acquire shares of local companies. The National Tax Authority considered that such expense is not necessary to obtain taxable income or to keep or maintain its source. In certain cases, the resolution of the Tax Authority was confirmed by the Tax Court.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Argentina recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

In Argentina, the role of the agent or trustee is governed by the rules of contract. Therefore, the parties in a syndicated lending may freely determine the functions and powers of the agent; such powers might include calculating the due amount of principal and interest, calculating financial ratios, informing the compliance or defaults of the debtor's obligations under the agreement, and keeping and guarding the loan documentation.

The figure of the agent in a syndicated loan is different from the figure of a collateral agent. Since in Argentina the guarantees must be linked to the credits which are guaranteed, it is not possible to split the holder of the credit from the holder of the guarantee. Thus, if a collateral agent is appointed, it might act as representative of the creditors but not as the holder of the rights arising from the guarantee.

5.2 If an agent or trustee is not recognised in Argentina, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

- The credits and the guarantee might be transferred to a trustee, who will be committed to enforcing the security if the debtor fails to comply with the agreement and applying the proceeds from the security among the grantors-beneficiaries.
- A real property might be transferred to a trustee, who might constitute a guarantee trust over such property in favour of the creditors.
- The guarantee might be granted in favour of one creditor, who commits to act as a collateral agent based on an intercreditor agreement.

5.3 Assume a loan is made to a company organised under the laws of Argentina and guaranteed by a guarantor organised under the laws of Argentina. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The assignment of credits must be documented in an agreement. A debtor's intervention in the agreement is not required.

The enforceability of the credits by the new lender is subject to two requirements: (i) the transfer of the credit; and (ii) the debt being payable.

Debtors should be given notarised notice of the assignment to be effective *vis-à-vis* third parties and the debtor itself, in case of a judicial claim.

Upon assignment of the credit, the local debtor must inform the details of the new creditor to the Central Bank, pursuant to a certain foreign debt information regime.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Deduction is allowed only for expenses incurred to generate taxable income.

Interest is deductible for the borrower. Interest deduction is limited by thin capitalisation rules (see question 6.5).

In addition, if the loan is made with a related party or with a party located in a low tax jurisdiction (regardless if it is related or not), interest is deductible only when paid and transfer-pricing rules apply. Decree No. 589/2013 of the Argentina Tax Authority establishes that "cooperative jurisdictions" will be those which signed an agreement for the exchange of information on tax matters or a convention to avoid double taxation with broadly interpreting information exchange clauses with Argentina. The Argentine Tax Authority draws up, publishes and keeps a list of countries, domains, jurisdictions, territories, associated states, or special tax regimes considered as "cooperative jurisdictions" up to date. If the loan is made with a non-related party which is not located in a tax haven jurisdiction, interest is deductible on an accrual basis and no transfer pricing rules apply.

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

There are no tax incentives to foreign lenders. Non-Argentine residents without a permanent establishment in Argentina are only subject to income tax on their Argentine-source income.

Foreign lenders will be taxed by income tax only on their profits from Argentina. When the lender is a bank or financial institution incorporated or located in a country deemed to be a Cooperative jurisdiction or in a jurisdiction that has entered into agreements of exchange of information with Argentina and, also, is a jurisdiction where the relevant governmental authority has adopted the international standards approved by the Basel Committee on Banking Regulations and Supervisory Practices, the presumed net income in case of cross-border interest payments is 43% and, deriving from that, a 15.05% effective withholding rate. In all other cases of cross-border interest payments, the presumed net income is 100% and, therefore, the effective withholding rate is 35%. The Argentine debtor is responsible for the withholding and payment of the tax. Argentina has entered into treaties for the avoidance of double taxation with different countries. In certain cases, such treaties set forth ceilings to the effective withholding abovementioned.

Value Added Tax ("VAT") applies to the sale of goods, the provision of services and the importation of goods and services. Under certain circumstances, services rendered outside Argentina, which are effectively used or exploited in Argentina, are subject to VAT.

Interest arising from a loan granted by a foreign entity is subject to VAT and the Argentine debtor is responsible for the payment of the tax.

The tax is levied on the interests paid and the current general rate is 21%. However, interests arising from loans granted by foreign banks are subject to a 10.5% rate when the central banks of their countries of incorporation have adopted the regulations provided by the Basel Committee.

Argentine Provinces and the City of Buenos Aires apply the Turnover Tax (Tax on Gross Income), levied on gross income obtained from the exercise of onerous and habitual activity within each relevant jurisdiction. The tax rate varies in each jurisdiction.

For tax purposes, the activity of lending money is presumed to be carried out on a habitual basis, even if carried out once, and therefore is subject to Turnover Tax. The amount of returned capital is excluded from the taxable base. Thus, only the total amount of interest will be subject to Turnover Tax. Notwithstanding, it is not clear if interest collected by a foreign lender is subject to Turnover Tax.

Stamp tax is a local tax levied on public or private instruments executed in Argentina, or documents executed abroad with effect in one or more relevant jurisdictions within Argentina. In general, this tax is calculated on the economic value of the agreement. Each jurisdiction applies different tax rates to different types of agreements, but the most common rate is 1%. Certain ways of entering into contracts do not trigger this tax.

Finally, a tax imposed on credits and debits in bank accounts (the "TDC") must be paid in the case of credits and debits in Argentine bank accounts at a rate of 0.6%. However, the credit of the borrower in an Argentine bank account arising from the disbursement of principal of the loan would not be subject to the TDC since the disbursement of principal under a "banking loan" is exempt from the TDC.

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

Non-Argentine residents without a permanent establishment in Argentina are only subject to Income Tax on their Argentine-source income. Only incomes from Argentina will be taxed by Argentine Income Tax.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

For notarisation, registration and other fees, please refer to question 3.9.

Also, the loan and the guarantees will generally be taxed by Stamp Tax. For the purposes of the Stamp Tax, the loan and the guarantees could be considered independently even if they were agreed in the same document. Then, the transaction might be doubly taxed in certain jurisdictions.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

When the loan is granted by a related party, interest payments are subject to thin capitalisation rules. According to these rules, the percentage of the interest payments equal to the percentage of the debt exceeding two times the net worth will not be deductible for the borrower, and will be treated as a dividend. This limitation will not apply if the recipient of the interest payments is a non-related party.

If the lender is located in a Non-Cooperative jurisdiction (regardless whether it is related or not) interest is deductible only at the moment it is paid and transfer-pricing rules apply. If the loan is made with a non-related party which is not located in a tax haven, interest is deductible on an accrual basis and no transfer pricing rules apply.

7 Judicial Enforcement

7.1 Will the courts in Argentina recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in 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 Argentina recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes. In principle, the courts of Argentina will recognise as valid and will enforce judgments of foreign courts if they refer to monetary transactions, subject to the compliance with certain procedural conditions.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in 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 Argentina against the assets of the company?

In Argentina, the length of litigation disputes depends on the complexity of the case.

Assuming the lender's creditor is unsecured, it might take between 3 and 6 years to obtain and enforce a final judgment. The 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 Argentina or (b) foreclosure on collateral security?

In order to file a suit against a company in Argentina, the foreign lender must prove, if it is a company, that it is duly incorporated under the legal rules of its country.

As foreign exchange restrictions may apply, please refer to question 2.6.

7.6 Do the bankruptcy, reorganisation or similar laws in 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 Argentina recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. Arbitral tribunals are competent in monetary disputes. The enforcement of the arbitral award will be as equal as the enforcement of a judgment.

Arbitral tribunals may not solve cases in which Argentine tribunals have exclusive jurisdiction, nor when there is an express prohibition against arbitration (e.g. certain provincial matters).

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Although the creditor does not have to wait until the credit filing procedure is finished before requesting the liquidation of the asset, the court will perform a summary examination of the documentation evidencing the creditor's preference and request the opinion of the trustee before carrying out the liquidation of the asset.

A credit with a special preference has priority over credits with general preferences and unsecured credits. However, the recognition of these credits must be verified and accepted by the court.

Credits with special preferences will have priority on a specific asset, such as mortgages and pledges. This kind of preference can be enforced exclusively on the relevant assets and up to the proceeds of the liquidation of such asset.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The court may determine a preference period of up to 2 years prior to the bankruptcy proceedings, depending on the date when insolvency was first evidenced.

Certain acts which occur during that preference period may be ineffective, such as: acts for which no consideration is given; debts paid prior to its maturity; and security interests obtained for a debt which is un-matured and which was originally unsecured.

There are two types of preferences:

(i) Special preferences, which are granted exclusively over certain specific assets of the debtor. E.g.: securities over the proceeds from the sale of the secured asset; expenses related to the assets that continue to be in debtor's possession; salaries, etc.

(ii) General preferences, which are granted over all of the debtor's assets. E.g.: labour credits not subject to a special preference; social security debts; certain personal expenses (as funeral or medical costs), etc.

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

Yes. Among others, insurance companies, cooperative associations and public entities, such as the Nation, Provinces and Municipalities, the Catholic Church and embassies.

Financial institutions are, with a few exceptions, subject to general bankruptcy law. However, the Central Bank's cancellation of their

banking licence is required and they may not voluntarily enter into a reorganisation or bankruptcy proceeding.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes. The debtor may enter into out-of-court agreements with all or part of the creditors. A certain majority of unsecured creditors is required.

These agreements imply a debt restructure and are enforceable against all the unsecured creditors who executed it, including those that did not approve its content or voted against it.

To be enforceable against all unsecured creditors, the out-of-court agreement must be endorsed or validated by a competent court. Companies that are regulated by special insolvency rules (e.g., banks and insurance companies) cannot enter into this kind of proceeding.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Argentina?

In principle, Argentine law allows parties of an international contract to submit to a foreign jurisdiction in matters of an economic content.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of 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 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 Argentina need to be licensed or authorised in Argentina or in their jurisdiction of incorporation?

There are no eligibility requirements in Argentina for lenders, agents or security agents. A loan may be granted by, and the agent may be, an individual, a company, a bank, or any other entity.

In the case of loans granted by banks, the role of an agent is generally performed by a financial entity.

In principle, lenders do not need to be licensed or authorised to grant loans, provided that the financing activity is not performed on a regular basis. Otherwise, certain corporate and regulatory issues should be considered.

From a corporate standpoint, foreign companies are able to perform isolated acts in Argentina but if they want to perform their activities on a regular basis, a branch or a subsidiary must be established. For such purpose, foreign companies must: (i) evidence before the Registry of Commerce the existence of the company; (ii) establish a domicile in Argentina; and (iii) justify the decision of establishing such branch or subsidiary and appoint a legal representative.

From a regulatory perspective, if the activities performed by the lender fall under "financial intermediation" (intermediation between the supply and demand of financial resources on a regular basis), prior authorisation of the Central Bank is required. An activity shall be deemed financial intermediation if it combines both raising local or foreign funds and granting financing to third parties with such funds.

The activity in Argentina of the subsidiaries or representation offices of foreign financial entities is subject to regulation by the Central Bank, who will grant the required authorisation subject to the analysis of the backgrounds and responsibility of the foreign entity and its local office.

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

There are no other material considerations which should be taken into account.

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Marval, O'Farrell & Mairal, founded in 1923, is the largest and one of the oldest law firms in Argentina. The firm has grown considerably in recent years and currently has over 300 professionals. The firm's law practice covers a wide range of legal services to financial institutions, commerce and industry and to diverse sectors of government. Although the firm practices Argentine law, its lawyers are well attuned to business issues and the complexities of multi-jurisdictional transactions. The firm is in the general practice of law including: Banking and Finance; Capital Markets; Project Finance; Commercial and Competition Law; Corporate Law; Foreign Investments; Mergers and Acquisitions; Real Estate and Construction Law; Administrative Law; Entertainment and Media; Environmental Law; Insurance Law; Intellectual Property; Internet and Information Technology; Natural Resources; Utilities and Energy Law; Tax and Customs Law; and Telecommunications and Broadcasting. The firm is ranked at the top of major legal publications and has been regularly awarded with many of the most recognised international awards. Chambers & Partners has recently recognised Marval, O'Farrell & Mairal as "*Latin America Law Firm of the Year 2013*".

Australia

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1 Overview

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

The main commercial trend in the Australian lending market in 2014 was a move by borrowers towards the debt capital markets and away from bank funding. Specific trends noted included:

- Growth in debt capital markets both in terms of domestic issuers and offshore issuers (the so-called "Kangaroo" bond market). Smaller corporates have used the domestic bond market to diversify their funding sources and reduce their borrowing costs. Larger senior unsecured issues have been undertaken by domestic and offshore corporates, banks and sovereign/semi-sovereign entities. Other issuance has been driven by Basel III and Solvency II-equivalent capital raising by banks and insurance companies. Secured issues have been undertaken by airport operating companies and project finance companies.
- Green bond issuance by IFC, Stockland Group Limited and the National Australia Bank sponsored fund have seen this product emerge in Australia, with signs of more to come.
- An increase in lending by non-traditional lenders such as pension funds, joint venture funds and through the US private placement market.
- Securitisation issuance has continued to grow, particularly in the auto receivables sector. There have also been a number of significant US and European RMBS and ABS issues by Australian banks. Domestically, further covered bond issuance has taken place. A likely area for securitisation growth is master trusts, once the Australian bank regulator, the Australian Prudential Regulation Authority (**APRA**) releases its requirements for master trust issuance by banks. There has been no indication as to when those rules will be released.
- Syndicated and bilateral asset-based lending with reference to receivables pools has increased notably in the Australian market, with some transactions forming part of acquisition finance structures.
- Project financing in the infrastructure rather than mining sector has grown but the outlook remains somewhat uncertain in some States where political changes have resulted in a withdrawal of government commitment to privatisation programmes.
- More generally, the mining sector continued to suffer from lower commodity prices and some smaller mining companies were placed into administration or receivership. Restructurings of mining facilities increased.

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

Listed below are a number of significant transactions that were concluded in 2014 and early 2015 that reflect the trends noted above and in which the firm was involved:

- A$2.1bn syndicated loan facility provided by 5 banks to the ALTRAC Light Rail Consortium (consisting of Transdev, Alstom Transport Australia and Capella Capital) on the Sydney Light Rail PPP Project. The Sydney Light Rail Project is a complex transport link that is to be constructed in the central business district and densely populated parts of Sydney.
- A$1bn+ acquisition of 100% of the Royal North Shore Hospital and Community Health Services PPP which also involves a refinancing of all external debt provided to the project entities.
- A$497m facility in relation to acquisition of 70% of Sensis Pty Ltd by US-based Platinum Equity Advisors, LLC from Telstra Corporation Limited. Sensis is the directories business which owns and operates directories including the Yellow Pages and White Pages in Australia. The facilities included a US$315m term loan facility and a A$50m asset based revolving credit facility.
- A term loan facility to a subsidiary of Teachers Insurance and Annuity Association – College Retirement Equities Fund (**TIAA**), a Fortune 100 financial services organisation, in connection with its joint venture entity's acquisition of the Mt Ommaney Shopping Centre in Brisbane, Australia. This is TIAA's first investment in Australian retail real estate assets. It already holds Australian office real estate assets.
- A$277m asset-backed pass through securitisation issuance by Fleetpartners, a leading leasing and fleet management company in Australia. This is the first auto operating lease-backed securitisation by an Australian issuer.
- A$1.2bn issue of senior unsecured bonds issued by Royal Bank of Canada, as part of its US$40bn programme.
- Adani Abbott Point – A$100m secured note issuance by the Abbott Point Coal Terminal No. 1 entity that operates what will be the world's largest coal terminal.

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 the borrowings of other members of its corporate group but those guarantees can be vulnerable to challenge

for various reasons. For example, if there is insufficient corporate benefit for the guarantor member of the group (see question 2.2 below). In addition, where the guarantor or beneficiary entities are public companies or are related bodies corporate of public companies, particular rules regarding the authorisation of intra-group guarantees must be followed. Those requirements can include shareholder approval of the grant of the guarantee. Where the guarantee constitutes financial assistance in relation to the acquisition of the shares of the guarantor company's parent or ultimate holding company, then additional approval requirements apply (see section 4 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?

A director of a company established under the *Corporations Act* 2001 (Cth) (the **Corporations Act**) is required to act in the company's best interests, with care and diligence, in good faith and for a proper purpose. A director must avoid any conflict between his/her duty to the company and his/her personal interest and is under a duty to disclose any personal interest that may cause a conflict. There are both civil and criminal penalties, as well as personal liability that may arise, where directors breach their duties under the Corporations Act.

A director is an officer of the company and in order for a guarantee to be valid, the company must have had the power to grant the guarantee and that power must have been validly exercised by its directors when approving the grant of the guarantee. Where a guarantee does not satisfy these requirements then it may be voidable, either because there was no commercial benefit for the company in granting the guarantee, and/or, at the instance of a liquidator, because it was an uncommercial transaction or an unfair preference, granted to the lender to whom the guarantee was given. (See *Bell Group Ltd (in liq) v Westpac Banking Corp* (No 9) (2008) 225 FLR 1.)

2.3 Is lack of corporate power an issue?

As noted above, a company needs to have the requisite corporate power to grant a guarantee.

An Australian company has all the powers of an individual except as limited by its Constitution. Therefore, it is usual for the Constitution of a company to be checked to ensure that the company has the power to grant guarantees and if so, whether any specific requirements need to be met.

In the exercise of these powers, establishing authority of the directors is important. Under the Corporations Act, a third party dealing with a company may make a number of assumptions regarding, the authority of persons who appear from the records of ASIC (Australian Securities and Investments Commission), to be directors or the secretary of the company and the due execution of documents signed by those individuals on behalf of a company. Those statutory assumptions may only be made if the person did not know or suspect at the time that the dealing or document was entered into, that their assumption was incorrect.

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

Shareholder approvals and other formalities (such as filing of resolutions and documents with ASIC) may apply in relation to guarantees that are related party transactions or constitute financial assistance (see section 4 below). Where there is a concern that a guarantee might not be for the commercial benefit of the company, then a lender may require that, in addition to director approval, the company's shareholders resolve to grant the guarantee. It should be noted that this may not be effective in resisting a subsequent claim by a liquidator, on behalf of the other creditors of the company (see question 2.2 above). For transactions involving consumers or small businesses, there are additional requirements under the *National Credit Code*.

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

Although the Corporations Act does not impose any limitations on the amount of a guarantee, the amount of a guarantee will be relevant in evaluating whether the directors of the guaranteeing company can be said to have acted in the best interests of the company in granting that guarantee. Arguably, if the company could be rendered insolvent, were the guarantee called, then, absent some equivalent benefit (such as access to group funding or a counter-indemnity), it would be difficult for the directors to argue that it was in the best interests of the company to grant that guarantee. For consumer transactions, it is important to note that the *Code of Banking Practice* requires that liability of the guarantor be limited.

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

Unless the recipient of a guarantee was listed on the Australian Government's sanctions list which prohibits payments to certain corporations, individuals and countries, there are no exchange control issues which would prevent payment under an otherwise enforceable guarantee.

3 Collateral Security

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

Security can be taken over virtually all types of property.

There are different regimes and specific rules which apply to taking security, and generally the set of rules that apply will depend on the type of collateral subject to security. The two main regimes are: security over real property; and security over personal property.

With respect to security over real property, each State and Territory has specific laws and regulations and generally this involves taking a mortgage over the land.

With respect to security over all personal property (being all property that is not land) and excluding certain statutory rights, the governing legislation is the *Personal Properties Securities Act 2009* (Cth) (**PPSA**).

The PPSA takes a "substance over form" approach when determining what constitutes a 'security interest'. A security interest is defined under the Act as an interest in personal property which secures payment of money or performance of an obligation. This would include traditional forms of security such as a charge, conditional sale agreements and a pledge. In addition, there are 'deemed security interests' which may not necessarily secure payment or performance of an obligation that are deemed to be a security interest under the PPSA. These include interest in a transfer of an account and an interest in a lease of personal property which meets certain criteria.

One of the unique features of the PPSA is that it establishes certain priority rules regulating priority between different creditors. In addition to the security interest being enforceable against the grantor

and third parties, the PPSA provides a 'perfection' mechanism, which allows secured parties to perfect their security interest. The different modes of perfection and general procedures are set out in question 3.2 below. The priority rules are quite complex but the general priority rule is that perfected security interest will take priority over unperfected security interests, and first perfected security interest will take priority over later perfected security interests.

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 a secured party to obtain a 'general security' over all assets of the grantor. This is known as a 'general security agreement' (**GSA**) which is security over "all present and after-acquired property". Alternatively, a secured party may wish to take security only over specific assets of the grantor, and this will be done by way of a 'specific security agreement' (**SSA**).

Assuming there is valid security interest and the grantor has rights in the collateral, there are certain requirements that must be met under the PPSA for a security interest to be enforceable. These include capturing the security interest in a security agreement evidenced by writing that describes the particular collateral, and states that a security interest is taken and signed or otherwise adopted or accepted by an act of the grantor. Furthermore, in order to obtain the highest possible priority, the secured party may perfect its security interest by one of three methods (depending on the type of collateral):

(a) by registration on the Personal Properties Securities Register (**PPSR**);

(b) possession of the collateral; or

(c) obtaining control over the collateral.

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

Security can be taken over real property, plant, machinery and equipment. As discussed in question 3.1 above, security over real property will be governed by the particular State/Territory regime applicable to the land, and this is determined by the location of the land. The procedure usually involves taking a mortgage over the land and registering the mortgage at the land titles office in the relevant State/Territory.

With respect to plant, machinery and equipment, to the extent that they are not found to be fixtures to the land, these assets will be considered to be personal property and are therefore governed by the PPSA. (See question 3.2 above.)

For specific types of financing such as equipment finance and asset finance, where the lender leases a valuable asset, or otherwise provides funding to acquire such assets, the lender/secured party has a 'purchase money security interest' (**PMSI**) over the funded asset. The PPSA provides that a PMSI, if registered properly, has "super priority" over other security interests. The rules regarding the registration requirements of PMSI are complex but generally this involves registration within a specific time frame, depending on the type of collateral.

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, and can be taken under a GSA (as part of the overall security) or an SSA (if only receivables are taken). Receivables, along with inventory, bank accounts and other types of current assets, are known as 'circulating assets' under the PPSA, which means that unless the secured party takes 'control' (as defined in the PPSA), the grantor will have the ability to deal with the collateral.

Obtaining control under the PPSA requires certain steps to be taken by the secured party, in addition to entering into a security agreement. Although the secured party need not go as far as notifying the account debtors of the security or take over collection of the accounts, the secured party may wish to agree with the grantor to deposit all proceeds from the receivables into a specific bank account and obtain control over that bank account. These additional procedures would be particularly important for lenders who are providing receivables finance or asset-based lending, where the cash flow from the receivables are the prime security for the loan.

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

Security can be taken over cash deposited in bank accounts. As noted in question 3.4 above, bank accounts are circulating assets under the PPSA and the secured party may wish to consider taking additional steps to obtain control over the bank account. Generally, if the secured party is an authorised deposit taking institution in Australia (within the definition of 'ADI' under the PPSA), the PPSA deems such secured party to have control over the account. Other secured parties will need to enter into a side deed with the bank which holds the account to obtain control over the account.

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?

Company shares are considered personal property under the PPSA and for unlisted companies are generally certificated. A GSA is commonly used where the security provider grants security over all of its assets, including all company shares. Alternatively, an SSA can be entered into where the secured party only take security over the shares. Perfection can be achieved by either registration on the PPSR, or to obtain control or possession (where the shares are certificated).

Shares in Australian Securities Exchange (**ASX**) listed companies are uncertificated and are evidenced in a company's electronic register. The shares are transferred by a sponsoring participant through the Clearing House Electronic Subregister System (**CHESS**). Perfection of security over shares is usually effected through registration of a financing statement on the PPSR.

If the secured party wishes to obtain control over the shares, the parties may enter into a CHESS sponsorship agreement which appoints the secured party as the 'controlling participant' on CHESS.

In the case of certificated shares the secured party can obtain possession by holding the share certificates, and collect blank transfer forms signed by the security provider. This should enable that party to transfer the shares to itself or another person or otherwise deal with the shares upon enforcement.

Assuming that the shares or the grantor of the security are located in Australia, and the secured party can establish it has a 'security interest' (as defined in the PPSA, see question 3.1 above), then security can be taken over the shares, subject to compliance with the requirements set out in the PPSA (see question 3.2 above). The question of enforceability of that New York or English law document

will depend on the rules regarding enforcement in Australia on foreign judgments (see section 7 for a discussion on this generally).

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

Security can be taken over inventory. As discussed in question 3.4, inventory is a pool of circulating assets under the PPSA and the grantor is free to deal with the inventory unless control is obtained by the secured party. Although it is possible for the secured party to take additional steps to obtain control over inventory, depending on the nature of the financing, it is not common for a secured party to do so, as the grantor's ability to deal with inventory goes to the core of the grantor's day-to-day operations of their business.

Perfection can be achieved by one of the three methods (see question 3.2 above); however, for the reasons discussed above, it is unlikely a secured party will obtain physical possession or control over inventory and therefore, the most common perfection method will be registration on the PPSR.

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 but subject to the other matters set out elsewhere in this article.

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 obtaining or registering a security interest under Australian law.

Small fees are payable to register a PPSA financing statement online, and fees associated with amending financing statements. It is important to remember that if incorrect information (such as the wrong serial number) is registered, then the registration may be ineffective.

There is also a small fee payable for registration with the relevant Land Title Office of a security interest over real property.

A more major consideration is a form of stamp duty called mortgage duty. This only exists in New South Wales (**NSW**) and no other Australian State or Territory.

Mortgage duty (a category of stamp duty) is only imposed by NSW where security for lending is granted over property located in NSW. For these purposes property has a wide meaning and includes, for example, shares in any company registered in NSW and the goodwill and intellectual property of a business to the extent it has customers in NSW. The current rate of mortgage duty is 0.4% of the total amount advanced (subject to a reduced rate for the first $16,000 of advances), reduced proportionately by reference to the value of secured property in NSW relative to the value of secured property anywhere else. The next scheduled date by which mortgage duty is due to be abolished in NSW is 1 July 2016, although based on past history, there is no certainty that abolition will occur on 1 July 2016.

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?

This does not usually involve a significant amount of time or expense. The PPS Register relies on the accuracy of information provided. If incorrect information is registered, then the registration may be ineffective. It is vital to double check information entered.

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

Security taken over regulated assets or assets, where a government agency or similar party has an interest, may have additional consent requirements, which are sometimes provided in specific legislation. The most common example of this situation is a mortgage over a lease of Crown land or public facilities where the lessor is a government agency. Please also refer to question 10.1 regarding acquisitions of Australian assets generally.

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

If the security interest arises under a GSA or if there is an SSA relating to receivables which are revolving in nature then it is important to establish control over those receivables in order to ensure that newly created receivables are also secured under that security.

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

There are no particular execution requirements in Australia that are more cumbersome than other jurisdictions. As discussed in question 2.3 above, certain assumptions can be made as to authorisation and power to enter into documents, that are executed in accordance with section 127 Corporations Act.

With respect to execution of deeds, care should be taken to ensure that the relevant officers of the company sign the same execution clause and page provided in the document (that is, they should not sign separate copies). There are some differing views as to application of section 127 of the Corporations Act and the assumptions may not apply, if the documents were not signed strictly in accordance with this section.

4 Financial Assistances

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Section 260A of the Corporations Act enables a company to provide financial assistance (which may include finance, loans or guarantees)

for the acquisition of shares in itself or its holding company if such financial assistance would not materially prejudice the interests of the company or its members or the company's ability to pay its creditors. The onus is on the company seeking to establish that there was no material prejudice, and the assessment of whether the financial assistance was materially prejudicial is based on the facts in question. The company's auditors usually opine on the question of prejudice to creditors.

Alternatively, a company can give financial assistance if it complies with the procedure prescribed in section 260B of the Corporations Act (known as the 'whitewash procedure'). The whitewash procedure involves describing to shareholders in reasonable detail the proposed transaction and financial assistance, obtaining a shareholders' resolution approving the giving of the assistance and filing that disclosure and resolution with ASIC. The financial assistance should not be provided until a period of 14 days has expired from the date on which those items are filed with ASIC. This allows ASIC to issue a notice of objection.

Contravention of the financial assistance provisions will not affect the validity of the transaction. However, individuals who are involved in the contravention (including the lenders) may be guilty of a civil offence or be subject to criminal liability if it is found that such involvement was dishonest. For these reasons, most lenders will require that a whitewash procedure be undertaken if financial assistance is involved, unless there is very clearly no material prejudice to the company's creditors.

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

The rules relating to financial assistance only apply if the financial assistance relates to shares being acquired in the company itself or its 'holding company'. A holding company is one which holds over 50% of the shares or which can cast (or control the casting of) over 50% of the votes or otherwise controls the composition of the board of the company. The restriction applies whether or not the holding company is incorporated in or outside Australia.

(c) Shares in a sister subsidiary

The restriction on financial assistance only applies to the acquisition of shares in the company or its holding company. This does not include acquisition of shares in its subsidiary or a sister subsidiary. However, as discussed in question 2.2 above, issues regarding corporate benefit should be considered.

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 agent and trustee is recognised in Australia and is common in syndicated lending arrangements. In syndicated lending, an agent acts as an intermediary between the borrower and the financiers and is responsible for administering the day-to-day operations of the syndicated facility. Usually the agent acts on the basis of a lender's instructions.

If the loan is secured, the security will be held on trust for the beneficiaries, namely the lenders or other secured parties by a security trustee under a security trust deed. A lender's ability to enforce the loan is regulated by the underlying loan document and usually, as the security trustee holds the security, the security trustee would enforce the security on instructions from the lenders and other secured parties.

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?

This is not applicable (see question 5.1 above).

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?

Lenders often seek the ability to "sell down" their rights and obligations under a facility agreement. Under Australian law, obligations cannot be assigned and therefore, the primary loan documents often include transfer provisions and a standard form accession deed. This usually establishes consent of the existing parties to the future novation of a lender's rights and obligations and the accession/transfer document, upon execution, effects that novation. The security trust deed will usually include as a 'secured party' a transferee under the above mechanism.

Assigning debt, under section 12 (3)(a) of the PPSA Act, is more complicated as it may constitute a "deemed security interest" under the PPSA which will required certain notice formalities to be carried out.

As part of basic due diligence, documents should be reviewed to determine whether there are any restrictions on assignments and transfers.

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 imposed on interest, and amounts in the nature of interest, paid by an Australian resident, or an Australian permanent establishment of a foreign resident, to a non-resident. The current rate of interest withholding tax is 10%. Most of Australia's double tax treaties do not affect the withholding tax rate imposed, as they allow for a rate of 10% or higher, although some treaties do provide for nil withholding tax on lending by foreign financial institutions or government entities. An exemption from interest withholding tax may be available where the lending is an issue of debentures or a syndicated loan which results from a public offer being made (i.e., broadly, where participation in the lending has been offered in the market to a number of potential investors or financiers).

Payments made under a guarantee or on enforcing security may also be subject to interest withholding tax to the extent they can be regarded as amounts paid in substitution for 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?

There are no preferential incentives or tax breaks for foreign lenders over domestic lenders.

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?

Technically, income derived by a foreign lender that has an Australian source, such as interest paid by an Australian borrower, is taxable in Australia. However, in practice this generally does not result in a foreign lender becoming subject to Australian income tax, for two reasons. First, if interest payable is subject to Australian withholding tax, or would be subject to withholding tax but for a double tax treaty or specific exemption (see question 6.1 above), that interest is excluded from being taxable income. Secondly, if the foreign lender is a tax resident of a country with which Australia has a double tax treaty, the foreign lender will generally only be subject to Australian tax on such income if the foreign lender has a permanent establishment in Australia (as defined in the relevant double tax treaty).

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 those discussed 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.

Presuming the parties are unrelated and dealing at an arm's length basis, there should be no adverse consequences from the application of Australia's transfer pricing regime.

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?

Parties to a contract are free to choose any governing law they wish so long as the choice is made in good faith and is not against public policy. The choice must be clear and unambiguous. It will only be relevant to the contractual rights and obligations under the documents. Conversely, statutory rights and obligations may apply irrespective of the choice of law. The law that governs a security interest will generally be determined according to where the collateral is located.

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?

Generally speaking, judgments given by English courts are recognised in Australia without the need to re-litigate. This is because there is a bilateral arrangement for the enforcement of English judgments in Australia provided under the *Foreign Judgments Act 1991* (Cth) (**FJ Act**). Provided that the judgment satisfies certain criteria, the judgment can be registered under the FJ Act and once registered, the judgment will have the status of a judgment delivered by an Australian court.

In order for the judgment to be registrable, it must be:

(i) a 'money judgment' (for the payment of money);

(ii) final and conclusive (although it may still be subject to appeal);

(iii) not wholly satisfied;

(iv) enforceable in the country in which the judgment was originally given; and

(v) applied to be registered within 6 years after the date of the original judgment.

Conversely, judgments given by New York courts go through a slightly different procedure as there is currently no reciprocal recognition of judgments between Australia and New York courts under the FJ Act. Enforcing judgments will therefore rely on the common law principles. Generally speaking, a final and conclusive money judgment will be enforceable at common law provided the Australian court is satisfied that the New York court has exercised jurisdiction in the international sense. A foreign court will be deemed to have exercised the relevant jurisdiction if:

(i) the defendant voluntarily submitted to the court's jurisdiction;

(ii) the defendant was ordinarily resident in the country of the foreign court or present in that country at the time that he/she was served with the originating process; or

(iii) the defendant was a citizen of the country of the foreign court and the defendant actively used his/her citizenship.

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?

This depends on a wide number of variables such as the provisions of the applicable security agreement, the willingness of the borrower to co-operate in enforcement actions and the type of enforcement action being undertaken.

With respect to registration of a foreign money judgment that is final and conclusive, registration applications involve preparation and lodgement of a suite of documents. Once the judgment has been registered, the plaintiff must serve a Notice of Registration on the defendant, under which the defendant has 14 days to file any application to set aside the registered judgment.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Generally speaking, there are no particular restrictions on the enforcement of collateral security. The rules regarding enforcement of security are set out in the Corporations Act, PPSA and the relevant security agreements. In the example of appointing a receiver over the collateral upon default, the receiver's powers are largely governed by the terms of appointment provided in the security agreement.

With respect to real property, State and Territory legislation contain analogous provisions which require the lender/receiver appointed to sell the assets at market value if that asset has a market value at the time of disposal, or otherwise obtain the best price reasonably obtainable at the time of disposal, having regard to the circumstances existing when the asset is sold. For other assets, there may be specific regulatory requirements if the assets are covered by mining, power, pharmaceutical or other regulations specific to a particular industry or sector.

Please also refer to question 10.1 below regarding acquisitions of Australian assets generally.

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?

Subject to our discussion in question 10.1 below, there are no specific restrictions under Australian law which would apply only to foreign lenders. A foreign lender may file suit against the borrower in Australia in the same way as an Australian lender.

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?

An extensive moratorium applies where a voluntary administration regime is entered into. A voluntary administration regime can be commenced in one of three ways; one is appointment of an administrator by a person who is entitled to enforce a security interest in the whole, or substantially the whole of the company's property, if the security has become enforceable.

Once an administrator is appointed, a moratorium applies, which prohibits the commencement or continuation of court proceedings against the company or in relation to any of its property (section 440D Corporations Act).

There are exceptions to the moratorium, and one exception is any secured party who holds security interest in the whole, or substantially the whole of the company's property may enforce the security interest in relation to all of the secured property within 13 business days after the appointment of the administrator (section 441A Corporations Act).

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

Foreign arbitral awards may be recognised and enforced by Australian courts under the *International Arbitration Act 1974* (Cth), provided that the arbitral award was made (a) under an 'arbitral agreement' (an agreement in writing that the parties submit disputes to arbitration), and (b) made in a 'Convention Country' (i.e. a 'Contracting State' under the *New York 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*) or, if it was not, the party seeking to enforce the award is domiciled or ordinarily resident in Australia or a Convention Country.

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?

Depending on the type of proceedings undertaken, the enforcement rights of the lender may be affected by the Australian equivalent of bankruptcy or US-style Chapter 11 process. In the case of voluntary administration, the commencement of the administration will prevent any secured party enforcing its security, other than a secured party with security over the whole or substantially the whole of the company's property (see question 7.6 above). On the other hand, a winding up will preclude lenders from commencing or continuing legal proceedings against the company or any of its property, except with the leave of court and in return, the lenders will be granted the right to participate and vote at creditor's meetings and prove for their 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?

A liquidator may seek court orders to set aside certain transactions preceding the winding up of the company. The two common types of "voidable transactions" which a liquidator may seek to challenge are described below.

An uncommercial transaction is one entered into when the company was insolvent and that a hypothetical reasonable person in the company's circumstances would not have entered into. Factors which may be taken into account include the benefits and/or detriments to the company entering into the transaction, and benefits to other parties. A liquidator may seek to set aside an uncommercial transaction if it was entered into 2 years prior to the winding up of the company.

An unfair preference is a transaction between an insolvent company and a creditor, by which the creditor receives more for an unsecured debt than it would have received if the creditor had had to prove for it in the winding up. A liquidator may seek to set aside an unfair preference transaction within 6 months of the appointment of the liquidator, or 4 years if the transaction was with a related party.

A secured creditor with a perfected security interest will normally be entitled to enforce security, even if a judicial winding up order has been made. Circulating assets, however, will usually be first used to pay for employee claims (wages, superannuation) and taxation liabilities, and other expenses incurred by authorities and to indemnify expenses incurred by administrators.

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

There are no companies excluded from insolvency proceedings, other than certain statutory corporations. However, certain entities

are subject to different insolvency regimes e.g., for banks and other authorised deposit-taking institutions (*Banking Act 1959* (Cth)) and insurers (*Insurance Act 1973* (Cth)).

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 receiver can be appointed without the initiation of court proceedings. As discussed in question 7.4 above, the power to appoint a receiver is contained in the security agreement, and the powers of the receiver therefore will arise within the 'four corners' of the agreement.

With respect to personal property, the PPSA provides that the secured party may, without a court order but subject to certain notice requirements, seize or collect, dispose of, purchase or foreclose on secured assets. In addition, it is possible to contract out of certain notice provisions in the PPSA unless the collateral is used predominantly for personal, domestic or household purposes.

In the case of a mortgage over real property, the power to appoint a receiver is implied into the instrument by statute (for example, under the *Conveyancing Act 1919* (NSW)) and the power may only be exercised when the mortgaged money becomes due or where a default has been made with respect to the mortgage.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Australia?

An Australian court will recognise a foreign choice of law and submission to the jurisdiction of foreign courts provided that the choice of law and submissions is not illegal or contrary to Australian public policy.

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

The scope of sovereign immunity in Australia is addressed in the *Foreign States Immunities Act 1985* (Cth). A waiver of immunity will generally be enforceable subject to a number of exceptions such as where it concerns personal injury.

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?

If a lender is wholly or partly owned by a foreign corporation or individual, then there is a possibility that the security it has taken over an Australian asset could constitute an 'acquisition' under the *Foreign Acquisition and Takeovers Act 1975* (Cth) (**FATA**) and would therefore require approval from the Foreign Investment Review Board (**FIRB**). The FATA governs foreign investments into Australia and acquisitions over a certain amount of interest in specific Australian assets and land will require approval by FIRB. Generally speaking, the acquisition of assets by way of enforcement of security for the purposes of a 'moneylending agreement' does not constitute acquisition of a notifiable interest under FATA.

There are no specific requirements for any particular lender to be a bank or an agent in order to be able to provide loans to an Australian borrower. However, if a body corporate (including a foreign corporation which is authorised to carry on banking business in its own country) wishes to carry on banking business in Australia, it must have obtained authority to do so from APRA. The word "bank, "banking" or other derivations of that word cannot be used in carrying on a business in Australia unless the user is an authorised bank or has obtained the consent of APRA.

A financial institution which carries on financial services business in Australia (for example, by issuing, dealing or advising in relation to deposit products, non-cash payment facilities, foreign exchange contracts, derivatives, custody services, managed investments, insurance and superannuation products to Australian clients) also needs to be authorised by ASIC in accordance with the Corporations Act.

Additional regulations and industry codes apply where a financial institution engages in consumer credit activities.

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

Each situation and each lender will present different issues and should be considered in light of these circumstances as the above comments are made solely as of the date of this publication, are generic in nature and do not constitute advice on any issue or circumstance.

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Belarus

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1 Overview

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

The Belarusian lending market is still in a very nascent stage. Local banks mainly provide standardised products to local borrowers. Development banks, such as EBRD, the CIS Eurasian Development Bank, and international financial organisations such as the World Bank, continue to play a key part in infrastructural and development programmes.

The year 2014 has seen a fall in Euro and USD interest rates and an increase in demand for loans in Belarusian roubles.

Interest rates are affected by regulations of the National Bank of the Republic of Belarus (the "NBRB") which sets interest rate margin requirements for local banks.

In 2014 we have also seen a certain refinement in the NBRB approach to the regulation of bank liquidity and risk assessment. There are some indicators of a shift from formal to more principles-based regulation in these areas.

The local implementation of Basel III standards is one of the strategic targets explicitly mentioned in the 2014 annual "Main Guidelines of Financial and Lending Policy of the Republic of Belarus", a fundamental programme document, drafted by the National Bank and approved by a presidential decree. Consequently, extensive and very detailed National Bank recommendations on the adaptation of Basel III were published and the banks were required to report on their progress in adopting the recommendations.

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

The Chinese ExIm bank is one of the main lenders for projects by the Belarusian Government. The total amount of financing contracted by the Belarusian Government towards infrastructural and industrial projects to be developed by Chinese companies in Belarus is about USD 1 billion.

The most recent notable transaction (March 2014) transaction is a syndicated loan of EUR 130 million to the Development Bank of the Republic of Belarus from a consortium of banks including AKA Ausfuhrkredit GmbH, Alfa-Bank, VTB Bank Germany, Globexbank, MDM Bank, Novikombank, Promsvyazbank and Rosselkhozbank.

Another noteworthy syndicated loan is by a syndicate of Russian banks, including VTB Bank and Globexbank and Svyaz-bank which advanced USD 125 million to the Belarusian Belvnesheconombank.

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, this is possible.

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, since the relationship is between the lender and the guarantor, the enforceability of the guarantee does not depend on compensation or other benefits received by the guarantor from the borrower.

However, if it can be shown that the borrower initially had no means to repay the loan and the guarantor was aware of this when he provided the guarantee, the director of the guarantor may be subject to criminal liability and civil liability to the shareholders of the company.

2.3 Is lack of corporate power an issue?

Yes, it may be.

First, the power of the director of the company to cause the company to issue a guarantee may be limited by the constituent documents of the company.

Second, if affiliated persons of the company have a direct or indirect interest in the transaction (established according to criteria provided in the law) a shareholders' resolution is by default required to enable to company to issue the guarantee. The constituent documents of the company may delegate the power to authorise certain transactions where affiliated persons may have an interest in the company's board of directors.

Third, there are certain public disclosure requirements for transactions where certain types of affiliated persons have an interest.

Fourth, a shareholders' resolution (constituent documents of the company may delegate this to the board of directors) is required to authorise a guarantee, the value of which exceeds 20 per cent of the balance-sheet value of the assets.

There are certain exceptions to these rules, such as that the guarantee is the type of a transaction, which the company enters into regularly in the course of business.

Where the above requirements are not observed a court may acknowledge the guarantee invalid on the basis of a claim by the shareholders of the company, the company itself or by the members of the board of directors of the company.

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

Yes, a permit from the National Bank of the Republic of Belarus is required in order to make payments under the guarantee if the securing/guaranteeing company is located abroad and the beneficiary of the guarantee is a local company, or *vice versa*.

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

No, they are not. However, there are some decisions by the courts whereby guarantees were found void *ab initio* as mock transactions. I.e. – transactions which were not initially intended to generate any consequences at law. In these cases the courts were motivated by evidence of guarantor's financial inability to satisfy the requirements of the guarantee at the time when it was provided and the lender's awareness of this.

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

See the answer to question 2.4.

3 Collateral Security

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

The most widespread form of collateral is an agreement of pledge ("*zaloh*") or a mortgage agreement ("*ypateka*"). For loans provided by financial institutions, two additional types of agreement are available: transfer of title to property; and guarantee cash deposit.

A transfer of title to property is in many ways a sale and repurchase agreement, i.e. the collateral is "sold" for the principal amount of the loan and then repurchased on the return of the loan; however, ownership is transferred to the bank only in case of default.

A guarantee cash deposit is a form of security agreement over cash on a bank account.

Under the agreement of pledge or mortgage **any asset may serve as collateral, except for**:

1. assets the commercial circulation of which is prohibited by law (psychotropic drugs, explosives, radioactive substances *et al.*);
2. inalienable personal entitlements such as entitlements to alimony, entitlements to compensation for bodily harm;
3. subsoil sections, bodies of water, forests; and
4. personal assets protected from enforcement under procedural law.

Lease rights to land under leases from the state can be pledged only if they have been paid for (payment for lease rights is different from rent payments under a lease under Belarusian law).

See below for issues related to pledges and other forms of collateral over cash.

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?

No, general security agreements are not valid under Belarusian law. In order for the pledge agreement to be valid under Belarusian law each asset and its respective value along with some other particulars be defined separately in the security agreement. It is possible to pledge generic assets i.e. – assets which are defined by type and measure (e.g. weight, amount, etc.) provided that the overall value of the pledge is defined in the agreement.

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

Yes. However, distinction between movable and immovable property is important. Immovable property can be provided as collateral under a mortgage agreement ("*ypateka*"). Aside from land and buildings and other assets "firmly connected to land" ships, aircraft and spacecraft are also treated as immovable property. There is also a special type of an asset, which is peculiar to post-Soviet states. This is called "enterprise as an asset complex". This asset is, basically, the entirety of all assets and liabilities of an incorporated entity, registered as a single asset in the register of immovable property. In some cases a mortgage of an enterprise as an asset complex can be a good alternative to a pledge of shares, given poor regulations on the latter.

Mortgage agreements must be registered in order to be valid. An important difference between mortgage and pledge agreements is that mortgages are available over assets, which can be defined but do not exist at the time of the execution of the agreement.

Plant, machinery and equipment which is not firmly tied to land are subject to regular rules on pledges.

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

This can be done by way of agreement for assignment of receivables, which is triggered in the event of default under the loan transaction.

Briefly, the procedure would consist of:

1. the execution of an assignment agreement between the borrower and the lender, where the receivables would be defined it terms of documents under which they arise. If the initial agreements between the borrower and the debtors were notarised and/or registered, the assignment agreement should be similarly notarised and/or registered;
2. transfer of documents and information evidencing rights to receivables from the borrower to the lender;
3. notification of debtors. Although there is no requirement for this, the new creditor under an assignment bears all risks of non-notification of debtors. Debtors which are not notified are entitled to pay the receivables contemplated in the assignment agreement to the borrower as if he were the creditor; and
4. debtors are also entitled to withhold payment of assigned receivables until they receive evidence of assignment.

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

The response is a definite "yes" for loans provided by financial institutions. The issue is not decided at law for other types of lenders.

Financial institutions: guarantee cash deposits

This type of collateral is available for loans provided by financial institutions. This is done by an agreement between the lender and the borrower. Enforcement is done by way of a write-off of the case deposited. Unless the contract between the lender and the borrower provides otherwise, the account with the collateral does not bear interest.

Other lenders

There is an unsettled issue as to cases in which money can serve as collateral under an agreement of pledge, since the law expressly provides the enforcement of a pledge can be made only by sale, subject to very narrow exceptions. The reasoning against pledges of cash is that cash cannot be "sold" and therefore by its very nature may not act as collateral. The argument for such pledges is that the law does provide for purchase and sale of cash in currency exchange transactions.

There is, however, growing commercial practice of retention agreements, whereby cash owed to the debtor is retained by the creditor subject to due performance of outstanding obligations. To our knowledge there have been no court cases on validity of such agreements.

3.6 Can collateral security be taken over shares in companies incorporated in Belarus? 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 Belarus. Shares exist in electronic form in security depositary institutions. Collateral is effected by way of blockage of shares provided as collateral. In order to effect the blockage the following documents must be provided to the depositary institution:

1. An instruction from the owner of the shares for the blockage.
2. An original and a copy of a pledge agreement between the owner of the shares and the lender.

Rules on enforcement against shares provided as collateral do not require the shares to be sold. The pledge holder may claim ownership of the shares.

However, the law is not clear on details of enforcement. Notably the procedure of notifying the depositary institution which keeps the shares blocked of the borrower's default is not described in any detail. Although the law provides that in case of a notarised agreement between the pledge provider and the borrower enforcement can be made against collateral without recourse to court, it is unclear how the lender can instruct the depositary institution to transfer shares to them in case of default.

Generally, because regulation of pledges of shares is in a nascent stage in Belarus, we do not recommend taking shares in Belarusian companies as collateral.

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

Yes. However this type of pledge is not practised widely in Belarus. This is done by an agreement of pledge, which specifies the value of the inventories pledged. The law requires the provider of the collateral to maintain a pledge ledger, where all operations with the pledged inventories are recorded. The provider of the collateral may not take actions, which will decrease the value of the inventories below the value of the pledge.

If the provider of such collateral does not observe the conditions of the pledge, the pledge holder may suspend operations with the inventories. This is done, rather impractically, by the pledge holder by "applying markings and seals" to the inventory articles.

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?

Registration fees apply to securities over immovable property (mortgages, transfers of title) and pledges of intellectual property (trademarks and patents).

Notarisation is mandatory only for enforcement agreements (see response to question 3.13 below).

It is important to note that the fees are not linked to the value of the collateral.

Notary and registration fees are normally estimated in "base values", which are basically nominal amounts in Belarusian roubles indexed from time to time for inflation. Currently a base value is 180,000 Belarusian roubles, which is roughly the amount needed to **buy** 12 US dollars from a commercial exchange counter in Belarus and the result of a sale of about 15 US dollars at an exchange counter (value per rate of the National Bank).

The fees for registration of intellectual property are set in US dollars.

Generally, the fees are very small.

The registration of a mortgage or a transfer of title will cost about 5.5 base values (about USD 80 per National Bank rate) for the first asset registered under a particular security agreement and 2.5 base values (about USD 32 per National Bank rate) for every consequent asset under the same agreement.

For registration of a pledge of intellectual property over the first asset (trademark, patent) under a particular security agreement the fee is USD 100 and USD 50 for every consequent asset.

Notarisation fees are of similar scale.

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?

Immovable property

See above for information on expenses. As regards time – most securities over immovable property will take about 7 business days to be registered from the time of initial submission of documents. Provided a small fee is paid for expedited registration, this time can be shortened to 2 business days from the date of application. In particularly complex cases, the time for registration may be extended up to 1 month.

Intellectual property

Registration of pledges over intellectual property (trademarks and patents) can take up to 1 month from the date of application.

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

Generally, no specific regulatory consents are required.

However, pledges and mortgages of Government property are subject to consent from various authorities depending on the type and the title holder of the property.

However, in order to receive a guarantee deposit of cash, the receiver of the security must hold a valid banking licence, which permits the financial institution in question to receive deposits from relevant entities.

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 no special concerns for securities under a revolving credit facility.

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

Mortgages do require registration. There are optional formalities for pledges of movable property. Please see details below.

Mortgages (pledges of immovable property), transfers of title and other security interests over movable property

These interests must be registered in the "Register of immovable property, transactions with and rights to it". The registration would consist of two or three steps, depending on whether the asset exists at the time of the execution of the security agreement. If the asset does exist, the register agent will check whether the asset itself is registered. If not, it must be registered itself. Afterwards (the submission can be done on the same day) the mortgage or title transfer agreement and the mortgage right (title) itself must be registered.

Security over movable property

These can be done by way of a simple agreement in writing; there are no registration requirements.

Security over intellectual property rights

These are subject to registration in a separate register.

Enforcement agreements

The enforcement of a pledge or a mortgage is normally done in two steps: application to a court of law to enforce the pledge; and arrangement of an auction on which the asset pledged can be sold by a bailiff.

These formalities can be circumvented if the provider and the holder of the pledge or mortgage enter into a **notarised** agreement on the enforcement of the security. By virtue of such an agreement, pledge holders may enforce the pledge without applying to a court for enforcement.

Financial institutions may have the additional benefit of a right to enforce the pledge not only without involving a court of law, but also by the means of a direct sale, without an auction.

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

Belarusian law does not explicitly prohibit financial assistance. However, if malicious intent and a criminal motive can be shown (such as an intent to "syphon" funds out of the company), the directors of the company may be subject to criminal liability. However, the practice of persecution of such acts is not very developed, since most companies are private and their shares are not traded on an exchange.

(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 Belarus 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?

Belarusian law will not recognise a trustee since Belarus is a civil law country and is not party to the Hague Convention on the Law Applicable to Trusts and on their recognition.

However, several types of agency are possible. Please see response to question 5.2 for details.

5.2 If an agent or trustee is not recognised in Belarus, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Several mechanisms are available. Notably the Belarusian loan market regulator – the National Bank of the Republic of the Republic of Belarus in one of its board resolutions provides that syndicated loans may be documented via a joint venture agreement or "by means of other contracts, which do not contradict Belarusian law". Under a joint venture agreement, the parties may appoint a single person among themselves to conduct the business of the JV. This is achieved by respective wording in the JV agreement and by powers of attorney from each of the parties of the JV to the party entitled to conduct the business of the JV.

However, Belarusian joint venture agreements are exposed to deadlock situations, because of a mandatory provision in the law that all affairs of the joint venture are decided by the parties unanimously.

Another way to achieve the desired result is to provide in the syndicated loan agreement and the security agreements that the all claims of the lenders to the borrower arising under the syndicated loan agreement an or in connection with it as well as claims arising under or in connection with the security agreements entered into pursuant to the syndicated loan agreement are joint (or "solidary", to use the terminology of the Belarusian Civil Code). In this event, any one of the lenders may enforce the syndicated loan and the security agreements.

5.3 Assume a loan is made to a company organised under the laws of Belarus and guaranteed by a guarantor organised under the laws of Belarus. 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 further action is required. Under the law the beneficiary of an assignment receives by default (unless the assignment agreement provides otherwise) all rights of the original creditor, including rights to any security.

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?

Domestic lenders

There is no withholding tax for domestic lenders except where the lender is a natural person and the borrower is an incorporated entity. In this case the withholding tax is 12% on interest income.

Foreign lenders

There is a 10% withholding tax on interest paid to foreign lenders, which are incorporated entities not resident in Belarus. If there is a DTA in effect between Belarus and the foreign jurisdiction in question and the DTA provides for other tax treatment of interest, the latter will apply in place of the withholding tax.

See the response to question 6.2 for preferential exemptions to this rule.

Proceeds of a claim under a guarantee and proceeds of enforcing security

Proceeds of a claim or the proceeds of enforcing security are not subject to any withholding tax, except where they constitute net income (interest, fines, etc.).

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?

First, the 10% withholding tax rate is a sort of a preference in itself, since most other income of non-resident foreign companies is subject to a 15% withholding tax, save for income from shipping activities (6%) and dividends and capital gains (12%).

Second, there is no withholding tax on the income of non-resident companies sourced from:

1) loans to the Republic of Belarus or its Government or loans to other persons secured by guarantees from the State;
2) long-term bonds issued by the Republic of Belarus, which are placed outside of Belarus;
3) services related to the issuance, circulation, redemption of such bonds, depositary services in respect of such bonds; and
4) loans to Belarusian companies, where these loans are funded:
   a. by proceeds from issuance of securities of the said non-resident companies designated for the said loans; and
   b. under syndicated loan agreements.

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

Save for the above-mentioned withholding tax, the sole act of advancing a loan or taking a guarantee/security from a Belarusian company will not make a non-resident company taxable in Belarus. However, if as a result of an enforcement of a security over immovable assets registered in Belarus, the Lender/Security Holder will become the owner of the said assets, it will become taxable in Belarus, in respect of income sourced from such property and immovable property tax and land tax (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.?

See the responses to questions 3.9 and 3.10 above. No special fees or costs arise on account of the lender being foreign.

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 may apply.

Belarus uses a variation of a debt:equity ratio approach to establish thin capitalisation.

Rules on thin capitalisation apply if the following conditions are satisfied:

1. A non-resident directly or indirectly controls 20 per cent or more of the interest-paying resident ("IPR").
2. The IPR has outstanding debt to the above controlling non-resident ("CNR") or to a resident company, which is an associated enterprise of the controlling non-resident ("Qualified Debt").
3. The Qualified Debt is greater than three times the difference between a) the assets of the IPR, and b) its total liabilities to the controlling non-resident ("Equity").

In this event the relief is capped at a value determined by dividing the interest accrued in the relevant period by the following quotient:

$$Quotient = \frac{Principal\ Qualified\ Debt / Qualified\ Equity}{3}$$

Where:

- **Principal Qualified Debt** is the value of the principal of all **Qualified Debt** to CNR for the relevant period; and

- **Qualified Equity** is that part of Equity which proportionate CNRs share in the IPR's share capital.

7 Judicial Enforcement

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

Yes, to both questions. Domestic law is applied to relations between domestic parties, but relations between a domestic and a foreign party may be governed by foreign law. The parties may choose the law applicable to the contract as a whole and for its individual parts.

The choice of foreign governing law must be explicitly or should follow directly from the terms of the contract and the circumstances of the case in their entirety.

In this event the local courts will apply the law chosen by the parties. In order to apply foreign law the courts will endeavour to establish the content of applicable rules, in accordance with official interpretation, application practice and the doctrine of the relevant foreign state.

7.2 Will the courts in Belarus 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?

This is unlikely.

Belarusian courts will recognise and enforce a foreign judgment without the re-examination of the merits of the case, provided any of the following conditions are satisfied:

1) the law requires them to do so;
2) an international treaty requires them to do so; and/or
3) doing so would satisfy the principle of reciprocity.

None of these requirements are satisfied in respect of judgments by New York or English courts. Therefore it is highly unlikely that Belarusian courts will recognise and enforce such foreign judgments.

However, being a signatory to the New York 1958 Convention, Belarus will enforce an arbitral award made in any of these jurisdictions.

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 Belarus, 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 Belarus against the assets of the company?

In this case it is critical for a foreign company to appoint local representatives or to otherwise establish a legally recognised presence on the territory of Belarus, since otherwise, very extensive (up to 1 year) terms of resolution will apply.

In case a local presence is established, terms set for local companies will apply. This is normally 2 months; however, even local cases can take more time. Even if the borrower has no defence to payment, the establishment of rules of applicable foreign law may delay time within which a judgment may be obtained. Provided that the law to be applied to the case is clear, obtaining a judgment may take up to 6 months.

If the borrower does not appeal, the judgment will enter into force within 15 days from its pronouncement. A writ "*sudebnyi prikaz*") (document required to commence enforcement) is issued to the enforcing party after the judgment will have entered into force. In some cases a writ may be issued immediately upon the pronouncement of the judgment.

The duration of enforcement is not limited time-wise. In straight-forward cases, enforcement may take up to 4 months.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Yes, unless an agreement on enforcement is entered into in respect of a pledge or mortgage, the enforcement of collateral provided under these two agreements involves a public auction. Please see the response to question 3.13 for details.

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

No, there are no special restrictions applicable to foreign lenders.

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

Yes, insolvency law provides for a "protective period" in insolvency proceedings. This period, when determined by the court, cannot last longer than 3 months. However, the debtor, or in certain cases government agencies, can apply to extend the protective period for up to 3 years if this is required to complete the corporate workout.

In the course of this period, most enforcement proceedings, except for those related to claims of employees and individuals who are independent contractors of the debtor and enforcement of claims related to compensation of personal harm, may be suspended pursuant to an application from the debtor, its workout manager and other persons.

Such a moratorium will apply to the enforcement of collateral security.

Insolvency of banks

General rules on protective periods do not apply in respect of banks. The National Bank can set a moratorium on enforcement of certain claims against a bank under insolvency proceedings. This will apply to enforcement of most commercial loans and respective collateral, except where enforcement proceedings were commenced prior to the appointment of a temporary administration by the National Bank.

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

If the arbitral award is made in a jurisdiction which is a party to the New York Convention on the Recognition and Enforcement

of Foreign Arbitral Awards, Belarusian courts will recognise and enforce the award without a re-examination of the merits.

Belarus is also a party to international treaties with Russia and other CIS states on recognition and enforcement of arbitral awards. Therefore, Belarus will recognise and enforce arbitral awards originating in those states without re-examination.

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?

Priority

Subject to preferential debts, for parties which are not financial institutions, secured claims rank below claims for personal (bodily or moral) harm, claims for employee compensation and compensation under authoring agreements, claims in respect of dues to the Republican Budget and social security funds, and claims for other mandatory payments under the law, but which rank above other creditors.

Protective period

See the response to question 7.6 above for explanation of the effects of a protective period under insolvency law.

Other effects on collateral security

A Pledge Agreement may be invalidated by a court decision pursuant to a claim of the bankruptcy administrator in cases where the contract was executed by the debtor prior to the opening of the debtor bankruptcy proceedings, simultaneously with the emergence of the debt or immediately after its occurrence, and if the pledge agreement was executed:

- within 6 months prior to the beginning of the proceedings of economic insolvency (bankruptcy) or after the initiation of proceedings on economic insolvency (bankruptcy); and
- with an interested party within 1 year before the start of the insolvency proceedings or after the initiation of insolvency proceedings.

If the interested party or the debtor can prove that the debtor at that time was not insolvent, the invalidation of the contract of pledge on such grounds is not allowed.

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 following debts rank above any others:

1. court duties and debts related to mandatory disclosure of information related to the insolvency proceedings;
2. debts to following creditors, which arose after the commencement of liquidation proceedings:
   a. claims for personal (bodily or moral) harm;
   b. claims for employee compensation and compensation under authoring agreements; and
   c. claims in respect of dues to the Republican Budget and social security funds; and
3. for banks, claims of individuals in respect of bank deposits and claims of individuals under bonds issued by the bank, as well as claims by an deposit guarantee organisation are preferential and rank above all others.

Also, collateralised debts rank above unsecured debts only to the amount of the value of the collateral.

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

No, there are no such entities; however, special *ad hoc* regulations, approved by the President of the Republic of Belarus, may apply to organisations tasked with special functions related to homeland security, organisations having particular urban importance and certain others.

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 a way. Resident tax payers, which have outstanding uncovered claims and are in default in respect of taxes due must inform such authorities of outstanding claims. Tax authorities may then proceed to write off such tax debts from the debtors of the tax payer.

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 Belarus?

Yes, prorogation agreements are valid and enforceable under Belarusian law, provided that the dispute does not fall into the group of disputes subject to the exclusive jurisdiction of Belarusian courts.

Also the law describes several groups of cases, where Belarusian courts are entitled to assume jurisdiction. If the dispute falls into one of the groups, a Belarusian court which commenced proceedings in respect of the dispute must proceed to resolve it under Belarusian procedural law, unless one of the parties to the dispute claims the benefit of the prorogation clause.

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

Yes, provided that it can be demonstrated that the waiver was executed by a party, which is entitled under foreign law to make such a waiver.

To our best knowledge Belarusian courts have never yet heard cases where sovereign immunity has been an issue.

10 Other Matters

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

For internal Belarusian transactions, there is a distinction between a loan contract, which is a "real" contract, in the meaning that it becomes effective after the funds have been transferred, and a credit contract, which can provide for a duty to advance funds. The latter can only be entered into by a licensed financial institution.

However, this distinction does not apply to contracts with foreign lenders.

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

Importantly, Belarusian exchange controls regulations will apply irrespective of choice of governing law and therefore must be taken into account in lending transactions with Belarusian entities.

Also, certain special regulations apply to lending transactions with government authorities and unitary enterprises, where the Government is the beneficial owner.

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Archer Legal is an investment and corporate law practice established in Minsk in 2010. We are proud to be a local firm, who understands how the law is applied, how the local authorities work and how local business thinks. However, we also have a strong international background. Our founding partners have worked at international law firms, most of the work we do is in English and we are regularly instructed by foreign clients.

In working with us you will find that we are easy to deal with, entrepreneurial and do our best to make certain that the law works in your favour.

Bermuda

Jeremy Leese

MJM Limited

Timothy Frith

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 can now, following legislative changes implemented in 2014, acquire land in Bermuda, but only to the extent that is either commercial property exclusively used for business purposes or, with the appropriate governmental consent and in accordance with immigration policy, only if available for purchase by non-Bermudians, residential property to house employees and officers (Companies Amendment Act 2014).

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 Bermudian legal practice. In certain limited circumstances, it is possible to assign a cause of action, but in practice such assignments are very rare because of the public policy rules against maintenance and champerty. The proceeds of a cause of action may be assigned.

Contractual rights may be mortgaged by way of assignment, and an "all assets" debenture will typically provide a mechanism for taking security over the benefit of the security provider's interest in specific "material contracts". In addition, rights under insurance policies and the proceeds of any claims thereunder may be assigned. In both instances, the assignment is perfected by giving notice in writing of the assignment to the counterparty to the material contract or the relevant insurer, and the secured creditor may also require that its interest in the proceeds of an insurance policy is noted on the policy by the insurer.

Debts may be mortgaged by way of assignment, in which case the secured creditor becomes the owner of the debt. Alternatively, debts may be charged where security is being taken over a large pool of receivables, the security will usually take the form of a floating charge.

Security over large individual debts, such as inter-company loans, is usually granted through a mortgage of the debt, effected by assignment to the secured creditor, with a proviso for reassignment to the mortgagor when the secured obligations have been discharged.

The Supreme Court Act 1905 provides that a legal assignment (an unconditional assignment of the debt for the time being not by way of charge only) may be made by giving the debtor notice in writing of the assignment. An equitable assignment may be made without any requirement for notice or other formalities.

A legal assignment entitles the assignee to enforce the debt directly against the debtor. Where there has been an equitable assignment, the assignee may convert it into a legal assignment by giving the debtor written notice of the assignment.

Both assignments and charges are generally registered with the ROC to protect the second creditor's priority.

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

In 1990, Bermuda enacted special legislation to deal with the uncertainty caused by the decision *in re Charge Card Services Ltd.* [1987] Ch. 150. The Charge and Security (Special Provisions) Act 1990 expressly provides that a bank may take security over its own indebtedness to its customers.

The most common form of security over cash deposit is a "charge back" whereby a bank takes security over cash deposited with it, or otherwise over indebtedness which it owes to the chargor. A "charge back" is perfected by attachment without further act.

Where security is created in favour of a foreign bank over a deposit with a Bermuda bank, the most common form of security is a control agreement whereby the Bermuda bank agrees it will not exercise any rights of set off against the relevant account and will not permit any withdrawals from the relevant account without the consent of the foreign bank. The security provider and the foreign bank will agree that the security provider is not permitted to make withdrawals from the relevant account or otherwise exercise any of its rights as beneficial owner of the cash deposit until the secured obligations have been discharged, with the result that the security provider's cash deposit becomes a "flawed asset".

Charges over deposits are normally registered with the ROC.

3.6 Can collateral security be taken over shares in companies incorporated in Bermuda? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

The most common types of collateral over which security is granted is shares issued by privately held companies.

Bermudian companies are prohibited from issuing bearer shares. The usual security granted over certificated shares is an equitable mortgage. Legal mortgages of shares are rare in Bermuda.

Where shares are uncertificated, it is generally advisable to require that the shares be certificated for the purposes of obtaining an equitable mortgage, failing which, a fixed charge may be taken over uncertificated shares.

Where a Bermudian company gives security over dematerialised securities traded in a market outside Bermuda the usual practice is that security will be created in accordance with the laws of the place where the securities are situated and transferred.

On the other hand, where the relevant dematerialised securities are traded electronically on the Bermuda Stock Exchange ("BSX") within the Bermuda Securities Depositary ("BSD"), then the BSD regulations apply. All securities held in the BSD are registered in the name of BSD Nominee Ltd., which is a subsidiary of the BSX. All of the Bermuda banks are member participants in the BSD ("Member Banks"). When a Member Bank proposes to make a loan secured by the security provider's interests in securities held within the BSD, the security provider as beneficial owner ("BO") will instruct its broker to deliver the relevant securities within the BSD to the Member Bank as custodian on an intra-member basis.

The BO will also grant the Member Bank authority to sell the securities on an event of default, and thereby realise its security. For its part, the Member Bank as custodian will agree to re-deliver the securities to the BSD's broker when the BO discharges its obligations to the Member Bank.

It is not mandatory for Bermuda law to govern a charge over the shares of a Bermudian company, although it is recommended. A charge over shares governed by Bermuda law will typically be executed as a deed. A share charge generally requires the delivery of ancillary documents to the chargee, including:

(i) executed but undated share transfer forms and share certificates;

(ii) undated letters of resignation, letters of authority, and powers of attorney from the directors, and an irrevocable proxy from the shareholder;

(iii) evidence of approval of the directors of the company whose shares are being charged, if the bye-laws of that company so require;

(iv) certified copies of directors' resolutions approving the granting of the charge; and

(v) an undertaking from the company, in the form of a deed, that it will register the share transfer form.

Share charges generally are registered with the ROC to protect priority.

Except in the case of shares listed on an appointed stock exchange, prior permission must be obtained from the Bermuda Monetary Authority ("BMA") for the transfer of shares of an exempted company or a local company owned by a non-Bermudian. However, the BMA has granted a general permission under the Exchange Control Regulations 1973 for the granting of a charge to a licensed bank or licensed lending institution in Canada, the US, Australia, EU countries, Bermuda, Hong Kong, Singapore, Norway, Switzerland and Japan (Notice to the Public dated 1 June 2005). This permission extends to transfers to those licensed lenders on enforcement of the charge.

The general permission does not extend to:

(i) charges over shares of Bermuda insurance companies; and

(ii) sales by the licensed lenders to third parties as part of the enforcement process.

BMA permission is not required where the securities being charged either do not carry the right to vote, or appoint one or more directors of the issuer, or are not by their terms convertible into securities carrying such rights.

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

Inventory falls within the ambit of what constitutes tangible property, which can be secured under Bermuda law. The most common form of security for inventory is a floating charge, which can be registered with the ROC.

Charges by Bermudian companies over Bermuda property do not need to be registered to be valid and enforceable. However, the date of the registration of security documents determines the priority of charges or mortgages or other security documents, and therefore they are usually registered. Most charges are registered at the ROC under section 55 of the Companies Act for a local or exempted company and section 61 for an overseas company granting security over a Bermuda property. The following must be filed with the ROC:

- an original of the security document (certified copies will generally be accepted);
- a Form 9 (particulars of a mortgage or charge); and
- the appropriate fee (see later).

The registration is effective as at the time of filing, and not the time the certificate of registration is issued.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, these are both very common circumstances in which a Bermudian company will grant a security interest over its assets.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The Stamp Duties (International Business Relief) Act 1990 abolished stamp duty on most documents (including loan and security documents) executed by "international businesses" (including exempted and overseas companies). However, this exemption does not extend to stamp duty payable on instruments involving Bermuda real estate.

A legal mortgage attracts:

(i) stamp duty at the rate of 0.25%, where the sum secured is no more than BM$400,000; and

(ii) stamp duty at the rate of 0.5%, where the sum secured is more than BM$400,000.

Local companies are liable for stamp duty on the execution of most documents unless the relevant transaction can be brought within the relatively narrow statutory exemptions in section 46(c) of the Stamp Duties Act 1976.

The following registration fees are payable for a charge against a company at the ROC:

(i) over exempted or overseas companies, BM$344 where the amount secured is less than BM$1 million and BM$603 where the amount secured is greater than BM$1 million (sections 55 and 61, Companies Act); and

(ii) over local companies: BM$172.

The fees for registration of an aircraft mortgage:

(i) where the amount secured by the mortgage does not exceed BM$5 million, the fee is BM$200;

(ii) where the amount secured by the mortgage does not exceed BM$20 million, the fee is BM$400; and

(iii) where the amount secured by the mortgage does exceed BM$20 million, the fee is BM$800.

Stamp duty in the amount of BM$25 is payable on all notarial acts, except for protests on bills of exchange or promissory notes. If there are exhibits to the document, an additional BM$25 must be affixed to each exhibit.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Usually, provided all documentation required to be filed or registered is provided promptly, filings and registrations can be completed quickly after security has been executed, and notifications received as to their acceptance for filing or registration, and any certificates of registration, returned in a matter of a few days.

As for expense, please see the answer to question 3.9. However, it is worth pointing out that stamp duty generally is not payable when security is granted over the assets of an exempted company, so there is no need to structure a transaction to minimise Bermuda tax consequences. Where local companies are granting security, there may be ways to minimise the stamp duty payable, such as using one composite security document to cover various assets. It is also possible to minimise registration fees by using a single document. However, registration fees usually are not a material issue in determining the structure of security arrangements.

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

Subject to the specific circumstances highlighted above with regard to the BMA's consent being required for the granting of security over the shares of certain types of companies or over the assets of certain regulated entities (such as insurance companies), no such consents are required for a Bermuda company to grant security over its assets.

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

There are no specifically Bermudian concerns to note, but the usual issues about ensuring that there is sufficient collateral to secure the variable amount outstanding under the credit facility and that the definition of secured obligations is drafted widely enough to encompass all amounts so borrowed subsist.

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

As long as documents are executed in accordance with a Bermudian company's memorandum of association and bye-laws, the Companies Act and authorising board resolutions, there is no need for Bermuda law purposes for anything more than execution under hand by one authorised signatory (who does not have to be, although usually is, a director of the company). For foreign law governed security documents, one needs to ensure compliance with any requirements of such laws with regard to enforceability, security filing/registration and admissibility into evidence in court proceedings.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

(a) Shares of the company

The statutory rule against financial assistance being given by Bermudian companies was abolished by amendments to the Companies Act passed in 2011.

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

See above.

(c) Shares in a sister subsidiary

See above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Bermuda recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The concept of both agency and trustee is well recognised in Bermuda.

The agent bank is often the arranger of the facility, and is normally chosen by the syndicate members. An agency arrangement governed by foreign laws will be recognised by Bermuda courts. Typically, the agent acts as a conduit for payments, and for dissemination of information to syndicate members. In a pre-insolvency situation, the agent bank usually represents the syndicate members in dealing with the enforcement of the lenders' remedies. On the liquidation of the debtor company, each lender bank may submit proof of debt or the agent bank may do this on behalf of the syndicate members, provided that the agent bank is able to submit a proof of debt on its own account.

With regard to security trustees, generally, only the security trustee can enforce the security on the creditors' behalf, and the borrower's individual creditor is precluded from taking independent action against the borrower. By virtue of the UK Recognition of Trusts Act 1987 (Overseas Territories) Order 1989, trusts from other common law jurisdictions and certain types of similar concepts that apply in civil law jurisdictions generally are recognised in Bermuda.

5.2 If an agent or trustee is not recognised in Bermuda, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable in Bermuda.

5.3 Assume a loan is made to a company organised under the laws of Bermuda and guaranteed by a guarantor organised under the laws of Bermuda. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

There are no special requirements to ensure a transferred loan is enforceable by the new lender. However, to ensure priority of registration of any related security, notification of the transfer of the secured obligations should be notified to the Registrar of Companies on the appropriate form.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

No Bermudian company is required or entitled under Bermuda law to make any deduction or withholding in respect of any Bermuda taxes from or with respect to any payment to be made by it under a facility agreement it has entered into, whether of principal, interest, fees or otherwise.

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

No foreign lender will be deemed to be resident, domiciled or carrying on business, or subject to any tax, in Bermuda by reason only of the execution, delivery, performance and/or enforcement of any loan facility agreement or related security document where the borrower or guarantor is incorporated in Bermuda.

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

Please see the answer to question 6.2 above.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

None, other than the fees set out in the answer to question 3.9.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

The fact that the lenders are overseas makes no difference to a Bermudian borrower's position.

7 Judicial Enforcement

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

The express choice of the applicable foreign governing law as the governing laws of any loan facility agreement or related security document would be deemed a proper, valid and binding choice of law, and would be recognised and given effect to in any action brought before a court of competent jurisdiction in Bermuda, except for those laws:

(i) which such courts consider to be procedural in nature;

(ii) which are revenue or penal laws; or

(iii) the application of which would be inconsistent with public policy, as that term is interpreted under Bermuda law.

7.2 Will the courts in Bermuda recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

A foreign judgment given by a New York court or an English court (a "foreign court") is not of itself enforceable in Bermuda, but a final and conclusive judgment *in personam* obtained in a foreign court against any Bermudian company based upon any loan facility agreement or related security document under which a sum of money is payable, (other than a sum of money payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty) may be enforced by separate action before a Bermuda court, provided that:

(i) the foreign court had jurisdiction in relation to the subject matter of the dispute under all applicable laws and Bermuda conflicts of laws rules (and an express, contractual submission to jurisdiction is sufficient for these purposes);

(ii) the judgment was not obtained by fraud or in a manner opposed to natural justice;

(iii) the relevant obligor received notice of the proceedings and was afforded an adequate opportunity to present its defence;

(iv) the enforcement of the judgment would not involve the enforcement of foreign revenue, penal or other public laws or otherwise be contrary to Bermuda public policy;

(v) there has been due compliance with the provisions of the Judgments (Reciprocal Enforcement) Act 1958, as amended, where applicable (it applies to English courts, and those of most of the commonwealth countries, but not the courts of the United States);

(vi) enforcement of the judgment is not precluded by the Protection of Trading Interest Act 1981, as amended (which prohibits the enforcement of judgments for multiple damages and certain other foreign judgments); and

(vii) the proceedings to enforce the judgment of the foreign court are commenced within six years of the date of such judgment.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Bermuda, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Bermuda against the assets of the company?

The court system in Bermuda is efficient and responsive. A liquidated money claim for recovery pursuant to obligations set out in a loan agreement or guarantee is normally issued in the Commercial Court of the Supreme Court by way of a writ of summons under Order 6 Rules of the Supreme Court 1985. If the company is registered in Bermuda, the Defendant must file a memorandum of appearance through its attorneys within 14 days of service of the writ of summons in accordance with Order 12 Rules of the Supreme Court 1985. The time limit is extended if it is necessary to serve proceedings on a Defendant out of the jurisdiction.

If the Defendant does not enter an appearance within the period allowed, the Plaintiff may have a judgment entered for the liquidated claim in accordance with Order 13 Rule 1 Rules of the Supreme Court 1985.

If a notice of appearance is served but it is considered that the Defendant has no legal merit in defending the claim, an application for Summary Judgment can be made by the Plaintiff under Order 14 Rules of the Supreme Court 1985. This application is made by summons and supported by affidavit.

If the application is not defended then judgment can be entered on the first return date which would be approximately 4-5 weeks from the issue of proceedings. If the application is defended then directions are given at the application return date and the Defendant will have leave to serve an affidavit in answer and the Plaintiff a further affidavit in reply. The application is then relisted for a hearing which would normally take place 12-14 weeks after the original proceedings were served on the Defendant.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There are no significant restrictions other than following due process in any proceedings to enforce judgment, obtain possession of property or obtain an order for the sale of the property.

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

There are no specific restrictions that apply to a foreign lender in the event of filing suit against a company in Bermuda or foreclosing on collateral security. However, it should be noted that the Defendant to any writ of summons or Court-controlled enforcement process by a foreign lender can apply for security for costs pursuant to Order 23 Rules of the Supreme Court 1985 on the basis that the Plaintiff is ordinarily resident out of the jurisdiction. Following application for security, the Court may order the granting of an appropriate security for the payment of the Defendant's costs as a condition of the Plaintiff continuing with the litigation. The grant of such an order is intended to protect the Defendant in the event that the Defence to the Claim is successful. The security is released if the Plaintiff is ultimately successful at trial or prior summary determination of the claim.

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

In a compulsory winding up of a company in Bermuda, following the presentation of a petition, the company or a creditor or contributory may apply to Court under s.165 Companies Act 1981 to have any creditor's claim stayed. The Court may stay the proceedings on such terms as it thinks fit. Following the grant of a winding up order or the appointment of a provisional liquidator, no action or proceeding may be commenced or continued without the leave of the Court pursuant to section 167(4) of the Companies Act. The generic rationale is for the claims of unsecured creditors to be stayed to allow an orderly distribution to creditors *pari-passu* following the winding up of the company.

The position of a secured creditor is largely unaffected by the insolvency regime as the security interest is normally a property right of the secured creditor and as such stands outside the insolvency regime which is designed to effect the orderly distribution of the company's assets. If, on the basis of the security documents, the lender is entitled to take possession of and title to the secured property, he may, after realising the security, prove in the liquidation for the balance of any debt as an unsecured creditor. In the event that the assistance of the Court is needed to enforce the security then an application has to be made to the court for permission to proceed.

Under Rule 98 of the Companies (Winding-Up) Rules 1982, the liquidator may require a creditor to give up security on payment of the estimated value of the security plus a 20% uplift.

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

An arbitration award made in a foreign country other than the United Kingdom that is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 19 June 1958 (the "New York Convention") in respect of any loan

facility agreement or related security document for a definite sum obtained against the Bermudian company may be enforced with the Bermuda courts and judgment entered in the terms of the award. The Bermuda courts may only exercise its discretion to refuse leave if:

(i) a party to the arbitration agreement was, under the law applicable to him, under some incapacity;

(ii) the arbitration agreement was not valid under the governing law of the arbitration agreement;

(iii) the Bermudian company was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;

(iv) the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration, subject to the proviso that an award which contains decisions on matters submitted to arbitration which can be separated from those matters was not so submitted;

(v) the composition of the arbitral authority was not in accordance with the agreement of the parties or, failing such agreement, with the foreign governing law;

(vi) the award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority, either pursuant to the foreign governing law, or pursuant to the law of the arbitration agreement;

(vii) the subject matter of the award was not capable of resolution by arbitration; or

(viii) enforcement would be contrary to public policy.

An award made pursuant to an arbitration agreement in a foreign country including the United Kingdom that is not a party to the New York Convention may be registered under the provisions of the Arbitration Act (Cap 6) and enforced as a judgment of the Bermuda courts. There is no statutory test for the exercise of the courts' discretion in relation to registration in this manner, but in our view the court would be likely to exercise its discretion in a similar matter to the requirements for enforcing awards under the New York Convention where the award was made in a jurisdiction which is a signatory of the New York Convention.

If any such final and conclusive monetary award in an arbitration has the force of a judgment under the foreign governing law, then it may be registered and enforced as a judgment of the Bermuda court as set out above.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The start of insolvency proceedings against a Bermudian company may affect a creditor's ability to enforce its rights. All or part of a transaction may be attacked as constituting a fraudulent conveyance or a fraudulent preference. In certain circumstances, floating charges can also be attacked. Please see the answer to question 8.2 below.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Security created within six months of the start of a Bermudian company's winding up can be set aside on the application of the liquidator where the purpose of creating the security was to give a secured creditor preference over other creditors (section 237, Companies Act). Section 237 cross-references Bermuda's bankruptcy law regime, and section 47 of the Bankruptcy Act 1989 reproduces section 44 of the English Bankruptcy Act 1914. English or Commonwealth cases on the meaning and effect of those provisions will be relevant to their interpretation in Bermuda courts.

The start of the winding up is either:

(i) the date that the company resolves that it be wound up; or

(ii) if there is no such resolution, the time of presentation of the petition that led to the winding up.

The legislation's intention is to avoid preferences at the expense of unsecured creditors. The presence of "fraud" on the company's part or the person who is being preferred is not required. However, it is necessary to show that the company's "dominant intention" was to prefer one creditor over other creditors. The burden of proof is on the liquidator, although the court can draw inferences about intention from all the relevant facts. Payments to secured creditors are normally not preferences. However, the granting of security may be a preferential transaction that can be set aside if the relevant intention exists.

Floating charges that are created within 12 months before winding up commences can be set aside (section 239, Companies Act). This provision takes automatic effect, and is not dependent on the liquidator or creditor applying to set the floating charge aside. Floating charges are valid if the creditor provided new value (cash paid) at the time of, or in consideration for, the security. Otherwise, they are void to the extent that the creditor did not provide new value, unless the creditor can prove that the company was not insolvent at the time of the charge. The creditor is entitled to recover interest on the amount of money paid to the company at a statutory rate.

Notwithstanding the above, secured creditors with fixed charges may realise their security outside the winding up regime. Secured creditors also may recover the full proceeds of realisation without deductions other than for enforcement expenses. Other creditors are usually paid in the following order on an insolvency:

(i) secured creditors with fixed charges;

(ii) preferred creditors set out in section 236(1) of the Companies Act, including the government and municipalities' claims over taxes and rates;

(iii) employees, for up to BM$2,500 of wages or salary relating to the four months before the liquidation or winding up, and accrued holiday pay;

(iv) all amounts due in respect of:
- contributions payable by the company for the preceding 12 months under the Contributory Pensions Act 1970;
- any contract of insurance;
- any accrued compensation; or
- liability for compensation under the Workmen's Compensation Act 1965;

(v) secured creditors with floating charges; and

(vi) unsecured creditors.

The ranking of subordinated creditors depends on the nature of the subordination. A junior secured creditor is paid after a senior secured creditor, but before unsecured creditors. However, an unsecured subordinated creditor normally ranks after other general unsecured creditors. The priority of security depends on the registration date of the security document, priority notice or, in the case of aircraft, the notice of intention to file a mortgage.

The registration of security is not mandatory and is not essential to the creation of valid security. On insolvency, the failure of a secured creditor to perfect its security or register it as a charge does not entitle a liquidator to have the security set aside for the benefit of the company's unsecured creditors. The general position is that registration does not constitute perfection and so the method of

perfection for a particular asset class is a matter of common law. Where a creditor has failed to perfect their security, there is a risk that a subsequent creditor with a security interest in the same asset may be able to achieve priority by being the first to register their security as a "charge".

On insolvency, secured creditors with fixed charges have priority over all other secured and unsecured creditors. Registration affects priority between secured lenders. If no secured creditor has registered their security, priority is determined by the time of creation.

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

The insolvency regime contained in the Companies Act generally applies to all Bermudian companies. The insolvency of individuals is dealt with by the Bankruptcy Act 1989 and the Bankruptcy Rules 1990. The insolvency of partnerships is governed by the Bankruptcy Act 1989 and sections 33-40 of the Partnership Act 1902.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

The mechanisms for enforcement depend on the remedies contained in the security documents:

(i) **Powers of sale**: Mortgages (over land or other assets) or charges generally contain powers of sale. In the case of mortgages over land, the Conveyancing Act provides for limited rights of sale and foreclosure.

(ii) **Appointment of receiver**: The terms of the security may enable the lender to appoint the receiver. Alternatively, it may be possible to apply to the court for the appointment of a receiver.

(iii) **Possession of assets**: A lender may be able to take possession of charged assets or be noted as the registered owner in the case of a security interest over shares (see section 3 above).

What is the best enforcement action depends on the particular circumstances at the time.

An alternative to enforcement is a scheme of arrangement, which is available under section 99 of the Companies Act. A scheme may be used to effect the reorganisation of a company. There is a substantial body of English case law on schemes to effect the reorganisation of a company and on the relevant provisions of the Companies Act. Bermuda applies English law principles to the interpretation and implementation of schemes. A scheme must be approved by a 75% majority in value and a number majority of each distinct class of creditors (and shareholders, if the scheme also involves shareholders) and sanctioned by the court.

The court has wide powers under section 102 of the Companies Act to deal with various ancillary matters under the scheme.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Bermuda?

The submission by any Bermudian company in any loan facility agreement and related security document to which it is a party to the jurisdiction of the relevant foreign courts would be deemed valid and binding upon such Bermudian company and would be recognised as such by the Bermuda courts, if such submission is accepted by the relevant foreign courts and is valid and binding under the foreign governing law.

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

The signature, delivery and performance of any loan facility agreement and related security document to which it is a party by any Bermudian company constitutes private and commercial acts by such company rather than public or governmental acts and, accordingly, such company is subject to suit under private commercial laws. Neither it nor any of its property has any right of immunity on any grounds from suit or from jurisdiction or execution of judgments.

10 Other Matters

10.1 Are there any eligibility requirements in Bermuda for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Bermuda need to be licensed or authorised in Bermuda or in their jurisdiction of incorporation?

There is no eligibility requirement for a lender to a Bermudian company, nor is it necessary for any foreign lender to be licensed, authorised or establish a place of business in Bermuda in order to enforce any provision of any loan facility agreement and related security document where the other party thereto is a Bermudian company.

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

None that are material.

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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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Timothy Frith MA (Hons) LL.M. FCIarb is a Commercial Barrister with 15 years' experience at the Bar in London. He moved to MJM from Devereux Chambers in 2012 and became a registered associate of the Bermudian Bar in September of that year. He practises in a wide range of Commercial and Corporate disputes having a particular expertise in Minority Shareholder, Banking, Insolvency and Telecommunications cases. He has acted for clients in litigation, mediation and arbitration in Singapore, Spain, Thailand, Jordan, Dubai, Bermuda and the United Kingdom. He is a Fellow of the Chartered Institute of Arbitrators and an Accredited Mediator.

MJM is one of Bermuda's leading law firms. We have a broad ranging practice with an emphasis on civil and commercial litigation, banking and finance, general corporate, trusts, insolvency and restructuring. We also offer advice and services to international individual and commercial private clients.

MJM is regularly retained by leading international law firms. We offer practical, common sense advice based on an in-depth knowledge of the legal, regulatory and commercial environment in Bermuda. We also offer a high degree of partner involvement in the work that we do. Each practice area is led by a partner who is recognised as a leading practitioner in Bermuda in their respective field of specialisation. Three of our partners are ranked 'Leaders in their Field' by Chambers Global for 2013: Peter Martin for Corporate & Finance; Andrew Martin for Dispute Resolution; and Alan Dunch for Dispute Resolution. Our collective knowledge and experience across practice areas enables us to offer a comprehensive and thorough service to our clients.

Corporate & Finance

Our highly experienced team advises on all aspects of corporate and business law. Key practice areas include: aviation and ship finance; corporate borrowing and bank lending; mergers & acquisitions; joint ventures and shareholder agreements; global equity offerings and listings (IPOs); investment funds; international real estate finance; and regulatory compliance.

We have extensive experience in forming Bermuda local and exempted companies and partnerships. Our Quorum group provides a full range of corporate management and secretarial services to local and international clients.

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

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1 Overview

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

During 2014 Bolivia reached the third place in the ranking of economic growth in Latin America, reaching a 5.2 per cent growth in 2014, right after Panama and the Dominican Republic.

CEPAL data show that regional economic performance diminished in 2014 as the average for Latin America decreased from 2.7 per cent in 2013 to 1.1 per cent in 2014. This decrease was due to the deterioration of the terms exchange, which had already declined in 2013 (2.1 percentage points compared to 2012) and in 2014 (1.6 percentage points compared to 2013).

According to data provided by the Bolivian Ministry of Economy and Public Finance, economic growth has been above 5 per cent for 4 consecutive years between 2011 and 2014. In 2014, economic growth reached 5.5 per cent, 1.6 percentage points lower than in 2013.

Given the exceptional and extensive bonanza experienced in Bolivia between 2006 and 2014, which resulted in a dramatic increase of tax revenue, the country could have aspired to stronger growth if resources had been allocated more efficiently and if the country diversified its sources of production.

INE data indicate that in the third quarter of 2014, gross domestic product (GDP) registered a cumulative growth of 5.40 per cent compared to the same period in 2013. The three activities that had a greater impact in economic growth were: financial activities, which grew by 6.48 per cent; manufacturing, which expanded by 4.07 per cent; and especially the oil sector, which grew by 7.30 per cent. Together, these three sectors contributed 2 points to the total economic growth of this country. Mining grew to 6.20 per cent, but its contribution to Bolivia's economic growth was only 0.33 points.

As the rate of population growth tends to decrease, the per capita GDP of Bolivia in 2014 reached US$ 3,000, compared to 2013 when the GDP increased by 8.8 per cent.

In agriculture, an interesting phenomenon of improvement in performances was recorded. The gross value of agricultural production (VBPA) in 2014 grew by 14 per cent compared to 2013, mainly driven by the improvement in performances, as production grew much faster than the cultivated area (1.5 per cent), surface agribusiness items and cereals. These aspects together constitute 58 per cent of the VBPA. The increase in production volumes together with higher price levels in most agricultural items explain these positive results.

In 2014 the agricultural sector recorded a slight recovery of cultivated areas and of the amounts produced after the decline experienced in 2013. This increase was mainly due to the excellent yields provided by maize, rice, sorghum and soy beans crops in the 2013-2014 summer season, and wheat, sorghum and maize crops in the winter season of 2014.

Although the growth of Bolivia's economy was slower, problems were not due to a downturn in the terms of trade. Unlike the average for Latin America, in Bolivia terms of trade increased by 5.9 per cent in 2014 compared to 2013, a period which experienced a decrease of 1.7 per cent. Such increase allowed exports to reach a new record level of US$ 12,991,000. Of this amount, US$ 8.599 million (66 per cent) was traditional raw materials (oil and minerals), and US$ 4.392 million was non-traditional products (34 per cent).

Imports grew faster than exports, reaching US$ 10.492 million. The main concern on this matter is that 75 per cent of foreign purchases were consumer goods and raw materials that could be produced locally, considering the strengths and potentials of this country and the availability of resources for investment in the financial system.

The remainder of trade balance in 2014 was positive, reaching US$ 2.499 million. However, it is a lower figure by 16 per cent compared to 2013. The upper and continued growth of exports has allowed net international reserves to reach US$ 15.123 million. This liquidity seems to have encouraged public institutions to accelerate their budget execution.

In December 2014, cumulative inflation reached 5.19 per cent, a rate lower than the one experienced in 2013, which reached 6.48 per cent. This result was due mostly to the implementation of a tight monetary policy by the placing of government securities by the Central Bank of Bolivia, which managed to absorb the liquidity excess produced because of the expansionary fiscal spending.

A slower growth in demand as a result of the loss of purchasing power has become evident. An explanation of the phenomenon can be found in the rate that the accumulated inflation reached between 2005 and 2014 (40 per cent), severely affecting the purchase power of people. Today, an ordinary citizen with a certain amount of money is able to purchase slightly more than the half of what he could purchase in 2005. Although salaries have increased, inflation has eroded their purchasing power.

Another key aspect is that economic informality is growing. The rate of open unemployment has decreased, but informal employment remains the largest employer.

The economic activity that agglomerates a larger amount of employed persons is trade, which continually expands in urban areas. Retail trading, which is based mainly on smuggled goods (mostly clothes but also cars and appliances), has negative effects on public institutions that supply basic public services, health, education and security to the entire population, considering only a small amount of citizens pay taxes.

In 2014, several changes regarding financial intermediaries were established by the Financial Services Law, with the objective of creating specialised bodies and aiming to have a stronger presence of the government in this specific area by means of a regulatory entity. In early July of 2014, specific regulations were issued in order to establish loan rates that must be applied by financial intermediaries, especially for lending transactions celebrated with the productive sector and for social housing loans. Through these specific regulations, it is expected to allow portfolio growth in priority sectors defined by the national government, which are precisely productive credits and access to housing with social interest.

The specific regulations for financial institutions, SME banks, multiple banks and others, and especially Supreme Decrees (DS) 1842 and 2055, both issued in 2014, regulate interest rates for loans for social housing, loans for the productive sector and deposit rates. This kind of regulation aims to strengthen the productive sector and to improve the quality of life of Bolivian households through more affordable loans and higher returns on their savings.

Regarding social housing loans, new specific regulations oblige financial entities to give the total amount requested by lenders. This change has been produced because of the obligation of these entities to constitute a guarantee fund by providing the 6 per cent of their profits, in order to allow lenders to have access to housing loans without the need of paying in advance 10 or 20 per cent of the final price, which was the way it had to be done in the past.

The transformation of financial entities organised under the framework of the Financial Services Law is expected, especially the transformation of Private Financial Funds (FFP), multiple banks and banks SMEs. It is also expected that there will be a regulation of fees for the financial institutions that provide credits to the productive sector, and to make the credits prioritised by the Bolivian state more dynamic. It is important to mention that credit expansion will be accompanied by prudential regulatory measures in order to safeguard the quality of assets.

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

The Financial Services Law distinguishes between four types of financial institutions: commercial banks (BCC); specialised microfinance institutions (EMF); mutual funds (MAP); and savings and credit unions (CAC).

At the end of 2014, the financial intermediation system in Bolivia remained strong and stable, with good levels of financial performance as a result of the expansion of deposits and loan portfolio growth, accompanied by a low level of credit defaults and adequate patrimonial support.

Public deposits closed with a balance of US$ 17.420 million, resulting in an increase of US$ 2.621 million. 68.8 per cent of total deposits in the financial intermediation system were in retail banking, 24.5 per cent in specialised microfinance institutions, 4 per cent in credit unions and 2.7 per cent in mutual funds.

In 2014, the average tenure time of fixed-term deposits reached 888 days, maintaining the upward trend of the past five years. Thus, fixed-term deposits (DPF) with a 360-day term or more, constituted 90.7 per cent of total fixed-term deposits, whereas in December 2013 this kind of deposit reached 89.2 per cent and in 2006 they only represented 50 per cent. Furthermore, 92.7 per cent of fixed-term deposits in 2014 were established in local currency. The extension in the average tenure time of fixed-term deposits reflects a greater reliance of the public on the financial system, allowing financial institutions to have long-term resources to channel loans of greater maturity, which favours productive activities.

Deposits in local currency increased by US$ 2,626.7 million, experiencing a higher growth than in 2013 (US$ 2.275 million). In the same way, deposits in *Housing Development Units* (UFV – *Unidades de Fomento a la Vivienda* in Spanish) increased to US$ 1.4 million. By contrast, deposits in foreign currency (ME) decreased by US$ 6.7 million. In terms of participation, MN deposits, including deposits in UFV, considerably increased (80.7 per cent) compared to last year (77.2 per cent), while deposits in foreign currency decreased (from 22.8 per cent in December 2013 to 19.3 per cent in 2014).

The total number of savings accounts opened in 2014 comes to our attention, since today they reach 7.8 million, while in December 2013 they numbered 7.1 million. These numbers reveal the dynamics of opening savings accounts in the financial system in Bolivia.

Loans Portfolio

The loans portfolio closed in 2014 with US$ 14,186,700, resulting in an increase of US$ 1,989,000 compared to the end of 2013, equivalent to an increase of 16.3 per cent.

58.9 per cent of the total credit portfolio of the Bolivian financial intermediation system focused on commercial banking, 33 per cent on microfinance entities, 4.8 per cent on credit unions and 3.3 per cent on mutual funds.

The loan portfolio in local currency showed dynamic behaviour with an increase of US$ 2,404.8 million, whereas the foreign currency portfolio shows a decrease of US$ 414.6 million. The share of the loan portfolio in local currency represented 92.3 per cent of the total loans in December 2014, while in 2005 it only represented 6.6 per cent of the loan portfolio.

Loans in foreign currency represent 7.7 per cent of the total portfolio, while the portfolio in local currency with regard to *Development Housing Units* (UFV) has no relevance to the total amount of the portfolio. The share of the loan portfolio in local currency recorded an increase of 4.7 percentage points compared to the year 2013.

As of December 31, 2014, data registered an increase of 25,691 new borrowers. In this way, the total number of borrowers numbers 1,293,891. 60.9 per cent of all borrowers are concentrated in institutions that specialise in microfinance, 30.4 per cent in commercial banks, 7.2 per cent in credit unions and 1.5 per cent in mutual funds.

NPLs registered a balance of US$ 213.3 million, which means an increase of US$ 32.5 million compared to the amount recorded in 2013. The default rate (IM) – a ratio measuring NPLs in the overall portfolio – of the Bolivian financial intermediation system stands at 1.5 per cent, which has remained stable over the last four years.

Financial provisions reach US$ 441.2 million, which consist of US$ 248.4 million of specific provisions and US$ 192.8 million of generic provisions. The specific financial provisions exceed the amount of NPLs. In this scenario, the coverage ratio stands at 116.4 per cent.

The loan portfolio, classified by type, has the following distribution: 29.4 per cent in microcredits; 21.2 per cent in housing credits; 19.6 per cent in SME credits; 18 per cent in entrepreneur credits; and 11.8 per cent in consumption credits.

Productive Sector Portfolio

The loan portfolio for the productive sector, which comprises entrepreneurs' credits, micro credits and SME credits for all types of activities and industries (such as agriculture, hunting, forestry and fishing, extraction of crude oil and natural gas, metallic and non-metallic minerals mining, manufacturing, electricity, gas, water and construction) amounts to US$ 4,118.3 million, which represents 29 per cent of the total portfolio. In 2014 the loans given to the productive sector increased by US$ 810.7 million, mainly due to a rise experienced by the BCC of US$ 527.2 million, the EMF of US$ 284.1 million, the MAP with US$ 0.1 million, while open CAC decreased by US$ 0.8 million.

In December 2014, in the productive sector loan portfolio the sectors of manufacturing, agriculture, livestock and construction were the

fastest growing, with increases of US$ 442 million, US$ 263 million and US$ 86 million, respectively.

Productive enterprises classified as large companies require credit at higher rates for working capital, while micro enterprises and SMEs require loans for investment capital, a situation that is explained by the large number of new projects in this sector, which are covered by financial entities' funds directed to micro credits and SME credits.

2 Guarantees

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

In Bolivia, companies within a corporate group can secure loans from their companies provided that they belong to the same group and the same category (e.g. electricity); however, companies that belong to a different business group cannot guarantee loans to any of their members. On the other hand, 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 lies with the people who have approved the transaction. In general, however, directors also have responsibility as the operation is guaranteed by the goods of the company.

If the directors of a company ensure an operation and such directors do not have the authority to perform such act, they are also responsible for their own assets.

2.3 Is lack of corporate power an issue?

Indeed the lack of authority enabling a person or persons to act on behalf of a company is a grave and a serious problem. There are certain powers that enable people to carry out the activities and business of a company, and any person who acts without such authority is liable to penalties which are provided by law. All further acts performed by those people and the company might be void or voidable.

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

Bolivian law does not provide for state authorisation and credit approval for the creation of securities, except concerning state enterprises.

However, when a company applies for a loan the application must have the appropriate support, such as financial analysis of the company demonstrating the need for a loan, and, overall, approval of the shareholders of the company.

In the stock market, it is necessary to have the approval of shareholders in order to issue bonds.

For the granting of guarantees, such guarantees must be fully sanitised and free from all liens. If the security has a lien, the creditor will require permission for the property to be used as security for other creditors.

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

It depends on the amount requested. If the company has some financial indicators that are not in line with the credit policy of the entity, it may request the granting of additional collateral to support the operation.

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

For the enforcement of a security there are no exchange controls. The main obstacle is the time it takes to enforce a guarantee in the judicial system; such time frame depends on the individual case (please see the answers in section 8).

For the enforcement of a security with no exchange controls, the obstacles encountered are the extended time frames required for the judicial system and the processing of guarantees.

3 Collateral Security

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

In Bolivia lending obligations are secured by mortgages, collateral and unsecured personal.

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

The creation of securities depends on the type of loan requested. The procedure is to sign a contract, and each contract must be guaranteed. The contract also specifies the kind of guarantee given by the borrower, its characteristics, its value, its usefulness and for how long the collateral will be in force.

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

Yes, once the loan has been approved, the borrower delivers all relevant documents pertaining to the guarantee. These documents remain in the custody of the lender, which is usually a bank. The appropriate authorities then keep track of whether the property is collateral for a bank or institutional lender. However, this does not mean that the borrower transfers his ownership of the property to the bank, except where there is breach of property ownership, in which case it be transferred to third parties to honour the debt.

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

Bolivian law does not provide for this.

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

Generally not, but loan agreements provide that the company has

to keep a bank account where there is enough money to cover the monthly loan instalments; if the account is declared to have no money, the bank has the power to debit the money from other accounts that the company has with the bank, after communicating these actions to the debtor.

3.6 Can collateral security be taken over shares in companies incorporated in Bolivia? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Bolivian law does not allow companies to give its shares in warranty as in other countries. What is usually done is that the shareholders of a company must agree to be guarantors of the credit operations of the company and they guarantee the loan with their shares.

In Bolivia shares have to be issued certificates and such certificates must be registered in the books of the company's shareholders.

As part of a loan agreement, a clause allowing the resolution of disputes and enforcement of a security to be resolved under the laws of another country may be included. This is not a usual practice in Bolivia, but it is allowed, depending on the terms of the agreement between parties.

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

Yes it can. Collateral may be taken over goods in process, finished goods or raw materials. The debtor must request a warrant from the company storing the materials. The bank has control of such materials and each time the company needs to access the materials it has to apply for the bank's authorisation. In this way, the bank has control over the debtor's production and is satisfied that the debtor will honour its debt.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

No it cannot. In Bolivia it is regulated by the Supervisory Authority of the Financial System (ASFI) and is punishable under the law.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notary fees on guarantees are 4/1,000 of the loan amount for warranty registration in the office of real rights. Further legal costs of around US$ 150 also apply, along with the cost of registration at the Commercial Register in Bolivia which is US$ 25.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

For the registration of a guarantee, on average a time period of 30 to 45 days is required. On top of this notary processes will also take between 10 and 15 days. A total of 60 days, on average, is required, and the costs vary in relation to the amount of each loan.

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

No consents are required for the creation of a security.

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

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

The priority is given predominantly by the order in which the loans were requested; if the guarantee is executed, the amount collected will first cover the oldest operations and then operations that were requested at a later date.

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

For the enforcement of a security, financial institutions have to give their representatives power of attorney, enabling them to pursue the enforcement of the security. These powers must be registered in the Commercial Register of Bolivia, which is also responsible for their validation.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

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

5 Syndicated Lending/Agency/Trustee/ Transfers

5.1 Will Bolivia recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Bolivia recognises a trustee as long as it is a financial institution, authorised by the Financial System Authority (ASFI). The trustee may have the ability to obtain documentation, such as the enforcement of security, in order to manage the portfolios of banks and borrowers which have the backing of the system and the borrowers.

5.2 If an agent or trustee is not recognised in Bolivia, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

In Bolivia agents are recognised as long as they have a clear mandate from the Bolivian financial institutions, so they are responsible for performing the collection and enforcement of security granted by banks to borrowers. This does not mean, however, a transfer of the portfolio of the banks to the agent.

5.3 Assume a loan is made to a company organised under the laws of Bolivia and guaranteed by a guarantor organised under the laws of Bolivia. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

No, because the lender has cancelled the amount due. The requirement for this transfer is that Lender A has to lift the lien on the collateral so that Lender B can record the loan and have the right to charge his debt and the guarantee.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

No, since the legislation does not provide this figure, the only thing that sets the tax law is that if a borrower is foreign, payments made by the debtor for interest are taxed at a rate of 12.5 per cent, as long as the loan agreement was signed in Bolivia. If there is a loan agreement not signed in Bolivia, the rate of 12.5 per cent applies to the total amount including principal and interest as it is considered a remittance abroad.

The debtor is liable to pay agent retention and replacement of tax liability.

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

Bolivian tax legislation does not provide any tax incentives or benefits; taxes that apply are detailed in question 6.1.

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

Applicable taxes are detailed in question 6.1.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No, just those listed in question 3.9.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

If the loan agreement is made under the laws of a foreign country (e.g. USA), and under such legislation consequences exist for lenders, such adverse consequences apply in Bolivia.

On the contrary if the loan is carried out under Bolivian legislation there are no consequences because Bolivia does not have experience and jurisprudence in such cases.

7 Judicial Enforcement

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

Bolivian courts recognise and enforce contracts subject to a foreign law provided they contain two elements: first, that the benefits arising out of these contracts are to be utilised in Bolivia; and second, that the foreign law under which the contract was created is not contrary to Bolivian laws.

7.2 Will the courts in Bolivia recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The courts in Bolivia execute foreign judgments as long as there is a treaty in place with the country concerned. Following the principle of reciprocity, and in the absence of treaties on the matter, Bolivian courts will grant these judgments the same force that the nation in question gives to Bolivian judgments. However, if a foreign judgment was enforceable, it would be necessary to follow a procedure in which the concerned party must seek the enforcement of the judgment at the Supreme Court, and later request for the answers of the other party within 10 days. With or without such answers, and after a fiscal opinion (which involves additional time), the court will determine whether or not to enforce the judgment. The enforcement of the judgment shall correspond to the tribunal which would have been the case at first instance in Bolivia.

The new Bolivian Procedure Code (which will come fully into force in August 2015) maintains the same principles and procedure on this matter. However, it specifies that even though it is not necessary for courts in Bolivia to re-examine the merits of the case, it is necessary for the Supreme Court to recognise the foreign judgment (to determine whether the judgment meets the requirements and procedural basic principles), in order to proceed to its execution (only if the judgment concerns the compliance of an obligation or if it is the intention of a party to validate its probative effects).

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Bolivia, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Bolivia against the assets of the company?

A suit for non-payment can be filed as soon as the deadline the parties have agreed has expired. Generally, it will be possible to act by the way of an executive process, which is quite quick (the suit is filed, the judge examines the procedural requirements of executive judgment, and if appropriate he shall issue a formal notice to be fulfilled within three days, besides having the injunction of the debtor's assets). The executive process should take about a month (depending on which exceptions shall be made, counting also the evidence term which will take 10 additional days). In the case the loan agreement included a waiver clause regarding the executive procedure, the obligation may also be required by way of coercive procedure, which takes less time than the executive procedure. In all cases, the enforcement of the judgment will depend on if is enforceable and if it is enforceable, the court will execute the judgment within the time established or, failing that, within three days.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

It depends on the guarantee. In general, a public auction is required. This involves a procedure that might take over a month.

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

No. If the requirements are met, there is no restriction on the lender to filing a law suit against the borrower or the guarantee it has granted.

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

Please see the answer to question 8.1.

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

Bolivia has signed and ratified the New York Convention on the enforcement of arbitral awards. In this sense, the Bolivian courts do recognise such decisions without needing to re-examine their merits. Moreover, the new civil procedure code prescribes that arbitral awards enable a lender to initiate a coercive enforcement of a debt, and it is not necessary for the judge to re-examine the merits of such arbitral award.

The procedure to enforce a foreign arbitral award is the same described in question 7.2 for foreign judgments.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The ability of a lender is affected because the entire bankruptcy process is handled by a judge. In this sense, the affected lender cannot seek the enforcement of its security as freely as in the case of not being subject to the debtor company's bankruptcy. However, bankruptcy does not involve any other violation of the right of the lender to make a debt enforceable and the debt shall be paid by means of the security given by the debtor.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

All guarantees have priorities on the enforcement of the goods or assets given as such. However, tax debts and employee claims are always taken as preferential creditors' rights in the case of bankruptcy of the borrower.

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

Yes, financial intermediaries, for example, are only subject to a process of "intervention", after which it is to be decided whether to give it a solution or to proceed to compulsory liquidation.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

The only way other than court proceedings to seize the assets of a company in enforcement is a process called "*dación en pago*", which consists of a new transaction between the creditor and the debtor through which the creditor receives a new asset, or the asset given as a guarantee, as a payment of his credit.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Bolivia?

Please see the answer to question 7.1. However, a party cannot submit to a foreign jurisdiction on his own, for it takes both parties to choose the jurisdiction that will rule the contract and its enforcement.

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

If the sovereign immunity was awarded to a party in Bolivia, it would be by means of a law; therefore it would not be a disposable right, which implies that a party's waiver of sovereign immunity would not be legally binding and enforceable under the laws of

Bolivia. Nevertheless, in the event a party's sovereign immunity was awarded in a country the laws of which allow the waiver of sovereign immunity, then it would be legally binding and enforceable in Bolivia.

10 Other Matters

10.1 Are there any eligibility requirements in Bolivia for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Bolivia need to be licensed or authorised in Bolivia or in their jurisdiction of incorporation?

Bolivian law provides that a bank or financial institution is that of domestic or foreign origin, and dedicated to perform financial intermediation and financial services to the public, both in the country and outside the country.

The financial intermediation and auxiliary financial services will be carried out by financial institutions authorised by the Supervisory Authority of the Financial System (ASFI). No person, natural or legal, will perform regularly in the territory of Bolivia the activities of financial intermediaries and financial auxiliaries services described in the law, without prior permission of incorporation and operation granted by ASFI, with the formalities established in the law.

Any natural or legal person, domestic or foreign, domiciled in the country or not, who does not meet the requirements and formalities concerning the organisation and functioning of financial intermediaries and financial auxiliaries services under the Act is prohibited from making announcements, publications and circulating papers, written or printed, the terms of which imply that such person has legal authorisation to perform activities reserved by law to the said banks. In the same way, any natural or legal person may not use in its name, in Spanish or another language, terms that may lead the public to be confused with legally authorised financial institutions.

The requirements for the establishment of a financial institution in Bolivia and for obtaining the operating licence are as follows:

A) Founders may not:
   1. Be declared legally incapable to engage in commerce.
   2. Have an indictment or conviction for committing crimes.
   3. Have outstanding debts related to the financial system or running off loans.

B) In order to obtain an operating licence, a financial institution must:
   1. Have conducted a study of economic and financial feasibility.
   2. Have drafted articles of incorporation and bylaws of a corporation.
   3. Have a certified personal history for individuals – issued by competent authority.
   4. Have a certificate of fiscal solvency and disclosure of assets of the founders.

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

Considerations to be taken into account are those that are provided by law and detailed in this report.

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Carlos joined Criales, Urcullo & Antezana in June 2012 as an associate to participate in the expansion projects of the company, advising on matters of administration and finance.

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Botswana

Khan Corporate Law

Shakila Khan

1 Overview

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

The bank lending sector has seen strong competition in the corporate lending markets from the non-bank sector in recent years (statutory financial institutions, asset managers acting on behalf of insurance companies and pension funds). The current lack of liquidity in the banking sector has put this sector under further pressure. There has also been a corresponding tendency to raise capital from the capital markets and this has similarly put pressure on the bank corporate lending sector.

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

There have been significant lending transactions in the area of project finance and there has been increasing interest in public-private partnerships that involve bank finance.

2 Guarantees

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

Yes, it can.

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

No, there are not.

2.3 Is lack of corporate power an issue?

Not in general; the Companies Act, CAP 42:01 of the Laws of Botswana provides that "*a company has, both within and outside Botswana – (a) full capacity to carry on or undertake any business or activity, do any act which it may by law do, or enter into any transaction; and (b) for the purposes of paragraph (a), full rights, powers and privileges. (2) The constitution of a company may contain a provision relating to the capacity, rights, powers, or privileges of the company if the provision restricts the capacity of the company or those rights, powers and privileges*".

The following types of documents as applicable would need to be reviewed to see if they contain any restrictions on a particular entity:

1. Articles of Association or Constitution of the company (or enabling statute in the case of a statutory corporation);
2. any licence that the company may require (e.g. a banking licence, or pension fund licence); and
3. any internal rules and regulations of the company concerned.

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

The Articles of Association or Constitution might specify if shareholder approval is required for entry into a guarantee. Otherwise for a guarantee in the absence of any other security or charge on the guarantor's assets, no other consents or filings are generally required.

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

There are no statutory limitations, save for those in the Companies Act on financial assistance; please see section 4 below.

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

There are no exchange controls in operation in Botswana. There is still legislation on exchange control in the statute books, which has not been repealed. However, it has not been operational since 1998 when the Minister of Finance declared that exchange controls would be abolished in the Budget Speech. The fact that the legislation has not been repealed is treated as a technicality. As such there are no restrictions on the repatriation of funds. There are no other obstacles to the enforcement of a guarantee provided that the guarantee refers to an underlying and primary obligation that the guarantor is guaranteeing and that is owed to the lender.

3 Collateral Security

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

A wide range of assets may be used to secure lending obligations – moveable and immoveable property, intangible property (such as shares), receivables, cash in bank accounts, stock in trade, machinery, etc.

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

It is not possible to pass security over all asset classes by means of a general security agreement. The widest security is afforded by the general notarial bond and by a statutory pledge called a Deed of Hypothecation, both of which can only be passed over moveables. Therefore, other security must be passed over immoveable property (explained in question 3.3 below).

A general notarial bond is a mortgage by a borrower of all of its tangible moveable property in favour of a lender as security for a debt or other obligation. However, a general notarial bond does not (in the absence of attachment of the property before insolvency) make the lender a secured creditor of the borrower, it only offers a limited statutory preference above the claims of concurrent creditors in respect of the free residue of the estate on insolvency. A general notarial bond is required to be registered with the Deeds Registry, it must be prepared by a notary public and is subject to prescribed notarial fees.

The Deed of Hypothecation is a form of statutory pledge by a borrower and can cover both tangible and intangible moveables. A Deed of Hypothecation provides a first ranking security. It can only be granted to a creditor who has been approved by the Minister for Finance and Development Planning under the Hypothecation Act, CAP 46:05 of the Laws of Botswana. A Deed of Hypothecation can secure all, or certain specified, moveable assets of the borrower and can include future assets (such as receivables). In addition, with a Deed of Hypothecation, a creditor is deemed to be in possession of the secured assets at all material times, that is to say, the creditor is not obliged to take steps to attach the secured assets in order to perfect the hypothecation, and so in a liquidation, the assets remain secured in terms of the Deed of Hypothecation without the requirement of an attachment being effected by the creditor prior to the winding up order, or delivery of a statement of the book debts. A Deed of Hypothecation requires registration at the Deeds Registry Office to be perfected. A Deed of Hypothecation cannot be transferred. The Deed of Hypothecation must be prepared by a conveyancer or notary public and is subject to prescribed notarial fees.

As a Deed of Hypothecation affords secured creditor status, it is much more widely used than the general notarial bond in Botswana.

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

Immoveable property, such as land held by freehold, and land held by way of long-term interest (exceeding 10 years) whose interest is registered in the Deeds Office, and all improvement made thereon (e.g. buildings) can be secured by way of a mortgage bond. A mortgage bond grants a real right of security in insolvency/bankruptcy. A mortgage bond may be ceded as between creditors, provided that the cause of debt and amount of debt necessary remains the same. Mortgage bonds are generally enforceable in accordance with their terms. A mortgage bond is perfected by registration at the Deeds Registry Office must be prepared by conveyancer and is subject to prescribed conveyancing fees.

Machinery and equipment are not able to be secured by a mortgage bond and a separate Deed of Hypothecation is required to secure these and any other tangible moveables.

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

Yes, in terms collateral security can be taken over receivables either by way of a Deed of Hypothecation (described in question 3.2) or by way of a cession.

In terms of an out and out cession, where title to the property is transferred to the cessionary (chargor), subject to the cedant's right to have the property transferred back to it by the cessionary once the debt owed to the cessionary has been discharged, a cession does not require registration and is not subject to conveyancing or notarial fees. (There is a risk of recharacterisation of the agreement by the courts, and this point has not been judicially tested in Botswana.)

(There are two types of cession recognised in Botswana law, an out and out cession and a cession in security (cession *in securitatem debiti*). The cessionary would not be free to collect the receivables in the absence of a default with a cession *in securitatem debiti*. A cession *in securitatem debiti* which is granted in respect of receivables (book debts, rentals, etc.) does not require registration but does require delivery for its perfection. Such delivery has in case law been interpreted to mean delivery of documents evidencing the debt. A cession *in securitatem debiti* requires a court order for enforcement.)

Debtors are not required to be notified of the security, registration of a Deed of Hypothecation at the Registrar of Deeds satisfies the notification requirement and all charges on property must be recorded in the statutory register of charges of a company and details of the charge lodge with the Registrar of Companies – again the registration satisfies the notification requirement.

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

Yes, by way of cession *in securitatem debiti* or by way of a Deed of Hypothecation (explained in question 2.1 above).

3.6 Can collateral security be taken over shares in companies incorporated in Botswana? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Security can be taken over certificated shares by way of a pledge. A pledge, which is granted in respect of tangible moveables and requires possession or delivery for its perfection. The fact of delivery, and the nature of the possession must be demonstrated to any third party which may have a competing interest. (In respect of a private company therefore, the pre-emptive right of other shareholders must be considered and if possible, waived on entry into the pledge.) Delivery is effected by delivery of the original share certificates, notation of the pledge on the share register (as the share register represents *prima facie* evidence of title) and delivery

of share transfer forms signed by the transferor and left blank as to the transferee. A pledge requires a court order for enforcement. There are no registration fees associated with a pledge.

It is also possible to pass a Deed of Hypothecation over shares, both certificated or uncertificated.

Uncertificated shares are held in respect of publicly listed entities and these shares are held in accounts with the Central Securities Depository of Botswana (CSDB). A security interest over an intangible right (uncertificated securities) that is not the subject of a Deed of Hypothecation would be by way of a cession *in securitatem debiti*. The cession in security is concluded on the understanding that the intangible property or right will be retained by the cessionary until such time when the debt secured by the cession has been extinguished. Again the cession requires delivery to be effective. The incorporeal property will then revert back to the cedent. There is no statutory provision, nor is there Botswana precedent as to what constitutes delivery of an intangible right and or especially of uncertificated shares in particular. The CSDB participants with whom entities open accounts have the ability to note a cession on the account, and this, together with a transfer instruction relating to the account should be secured for any cession of uncertificated shares.

Security, in terms of a pledge or a cession can validly be granted under a New York or English law governed document, however the local law perfection requirements must be incorporated into the document.

Where a Deed of Hypothecation is opted for, this must be according to Botswana law.

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

Yes, by way of a pledge or a Deed of Hypothecation as described above.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes to both; please see the responses below on financial assistance.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

There is no stamp duty in Botswana. A pledge or a cession does not need to be registered or prepared by a notary and therefore attracts no registration fees. A special or general notarial bond (passed over tangible moveables), Deed of Hypothecation (passed over tangible or intangible moveables) and a Mortgage Bond (passed over immoveable property) all attract notary/conveyancing fees according to a prescribed tariff. The fees are calculated on an *ad valorem* basis.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

In order for a lender to have a Deed of Hypothecation passed in its favour, it must be an Authorised Creditor approved as such by the Minister of Finance and Development Planning. Where not already approved, an application for Authorised Creditor status can take in the region of 2 to 4 months.

Registration for notarial bonds, Deeds of Hypothecation and Mortgage Bonds can take anywhere from 10 days to 3 weeks depending on the volume of registrations pending at the Deeds Registry Office at any one time.

As discussed above, notarial bonds, Deeds of Hypothecation and Mortgage Bonds are subject to a prescribed tariff in terms of the fees payable to the conveyancer and/or notary public. The fees are calculated on an *ad valorem* basis and therefore the cost of these forms of security can be significant.

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

In respect of plant, machinery and equipment, where a lender seeks to have a Deed of Hypothecation passed in its favour, it must first be approved by the Minister of Finance and Development Planning as an Authorised Creditor. Authorised Creditor status once gazetted can be used in respect of transactions with different borrowers, i.e. it is not specific to a single transaction.

Apart from registration formalities, provided that the borrower has registered title to land, no further consents are required.

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

No, there are not.

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

These are explained in questions 3.2 and 3.3 above where applicable.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Section 76 of the Companies Act places the following restrictions on a company giving financial assistance to purchase its own shares:

"*(1) A company shall not give financial assistance directly or indirectly to any person for the purpose of or in connection with the acquisition of its own shares, other than in accordance with this section.*

(2) A company may give financial assistance for the purpose of, or in connection with, the acquisition of its own shares if the Board has previously resolved that -

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

(b) the terms and conditions on which the assistance is given are fair and reasonable to the company and to any shareholders not receiving that assistance; and

(c) immediately after giving the assistance, the company will satisfy the solvency test.

(3) *If the amount of any financial assistance approved under subsection (2) together with the amount of any other financial assistance given by the company which is still outstanding exceeds 10 per cent of the company's stated capital, the company shall not give the assistance unless it first obtains from its auditor or, if it does not have an auditor, from a person qualified to act as its auditor, a certificate that -*

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

(b) the person is not aware of anything to indicate that the opinion of the Board as to the matters in paragraph (b) of subsection (2) is unreasonable in all the circumstances."

Subsection 76 (5) provides that "*the term "financial assistance" includes giving a loan or guarantee, or the provision of security*".

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

The Companies Act does not specify the same restrictions on the giving of financial assistance for the acquisition of shares in a holding company, but a board resolution following the above is recommended. Any assistance cannot result in a subsidiary owning shares in its holding company, as this is prohibited except in the limited instance of a percentage of treasury shares.

(c) Shares in a sister subsidiary

As above, except there is no restriction on holding shares in a sister company.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Botswana recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Whilst a trustee or agent can enforce the loan documentation, the use of a security trustee or agent to enforce security is problematic. Botswana law recognises the concept of a trust; however, where the security to be held is mortgage bonds over immoveable property, or notarial bonds, the security trustee arrangement is prevented by statute in that the Deeds Registry Act, CAP 32:02 of the Laws of Botswana provides that "no bond shall be passed in favour of any person as the agent of a principal". In respect of other types of security such as a pledge or cession in security, in terms of common law these require an underlying legally valid and primary obligation owed by the grantor of the security to the recipient. The security trustee would not have this nexus with the grantor of the security.

5.2 If an agent or trustee is not recognised in Botswana, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Parallel debt obligations and the security SPV structure have been used in jurisdictions with similar laws to Botswana and there is precedent for the security SPV structure being used in Botswana. (The security SPV is where the security is transferred to an SPV that holds the security constituting the security package. The SPV would then issue guarantees and indemnities to the various lenders on the basis that such claims be limited to the value of the security held and the particular lender's relative exposure to the borrower from time to time. The SPV's obligation to the lender is in turn guaranteed and indemnified by the borrower. The SPV is usually managed by one of the members of the lending group or consortium as the case may be.)

5.3 Assume a loan is made to a company organised under the laws of Botswana and guaranteed by a guarantor organised under the laws of Botswana. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

There will be no special requirements to make the loan and guarantee enforceable by Lender B so long as Lender A had the right to cede its rights under both the loan agreement and the guarantee without any further formalities.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

There is a withholding tax on the remittance of interest payments to a foreign entity. In general, and subject to any Double Taxation Avoidance Agreement that may be in place, payments of interest to non-residents are subject to a 15% withholding tax. Payment of interest to a resident are subject to a 10% withholding tax.

There are no requirements to deduct or withhold tax from proceeds from a payment under a guarantee or the enforcement of a security.

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

There are no tax or other incentives for foreign lenders specifically. Tax incentives provided to foreign investors are in respect of the International Financial Services Centre, which offers tax and other benefits to investors (both domestic and foreign) that seek to set up Botswana companies that will provide financial services outside of Botswana. The term "financial services" has been widely construed and includes International Business Companies (IBCs). These IBCs are companies that cut across sectors and have operations/projects in several Sub-Saharan countries and are typically structured as Investment Holding companies or Regional Head quarter operations.

The following table summarises the tax advantages of the Botswana IFSC:

Tax	Botswana IFSC Company	Other Companies
Capital Gains Tax	Exempt	15%
Withholding Tax	Exempt	15%
Corporate Tax Rate	15%	22%
Value Added Tax	Zero rated	12%

Other tax incentives are offered to companies established in Botswana that are involved in the manufacturing and/or export sectors. In addition to this, Botswana has entered into a network of DTAAs that reduce the tax withheld in Botswana on remittances

to companies in those jurisdictions. DTAAs are in place with the following countries at present: Barbados; China; France; India; Lesotho; Mozambique; Namibia; the Russian Federation; Seychelles; South Africa; Swaziland; Sweden; the United Kingdom; Zimbabwe; and Zambia. DTAAs with at least nine other countries are in various stages of negotiation.

Taxes: there are no taxes that apply to foreign investments, loans, mortgages or other security documents specifically for the purposes of effectiveness or registration. Withholding taxes on the remittances of interest have been discussed above.

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

Outside of the withholding tax considerations on interest payments, the income of a foreign lender will not become taxable in Botswana solely because of a loan to, or guarantee or grant of security from a company in Botswana.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are no costs that pertain to foreign lenders that would not apply to local lenders. The main costs are around registration and notarial fees of security such as notarial bonds, mortgage bonds and Deed of Hypothecation.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there will be no such consequences for the borrower.

7 Judicial Enforcement

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

Choice of foreign law and jurisdiction clauses are upheld by the courts in Botswana. Where the law of a foreign jurisdiction is chosen, the court will require expert evidence on the foreign law to be applied but in the event that no expert evidence is adduced before the court as to the effect of the foreign law, the court will determine the dispute the between the parties in terms of Botswana law.

7.2 Will the courts in Botswana recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The Judgments (International Enforcement) Act CAP 11:04 of the Laws of Botswana allows for the enforcement of foreign judgments in Botswana where reciprocal treatment is given to Botswana judgements in that country. The President must declare by statutory instrument in the Gazette, the countries, which are deemed to give reciprocal treatment to Botswana judgments.

However, there are no Orders made pursuant to this Act that have been published in the Laws of Botswana in recent years, as to which countries are recognised as giving reciprocal treatment to orders of the Botswana Courts, there is only a published order relating to reciprocal countries in respect of maintenance orders. However, the Act also recognises those countries that were recognised as affording reciprocal treatment under the United Kingdom Judgments Act that was in force in 1981, prior to commencement of the Botswana Act.

There is, in addition, a procedure at common law whereby a fresh application for summary judgment is brought before the High Court. The foreign judgment is then submitted as evidence in a hearing that hears the matter afresh before the High Court of Botswana. Certain conditions must, however, be satisfied by a litigant who proposes to take advantage of that procedure. The main points to be satisfied are that the judgment must be final and conclusive. In addition, all documents necessary to prove the judgment must be in order and the judgment relied upon as a cause of action should be annexed to the application. A Botswana court order is thus obtained and can be executed.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Botswana, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Botswana against the assets of the company?

(a) The answer to question 7.1 is yes, and the estimated timeline to obtain judgment and enforce the judgment is anywhere from 3 weeks to 3 months where there is no legal defence.

(b) Enforcement of a foreign judgment can take anywhere from one month if the procedure in statute is followed to up to 6 months if the matter is to be heard afresh. Where matters are brought on urgency time periods can be reduced for obtaining the order, enforcement proceedings by way of a sale in execution will take a further few weeks.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Botswana law does not recognise self-help when it comes to enforcement of security, and all real security must be enforced through the courts where an order for a public auction will be sought. This procedure can result in delay and the value of the asset that is being secured may differ significantly upon a forced sale.

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

There are no such restrictions.

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

Court blocking procedures are available upon presentation of the petition for winding up of a company, by the company itself,

any shareholder or creditor. Once the winding up by court has commenced no execution or attachment order for the enforcement of collateral security may be made. The same applies upon a petition to place the company under judicial management.

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

Yes, the Recognition of Foreign Arbitral Awards Act CAP 06:02 of the Laws of Botswana provides that an arbitral award made in any country which is a party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards shall be binding and may be enforced in Botswana in accordance with the Convention and in such manner as an award may be enforced under the provisions of the Arbitration Act. This means that on application to the High Court, a foreign arbitral award (as with a local award) may be made an order of the Court.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Once winding up or judicial management proceedings have commenced, a secured creditor cannot commence enforcement or attachment proceedings, and a creditor holding moveable or immoveable property as security cannot realise that security itself, but must deliver it to the liquidator for realisation. Secured creditors are paid out before other creditors and will be paid in respect of the realisation proceeds of the sale of the asset that is the subject of the security, after the deduction of liquidation costs. The creditor is responsible for those costs, which represent the costs of maintaining, conserving and realising the property. Where secured creditors have security over the same asset, the creditor granted security earlier in time has a higher-ranking claim in respect of that asset. Secured creditors include holders of a mortgage bond, deed of hypothecation, cession in security and pledge. A notarial bond does not afford secured creditor status, merely a preference in respect of the free residue.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In respect of suspect periods and clawback rights, he liquidator may challenge the following type of transaction, and apply to the court to have these transactions set aside:

(a) Transactions at undervalue: where in a period of one year before the commencement of the winding up, the company entered into a transaction where the value of the consideration or benefit received by the company was less than the value of the consideration provided by the company or the company received no consideration or benefit, and when the transaction was entered into the company:

i) was unable to pay its due debts;

ii) was engaged or about to engage in business for which its financial resources were unreasonably small; or

iii) incurred an obligation knowing that the company would not be able to perform the obligation when required to do so; and

iv) when the transaction was entered into the other party to the transaction knew or ought to have known of whichever of the above applies. Or where the company entered into a transaction as for above, but where because of the transaction, the company became unable to pay its debts.

(b) Voidable preferences: where within 6 months before the commencement of winding up proceedings, the company made a disposition and immediately after the disposition, the liabilities of the company exceeded its assets (unless the person to whom the disposition was made proves it was done so in the ordinary course of business and did not prefer one creditor over another).

(c) Undue preferences: where on any disposition, notwithstanding any number of years having passed between the disposition and the commencement of winding up proceedings, the company's liabilities exceeded its assets, and the disposition was made with the intention of preferring one creditor over another.

(d) Collusive practices: where within three years of the commencement of proceedings to wind up the company, a transaction was entered into by the company, and the transaction was for either inadequate consideration in respect of a disposal, issue of shares to or provision of services to a director or other related party, or where the transaction was for excessive consideration in respect of an acquisition or the provision of services by the director or related party.

(e) Where a transaction that is proved by the liquidator to be at undervalue or as a result of collusive practices, the liquidator may recover from any other party to the transaction any amount by which the value of the consideration provided by the company exceeded the value of the consideration received by the company.

(f) Where a liquidator has proved a voidable or undue preference, the transaction will be set aside and the court may order any one or more of the following orders: an order requiring a person to pay to the liquidator in respect of benefits received by that person as a result of the transaction or charge such sums as fairly represent those benefits; an order requiring property transferred as part of the transaction to be restored to the company; an order requiring property to be vested in the company where such property represents either the proceeds of sale of property or of money which has been paid and transferred where such property or money is in the hands of the person against whom the transaction or charge is set aside; an order releasing in whole or in part a charge given by the company; an order requiring security to be given for the discharge of an order made under this section of the Companies Act; and/or an order specifying the extent to which a person affected by the setting aside of a transaction or by an order made under this provision is entitled to claim as a creditor in the liquidation.

There are preferential creditors' rights such as the costs of the liquidator in administering the estate, the claims of employees for up to 3 months unpaid salaries and the claim of the Commissioner of Taxes for unpaid taxes. These are paid after the secured creditors but before any preferment creditors in respect of the free residue and concurrent creditors.

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

There are no entities that are explicitly excluded from bankruptcy proceedings, however many statutory corporations are protected from bankruptcy through a *de facto* guarantee from the Government.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No, please see the response to question 7.4 above.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Botswana?

Yes, it is.

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

Yes, it is.

10 Other Matters

10.1 Are there any eligibility requirements in Botswana for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Botswana need to be licensed or authorised in Botswana or in their jurisdiction of incorporation?

No, the only eligibility requirement is as an Authorised Creditor, where a lender wishes to take security by way of a Deed of Hypothecation in their favour.

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

No, the central issues have been discussed above.

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Shakila Khan is a corporate attorney practising in Botswana. She is the Lead Attorney and Sole Proprietor of Khan Corporate Law. Shakila is a citizen of Botswana and was called to the Bar in England and Wales in 2004. She has an LL.M. from the University of London with a special emphasis on Law and Development issues, and was admitted as an Attorney of the High Court of Botswana in 2007.

Shakila has been ranked as a leading lawyer in Chambers Global Guide since 2013 and has been endorsed as a "Rising Star Lawyer" in the International Financial Law Review (IFLR1000)/Petroleum Economist: Energy and Infrastructure Guide (2014).

Shakila's practice areas include corporate M&A, debt and equity capital markets, structured finance, banking and financial services regulation, competition law, general corporate/commercial law, mining, energy and infrastructure.

KHAN CORPORATE LAW
RESULTS DRIVEN

Khan Corporate Law ("KCL") is a boutique corporate law firm in Botswana that focuses on providing legal services to banking and finance institutions, corporate advisory firms, large corporates, multinationals, private equity funds, government and parastatals.

KCL has handled some significant transactions since it was established in December 2010 and as a result, domestic and international market recognition for its strengths continues to grow. The firm's Lead Attorney, Shakila Khan, is the first female lawyer from Botswana to be recognised as a leading lawyer in Chambers Global Guide and has been ranked in Chambers since 2013.

Khan Corporate Law has been endorsed as a Recognised Firm in the International Financial Law Review (IFLR1000)/Petroleum Economist: Energy and Infrastructure Guide (2014) and Khan Corporate Law has been endorsed as a Recognised Firm in the International Financial Law Review (IFLR1000)/Financial and Corporate Guide (2015).

Brazil

Antonio Felix de Araujo Cintra

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1 Overview

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

The Brazilian financial market is quite sophisticated, with large Brazilian and international retail banks and a number of smaller specialised financial institutions.

In recent years, securitisation transactions involving the real estate and agribusiness sectors became more popular with a very substantial increase in the volume of transactions.

Corporate lending also increased not only in the form of direct loans and financings but also in the form of debentures (long term debt securities) issued in the local market and purchased by investment funds and other institutional investors.

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

There have been some significant lending transactions related to infrastructure projects in Brazil, some transactions entered for the financing of the airports, the operation of which has recently been transferred by concession to the private sector, and some large transactions involving sanitation and energy sectors. It should be noted, however, that in recent years the major lender in Brazil was BNDES (the Brazilian Federal Development Bank) and the success of the bank's lending policies have taken some space from the private sector banks in long term financing in Brazil. Due to a more restrictive fiscal policy that is currently being adopted by the Brazilian Federal Government, it is expected that the transfer of funds from the Treasure to BNDES will be substantially reduced in the coming years, thereby reducing the lending capacity of the bank. This may lead to an increase of the proportion of project loans by private local and international banks, as well as multilateral agencies.

2 Guarantees

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

As a general rule, a Brazilian company is free to guarantee borrowings of one or more other members of its corporate group. There are restrictions, however, in the case of publicly held corporations, since such type of guarantees may be seen as giving an undue benefit to the controlling shareholders of the relevant guarantor.

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

Provided that all corporate authorisations are duly obtained by the relevant guarantor in the form provided in its by-laws or articles of association, there should be no enforceability concerns with respect to guarantees granted in relation to borrowings of other members of a company's corporate group.

If the guarantor is a publicly held corporation, however, a guarantor or controlling shareholder may be held responsible if it is proven that the guarantee may cause a loss to the minority shareholders and benefit the controlling shareholders of the company.

2.3 Is lack of corporate power an issue?

Any transactions entered into by a Brazilian company must be entered in compliance with the provisions of their by-laws or articles of incorporation. Therefore, any guarantee signed by persons not duly empowered pursuant to the by-laws or articles of incorporation (and any relevant powers of attorney) may be declared invalid by a court decision.

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

Companies controlled by the public sector (either at the Federal, State or Municipal levels) are not free to sign guarantees without proper authorisations.

Private sector companies are free to execute guarantees, provided that they comply, as the case may be, with their by-laws or articles of incorporation. In addition, companies may also be subject to contractual restrictions resulting, for instance, from financing and similar agreements signed with banks or concession or similar agreements signed with the government aimed at operating some public services as concessionaires.

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

No. The law does not provide any net worth, solvency or similar tests on the amount of a guarantee. Companies that are giving fixed

assets as collateral must present a certificate of no indebtedness issued by the Brazilian Social Security Authorities to the relevant Registry (Real Estate or Deeds and Documents) where the agreement will be registered.

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

As a general rule, any company or person may remit money abroad to comply with any obligation incurred by it. The laws and regulations, however, impose a duty on the relevant Brazilian bank through which the remittance will be made to verify the validity of the underlying transaction. In other words, although there are no legal obstacles, it is normally advisable for a guarantor to speak to its bank to make sure that it will be able to make the remittance in the future without further discussions.

3 Collateral Security

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

The basic types of collateral that are available to secure lending obligations in Brazil are the following: (i) mortgage of real estate properties; (ii) pledge over movable assets and rights; and (iii) fiduciary transfer of title over real estate, movable assets and rights.

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

It is not possible in Brazil for a company to create a collateral over all of its existing or future assets to secure a debt. Any security agreement has to include a description of the relevant assets that are being given as collateral.

Mortgages have to be implemented by means of a public deed and must describe in detail the property being given as collateral. The agreement must also be registered in the competent Real Estate Registry with jurisdiction over the location of the property.

Pledge Agreements must identify all assets given as collateral thereunder and must be registered with the Registry of Deeds and Documents in the place of the headquarters of the grantor of the collateral. In case the assets are to be kept in the possession of the debtor, then the pledge agreement has to be registered with the Real Estate Registry with jurisdiction of the place where the assets are located.

Fiduciary transfer of title agreements follows the same procedures as above. It is important to note that foreign creditors and Brazilian non-financial institutions may not be secured creditors under fiduciary property agreements over credit and other rights or over fungible goods.

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

Please see the answer to question 3.2 above.

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

Yes. Collateral security may be taken over receivables.

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

Yes. In that case the bank has to be notified and normally the agreement provides that the bank will transfer the amounts deposited in the relevant account pursuant to instructions of the secured creditor or a collateral agent appointed for such purpose.

3.6 Can collateral security be taken over shares in companies incorporated in Brazil? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares in companies incorporated in Brazil may be given as collateral by the relevant shareholders. In this case the lien has to be registered in the Share Registry Book of the company or with the relevant custodian/registrar. Although the law allows the issuance of certificates of shares, virtually all shares exist only as book entry records in the Share Registry Books of private companies or registrars of publicly held companies.

Quotas of limited liability companies may also be pledged to secure debts. In this case the procedure involves the execution of a quota pledge agreement, which must be registered with the Registry of Deeds and Documents. It is normal practice to include an amendment to the company's Articles of Incorporation to include a provision reflecting the existence of the pledge over the quotas.

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

Yes. Inventory may be subject to a pledge agreement, which must be signed by the parties and registered with the Real Estate Registry with jurisdiction over the place where the goods are kept. The agreement must describe the relevant goods given as collateral and include the number of goods that are subject to the pledge agreement. In this case the pledge extends automatically to any new goods that replace the goods that have been sold, up to the number of goods initially pledged.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes. This possibility will be subject to the provisions of the relevant by-laws or articles of incorporation of the relevant company. There may also be limitations due to negative covenants that may exist in financial and other agreements entered into by the company.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The fees related to the notarisation and registration of security agreements are not relevant. There are no stamp duties in Brazil.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Generally speaking, the taking of security does not involve a significant amount of time or expense. If a property that is being given as collateral under a mortgage is located out of the Brazilian major urban centres then the process may take longer due to less efficient Registries.

If the security agreements are signed in a foreign language they will have to be translated into Portuguese by a sworn translator and this may add some additional timing and costs to a transaction.

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

Not as a general rule. Companies that operate under concessions granted by the government to operate public services (for instance in the energy, telecom, toll roads and similar sectors) may need authorisation from the relevant granting authority to create a security interest over the assets and credit rights.

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

No, there are not.

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

There are no particular documentary or execution requirements, except for agreements related to real estate properties, which have to be entered by means of public deeds.

As a general rule the creditor will want to make sure that the agreement is entered in accordance with the provisions of the bylaws or articles of incorporation of the relevant companies. These provisions will usually require approval from the shareholders or the board of directors of the company and the document to be executed by at least two duly appointed officers or attorneys in fact.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

No, there are not.

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

No, there are not.

(c) Shares in a sister subsidiary

No, there are not.

It should be noted, however, that publicly held companies may not offer collateral to secure the obligations of a third party, especially if such third party is in any way related to the controlling shareholders of the publicly held company.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Brazil recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

As a general rule, Brazil will recognise the role of an agent or trustee, provided that such agent or trustee acts as an attorney in fact duly appointed by each of the relevant creditors under the relevant syndicate of creditors.

5.2 If an agent or trustee is not recognised in Brazil, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Please see the answer to question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of Brazil and guaranteed by a guarantor organised under the laws of Brazil. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Assignments of credits are valid in Brazil and are enforceable against the debtor provided that the debtor is duly notified of the assignment. As a general rule, the collateral securing the loan, as an ancillary obligation, follows the assignment of the credit.

Notwithstanding such fact, in order to simplify enforcement of collateral it is recommended that the registration of the security interest be amended to reflect the amendment of the credit.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Yes. Interest paid to foreign lenders is subject to withholding tax in Brazil at the rate of 15% (or 25% for lenders domiciled in tax haven jurisdictions). The same rate applies to fees charged by the lender to the borrower (such as commitment or structuring fees).

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

There are no tax incentives granted specifically to foreign lenders. Loans related to export financing for Brazilian exporters are exempt from withholding tax.

Certain investments made by foreign companies in securities issued in Brazil related to infrastructure projects may also benefit from a withholding tax exemption.

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

No, it will not.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No, there will not.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Brazilian thin capitalisation and transfer pricing rules apply to cross-border transactions performed between a Brazilian company with: (i) a related party; or (ii) a company resident in a tax haven jurisdiction or subject to a beneficial tax regime. As a rule, the tax residency of the foreign company for Brazilian tax purposes is determined based on its place of incorporation. If the lender is incorporated in a tax haven jurisdiction or subject to a beneficial tax regime, interest expenses would be tax deductible for corporate income taxes purposes if: (i) the expenses are considered as necessary for the maintenance of the company's activities; (ii) all company debts with residents in a tax haven jurisdiction or a foreign country subject to a special tax regime do not exceed 30% of the Brazilian company's net equity; and (iii) interest expenses does not exceed a rate determined by the tax legislation based on the currency in which the loan was granted, plus a spread of 3.5%.

For the sake of clarity, a country or jurisdiction is deemed to be a tax haven jurisdiction when it: (a) does not impose income tax; (b) imposes income tax at a rate lower than 17%; (c) imposes restrictions on the disclosure of shareholding composition or on the ownership of investments; or (d) does not disclose beneficial ownership. The concept of beneficial tax regime is applicable for jurisdictions that, normally, are not considered as "tax havens", but in which certain companies are entitled to tax advantages.

7 Judicial Enforcement

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

Although there are a few conflicting decisions, we are of the opinion that the courts of Brazil should recognise a foreign law chosen by the parties to govern their agreement. The law provides expressly that the law that governs an agreement is the law of the place where the agreement is executed. In our opinion, this provision should apply only in case of the absence of an express choice of law provision in the agreement.

7.2 Will the courts in Brazil recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes. A foreign judgment or a foreign arbitral decision will be enforced in Brazil after being ratified by the Brazilian Superior Court of Justice, without a re-examination of the merits of the case.

In order to be ratified, the decision must be final and not subject to further appeal, the parties thereto must have been properly served of process and the decision must be translated into Portuguese by a sworn translation.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Brazil, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Brazil against the assets of the company?

Since the court system in Brazil is federative, the court efficiency may vary substantially throughout the country. As a general rule one may say that in case (a) above, the time may be between 2 and 3 years and in the case of (b), the time may be between 1 and 2 years.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

As a general rule, provided that the agreement contains such provision, the creditor may enforce collateral by means of a private sale. Mortgages over real estate properties, however, must be enforced by court-led auctions.

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

A foreign resident who owns no real estate property in Brazil that files a lawsuit in Brazil must post a bond to secure the court and legal fees. The value of the bond is determined by the judge and normally varies from 15 to 20% of the value of the claim.

Such bond is not required in case of enforcement proceedings in connection with extrajudicial collection instruments ("*títulos executivos extrajudiciais*"), which comprise, among other instruments, promissory notes, bills of exchange and agreements signed by two witnesses.

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

Yes. In case of the bankruptcy of a Brazilian company all collection and enforcement lawsuits against the bankrupt company are suspended. In the case of a judicial recovery the suspension may not exceed 180 days as of the approval of the judicial recovery by the court.

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

Yes. Please see the answer to question 7.2 above.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

There are two main bankruptcy proceedings in Brazil: (i) judicial recovery; and (ii) bankruptcy.

In the case of judicial recovery, all creditors have the right to vote to approve a recovery plan submitted by the company. After the filing of the recovery, there is a stay of enforcement of 180 days during which the creditors are not able to enforce their collateral. This rule is applicable to creditors under pledge and mortgage arrangements.

Creditors under fiduciary transfer of title arrangements are not subject to the judicial recovery and therefore may enforce their rights when the relevant credits become due and payable.

In the case of bankruptcy, all lawsuits are suspended and the company goes into a court-led liquidation, after which the creditors are paid in accordance with the ranking of their respective credits.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The Brazilian bankruptcy code provides that certain acts, if performed by the debtor within the so-called "suspect period" are not effective *vis-à-vis* the bankruptcy estate, irrespective of the absence of intention of the parties thereto to defraud third parties.

The most relevant of such acts are: (i) the payment of an obligation before its due date; (ii) the payment of a debt in a manner not specified in the relevant agreement; and (iii) the granting of a security interest in relation to indebtedness that existed prior to the suspect period. In any of these situations the trustee of the bankruptcy may set aside the relevant actions and claw the payments back.

The suspect period is fixed by the judge at the time of the declaration of the bankruptcy and may not retroact more than 90 days prior to the bankruptcy date or the date the judicial recovery is accepted by the court.

In addition, any actions taken with the purpose to defraud creditors may be set aside by the bankruptcy court.

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

Financial institutions are subject to special rules governing intervention and extra judicial liquidation; such actions are carried out by the Central Bank of Brazil. Depending on the circumstances, the extra-judicial liquidation may be converted into bankruptcy, governed by the general law.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No, but as mentioned above, the agreement may provide that the creditor has the right to sell the collateral in a private sale in case of default of the borrower.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Brazil?

Yes, but any such submission will be no exclusive. Pursuant to the Brazilian Code of Civil Procedure, Brazilian courts will have jurisdiction whenever (i) the defendant is domiciled in Brazil, (ii) the obligation has to be performed in Brazil, or (iii) the lawsuit originates from an event which occurred and/or an act which was performed in Brazil.

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

Yes. Entities of the public sector controlled by the Federal, States or Municipalities Governments may waive sovereignty when entering into transactions which are not essentially related to a public duty. So, as a general rule, such entities may waive sovereign immunity when entering into loan and financing agreements.

10 Other Matters

10.1 Are there any eligibility requirements in Brazil for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Brazil need to be licensed or authorised in Brazil or in their jurisdiction of incorporation?

Any individual or legal entity may be a lender in Brazil. The performance of banking transactions (including raising funds from

the market to fund loans to third parties, on a regular basis) are restricted to Brazilian financial institutions duly authorised by the Central Bank of Brazil.

In addition, any foreign loans to Brazilian companies must be registered in the ROF System of the Central Bank of Brazil. Such registration is necessary for the borrower to be able to purchase the foreign currency necessary to make any payments of principal, interest or fees under the relevant loan agreement.

Prior to registration the foreign lender will have to obtain a Tax Number (known as CNPJ) from the Brazilian Federal Tax Authorities and a Cademp Number from the Central Bank of Brazil. Obtaining such numbers is a simple procedure that should not take more than two or three days.

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

No, there are not.

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Working with TozziniFreire Advogados since 2007, Paulo Leme is a member of the Capital Markets practice group, and focuses his practice on transactions involving the banking/financing sectors, and infrastructure projects. He has experience in the implementation of debt and equity transactions involving private and development financial institutions. In addition, he regularly represents clients in private equity investments, secured and unsecured loans, export financing, project finance and securitisation transactions. Paulo Leme was born in São Paulo in 1981 and studied law at the Law School of Pontificia Universidade Catolica de São Paulo. He graduated in 2005 and in 2010 he was awarded an LL.M. in International Banking & Finance at the University College London. He is admitted to practise in Brazil.

Since 1976, TozziniFreire has distinguished itself as a premier, full-service law firm by consistently providing legal services to domestic and international companies in a wide variety of business sectors. Over the years, we have played a major role in many of the most significant transactions in the Brazilian market, becoming one of the largest and most prestigious firms in Latin America.

TozziniFreire's long history of representing local and international financial institutions in the negotiation and execution of loan agreements provides its banking practice with extensive knowledge in structuring all types of complex corporate finance transactions. In addition, its highly qualified professionals regularly advise clients on commercial transactions designed to finance imports and exports, such as pre-export financing and securitisation of receivables. As a leading advisor to those participating in the reorganisation of the Brazilian banking industry, we assist international banks in setting up their Brazilian operations, as well as local banks in their relationships with foreign partners.

British Virgin Islands

Maples and Calder

Michael Gagie

Matthew Gilbert

1 Overview

1.1 What are the main trends/significant developments in the lending markets in the British Virgin Islands?

The British Virgin Islands continues to be a jurisdiction of choice for corporate vehicles entering into secured finance transactions, and remains a markedly creditor-friendly jurisdiction. In the last 12 months, revised, modernised and consolidated editions of the jurisdiction's financial services legislation have been enacted. Amendments to the key corporate legislation, the BVI Business Companies Act, 2004 (2013 Revision) (the "**Act**") have enhanced the system for the public registration and priority of security. The creation of security over shares remains popular and, following the amendments to the Act, a chargee may enforce a British Virgin Islands law governed share charge immediately upon an event of default (the former mandatory grace/notice periods having been removed). For an English law-governed charge over shares in a British Virgin Islands company which provides for appropriation of the shares, the Privy Council has also recently provided more guidance on the rights of the parties, including the application of equitable relief, in *Cukurova Finance International Limited and Cukurova Holdings A.S (Appellants) v Alfa Telecom Turkey Ltd (Respondent)* [2013] UKPC 20.

1.2 What are some significant lending transactions that have taken place in the British Virgin Islands in recent years?

British Virgin Islands obligors continue to feature prominently in financed holding structures and joint ventures, notably: in the oil and gas and mining sectors; in development finance and infrastructure projects throughout Africa, Asia and Eastern Europe, CIS, Latin America and elsewhere; in high end property developments in London; and in shipping, drillships and other asset finance facilities.

2 Guarantees

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

The giving of a guarantee by a British Virgin Islands company is governed by the Act, and the company's memorandum and articles of association. Subject to its memorandum and articles of association, the powers of a company include (among other things) the power to guarantee a liability or obligation of any person and secure any obligations by mortgage, pledge or other charge of any of its assets for that purpose.

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

Under the Act, and subject to its memorandum and articles of association, a company has, irrespective of corporate benefit, full capacity to carry on or undertake any business or activity, do any act or enter any transaction and, for those purposes, full rights, powers and privileges.

The directors of a company have fiduciary and statutory duties to act honestly and in good faith and in the best interests of the company. A director who is in breach of his duties may be liable to the company for the resulting loss to the company.

In the event that there is a disproportionately small (or no) benefit to the company, the transaction may be open to challenge, for example as a transaction at an undervalue, in the event of the insolvency of the company (see below).

2.3 Is lack of corporate power an issue?

Under the Act, no act of a company and no transfer of an asset by or to a company is invalid by reason only of the fact the company did not have the capacity, right or power to perform the act or to transfer or receive the asset.

It should be noted that members' remedies have been codified in the Act, and, for example, if a company or a director of a company engages in, proposes to engage in, or has engaged in conduct that contravenes the Act or the memorandum or articles of the company, the British Virgin Islands court may, on the application of a member or a director of the company, make an order directing the company or director to comply with, or restraining the company or director from engaging in conduct that contravenes, the Act or the memorandum or articles.

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

It is not necessary to ensure the legality, validity, enforceability or admissibility in evidence of a guarantee that any document be filed,

recorded or enrolled with any governmental authority or agency or any official body in the British Virgin Islands. Shareholder approval would be required only in the event the company's memorandum and articles of association require it.

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

To the extent that under the applicable governing law the guarantee is characterised as a debt incurred on behalf of a member of the company, it may be deemed to be a distribution and accordingly be subject to the requirement on the directors to determine that the company will pass the basic solvency test immediately after the deemed distribution. Under the solvency test, the company's assets must exceed its liabilities and the company must be able to pay its debts as they fall due. For former International Business Companies that still have a share capital, the requirements for satisfying the solvency test differ.

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

There is no exchange control legislation under British Virgin Islands law and accordingly there are no exchange control regulations imposed under British Virgin Islands law.

3 Collateral Security

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

There are no limits under British Virgin Islands law on the types of collateral that a company may give.

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

A company may enter into a general security agreement such as a debenture.

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

It should be noted that assets would typically be held outside the British Virgin Islands and collateral instruments would typically be governed by a governing law relevant to the jurisdiction in which the asset is sited. In the event that the company holds an interest in real estate or other assets physically located in the British Virgin Islands, there are certain licensing, registration and stamp duty considerations.

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

British Virgin Islands law does not make statutory provision for an assignment by way of security. An assignment of receivables governed by British Virgin Islands law would require the written agreement of the debtor in order to take effect as a legal assignment, failing which the assignee would likely take an equitable assignment only.

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

A company may give security over cash held in its bank accounts in any jurisdiction. British Virgin Islands law does not make statutory provision for collateral security over cash deposited in bank accounts located in the British Virgin Islands, and the cooperation of the account holding branch would be required.

3.6 Can collateral security be taken over shares in companies incorporated in the British Virgin Islands? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Collateral security may be taken over shares in companies incorporated in the British Virgin Islands and this is a popular and frequently used type of security. Such security can validly be granted under a foreign law-governed document, and New York or English law-governed security is common. In the case of an English law-governed document the application of the Financial Collateral Arrangements (No 2) Regulations 2003 to shares in a British Virgin Islands company has been confirmed by the Privy Council in *Cukurova Finance International Limited and Cukurova Holdings A.S (Appellants) v Alfa Telecom Turkey Ltd (Respondent)* [2013] UKPC 2. Shares are in registered form and share security is typically taken by way of an equitable mortgage. The Act provides a mechanism for particulars of a charge over shares to be noted on the register of members, a copy of which the company may file publicly at the Registry of Corporate Affairs in order for a person carrying out a company search to be on notice of the equitable security. The Act now enables a chargee to enforce immediately upon an event of default. The Act also provides for the powers of the chargee or a receiver which may be modified or supplemented by the security instrument.

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

A company may give security over inventory. The applicable procedure would be driven by the jurisdiction in which the inventory is located.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Subject to its memorandum and articles of association, a company may grant a security interest to secure its obligations as a borrower, or the obligations of others.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

No steps are required as a matter of British Virgin Islands law to perfect a security interest where assets are not located in the British Virgin Islands. It is a requirement of the Act that a company keep a register of all relevant charges created by the company, either at the company's registered office, or at the office of the company's registered agent. For the purposes of priority, an application may

be made to the British Virgin Islands Registrar of Corporate Affairs to register the charges created, providing an advantage to secured creditors that is not available in some offshore jurisdictions. Subject to such registration, and any prior security interests registered on the applicable register, the security interest will, as a matter of British Virgin Islands law, have priority over any claims by third parties (other than those preferred by law) including any liquidator or a creditor of the company, subject in the case of a winding up of the company in a jurisdiction other than the British Virgin Islands to any provisions of the laws of that jurisdiction as to priority of claims in a winding up. A floating charge will rank behind a subsequently registered fixed charge unless the floating charge contains a prohibition or restriction on the power of the company to create any future security interest ranking ahead in priority to or equally with the floating charge.

No taxes, fees or charges (including stamp duty) are payable (either by direct assessment or withholding) to the government or other taxing authority in the British Virgin Islands under the laws of the British Virgin Islands in respect of the execution or delivery, or the enforcement, of security documentation. In the event that the company holds an interest in real estate or other assets physically located in the British Virgin Islands, there are certain perfection, licensing, registration and stamp duty considerations.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The Registry fee for registering a register of charges is US$100. A small amount of time will be required for the preparation of the particulars at the registration.

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

No, they are not.

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

No, there are not.

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

No, there are not.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Subject to its memorandum or articles, the powers of a company include the power to give financial assistance to any person in connection with the acquisition of its own shares.

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

There are no restrictions on the giving of financial assistance to any person in connection with the acquisition of shares of any company which directly or indirectly owns shares in the company.

(c) Shares in a sister subsidiary

There are no restrictions on the giving of financial assistance to any person in connection with the acquisition of shares in a sister subsidiary.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will the British Virgin Islands recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The British Virgin Islands courts will recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders, where that is provided for pursuant to the provisions of the applicable security documentation.

5.2 If an agent or trustee is not recognised in the British Virgin Islands, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not necessary in the British Virgin Islands.

5.3 Assume a loan is made to a company organised under the laws of the British Virgin Islands and guaranteed by a guarantor organised under the laws of the British Virgin Islands. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

This would be dependent on the applicable governing laws of the loan and the assignment documentation. British Virgin Islands law does not make statutory provision for the assignment of intangibles. An assignment of receivables governed by British Virgin Islands law would require the written agreement of the debtor in order to take effect as a legal assignment, failing which the assignee would likely take an equitable assignment only. A deed of novation would more typically be used to transfer a loan governed by British Virgin Islands law.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

No taxes are required to be deducted or withheld under the laws of the British Virgin Islands from (a) interest payable on loans made to

domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security. The British Virgin Islands complies with the EU Taxation of Savings Directive through the automatic exchange of information on savings income with tax authorities in EU Member States.

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

No taxes are payable to the government or other taxing authority in the British Virgin Islands under the laws of the British Virgin Islands in respect of the execution or delivery, or the enforcement, of security documentation. In the event that the company holds an interest in real estate or other assets physically located in the British Virgin Islands, there are certain perfection, licensing, registration and stamp duty considerations.

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

No income of a foreign lender will become taxable in the British Virgin Islands solely because of a loan to, or guarantee and/or grant of security from, a company in the British Virgin Islands.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are no significant costs such as notarial fees which would be incurred by foreign lenders in a loan to or guarantee and/or grant of security from a company in the British Virgin Islands.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

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

The British Virgin Islands courts will recognise a governing law that is the law of another jurisdiction, subject to the considerations applicable generally to choice of law provisions.

The British Virgin Islands courts may decline to exercise jurisdiction in relation to substantive proceedings brought under or in relation to a contract that has a foreign governing law in matters where they determine that such proceedings may be tried in a more appropriate forum.

7.2 Will the courts in the British Virgin Islands recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Any final and conclusive monetary judgment obtained against a company in the courts of England and Wales, for a definite sum, may be registered and enforced as a judgment of the British Virgin Islands court if application is made for registration of the judgment within 12 months or such longer period as the court may allow, and if the British Virgin Islands court considers it just and convenient that the judgment be so enforced. Alternatively, the judgment may be treated as a cause of action in itself so that no retrial of the issues would be necessary. In either case, it will be necessary that in respect of the foreign judgment:

(a) the foreign court issuing the judgment had jurisdiction in the matter and the judgment debtor either submitted to such jurisdiction or was resident or carrying on business within such jurisdiction and was duly served with process;

(b) the judgment given by the foreign court was not in respect of penalties, taxes, fines or similar fiscal or revenue obligations of the company;

(c) in obtaining judgment there was no fraud on the part of the person in whose favour judgment was given, or on the part of the foreign court;

(d) recognition or enforcement of the judgment in the British Virgin Islands would not be contrary to public policy;

(e) the proceedings pursuant to which judgment was obtained were not contrary to natural justice; and

(f) the judgment given by the foreign court is not the subject of an appeal.

Any final and conclusive monetary judgment obtained against a company in the courts of New York, for a definite sum, may be treated by the British Virgin Islands courts as a cause of action in itself so that no retrial of the issues would be necessary provided that in respect of the foreign judgment:

(a) the foreign court issuing the judgment had jurisdiction in the matter and the company either submitted to such jurisdiction or was resident or carrying on business within such jurisdiction and was duly served with process;

(b) the judgment given by the foreign court was not in respect of penalties, taxes, fines or similar fiscal or revenue obligations of the company;

(c) there was no fraud on the part of the person in whose favour judgment was given or on the part of the court, in obtaining judgment;

(d) recognition or enforcement of the judgment in the British Virgin Islands would not be contrary to public policy; and

(e) the proceedings pursuant to which judgment was obtained were not contrary to natural justice.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in the British Virgin Islands, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in the British Virgin Islands against the assets of the company?

There is no set timetable for such proceedings, and the time involved will depend on the nature of the enforcement proceedings

(for example, an application to appoint liquidators on the ground of insolvency may be quicker than an action to judgment on the debt claim). If there is no defence to the claim and it is unopposed, judgment may be obtained in proceedings against a British Virgin Islands company in approximately one month from the commencement of proceedings. If the proceedings are defended, then the time involved will depend upon the facts and circumstances of the case. Broadly the same considerations apply to an application to enforce a foreign judgment in the British Virgin Islands.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

No, there are not.

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

There are no restrictions applicable to foreign lenders.

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

The appointment of liquidators against a company under the BVI Insolvency Act, 2003 (2013 Revision) (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?

The Arbitration Act 2013 came into force on 1 October 2014. The principal change from the previous position is that United Kingdom and British Virgin Islands arbitral awards will now be treated in the British Virgin Islands as New York Convention awards. The British Virgin Islands is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "**Convention**"). A court in the British Virgin Islands is required by law to 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 under the laws of the British Virgin Islands, 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, there are four types of voidable transaction provided for in the Insolvency Act:

1. Unfair Preferences: Under section 245 of the Insolvency Act a transaction entered into by a company, if it is entered into within the hardening period (see below) 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 into a position which, in the event of the company going into insolvent liquidation, will be better than the position it would have been in if the transaction had not been entered into, will be deemed an unfair preference. 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 on terms that the company is to receive 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 entered into within the hardening period) be deemed an undervalue transaction. A company does not enter into a transaction at an undervalue if it is entered into in good faith and for the purposes of its 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 a floating charge created by a company is voidable if it is an insolvency transaction created within the hardening period. A floating charge is not voidable to the extent that it secures:
   (a) money advanced or paid to the company, or at its direction, at the same time as, or after, the creation of the charge;
   (b) the amount of any liability of the company discharged or reduced at the same time as, or after, the creation of the charge;

(c) 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; and

(d) the interest, if any, payable on the amount referred to in (a) to (c) pursuant to any agreement under which the money was advanced or paid, the liability was discharged or reduced, the assets were sold or supplied or the services were supplied.

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 the hardening period.

The hardening period (known in the Insolvency Act as the vulnerability period) in respect of each voidable transaction provision set out above is as follows:

(a) for the purposes of sections 245, 246 and 247 of the Insolvency Act the period differs depending on whether the person(s) that the transaction is entered into with, or the preference is given to, are connected persons of the company within the meaning of the Insolvency Act. In the case of connected persons the hardening period is the period beginning two years prior to the onset of insolvency (see below) and ending on the appointment of a liquidator of the company. In the case of any other person, the hardening period is the period beginning six months prior to the onset of insolvency and ending on the appointment of a liquidator of the company; and

(b) for the purposes of section 248 of the Insolvency Act the hardening period is the period beginning five years prior to the onset of insolvency and ending on the appointment of a liquidator of the company regardless of whether the person(s) that the transaction is entered into with is a connected person.

The onset of insolvency for these purposes is the date on which an application for the appointment of a liquidator was filed (if the liquidator was appointed by the Court) or the date of the appointment of the liquidator (where the liquidator was appointed by the members).

A conveyance made by a person with intent to defraud creditors is voidable at the instance of the person thereby prejudiced. There is no requirement that the relevant transaction was entered into at a time when one party was insolvent or became insolvent as a result of the transaction, and there is no requirement that the transferring party subsequently went into liquidation. However, no conveyance entered into for valuable consideration and in good faith to a person who did not have notice of the intention to defraud may be impugned.

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 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. In 2014, the Canadian market also saw the first issuance of "green bonds", including an issuance of green bonds to finance the North Island Hospitals Project in the province of British Columbia – the first green bonds issuance to fund a public-private partnership project in North America.

2 Guarantees

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

Yes, it can.

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

While there is no bright line test for adequate consideration or benefit, under such circumstances, the enforceability of a guarantee could be challenged on the basis that it was granted in a manner that was oppressive, unfairly prejudicial or that unfairly disregards the interest of creditors or minority shareholders under the oppression provisions of applicable corporate legislation, or subject to challenge under provisions of applicable insolvency legislation dealing with transactions at under value or preference claims. Directors and officers would only be subject to personal liability in such cases if specific facts were pleaded which could justify such a remedy (e.g. wrongdoing).

2.3 Is lack of corporate power an issue?

If the guarantor is a corporation, it must have the corporate power to give guarantees; however, most corporations have the powers of a natural person and it is unusual to see restrictions on that power in the constating documents.

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

Other than typical corporate authorising resolutions, no formal approvals are generally required. Where a corporation provides financial assistance by way of guarantee or otherwise, in some provinces the corporation is required to disclose the financial assistance to its shareholders after such assistance is given.

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

Not for corporations incorporated federally or under the laws of most provinces. However, the corporate laws in a few maritime provinces and in the territories continue to prohibit financial assistance to members of an intercompany group if there are reasonable grounds to believe that the corporation would be unable to meet prescribed solvency tests after giving the assistance, subject to specific exceptions.

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

No, subject to the provisions of applicable Canadian federal anti-terrorism legislation.

3 Collateral Security

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

Most types of personal property and real property are available to secure lending obligations, subject to certain limitations by contract (e.g. contractual restrictions on assignment) or by law (e.g. government receivables, permits, licences and quotas).

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

A general security agreement is generally used to grant security over all of the debtor's existing and after-acquired assets; however, it typically does not extend to real property as separate technical provisions apply to ensure registerability against land.

Provincial legislation generally governs the creation and enforcement of security. (A notable exception is security granted to banks under the federal *Bank Act*.) Most Canadian provinces have adopted comprehensive personal property security legislation (PPSA) resembling Article 9 of the United States *Uniform Commercial Code* (UCC). The PPSA regulates the creation, perfection and enforcement of a security interest in a debtor's personal property, and creates a system for determining the priority of competing interests in collateral. The act applies to any transaction that creates a security interest in personal property, regardless of the form of document used to grant the interest.

Under the PPSA, "security interest" is defined generally as an interest in personal property that secures payment or performance of an obligation. "Personal property" encompasses virtually all types of personal property. In most cases, the creditor perfects the security interest by registering a financing statement under the PPSA filing regime in the applicable province. Conflict of laws rules in the PPSA determine which filing jurisdiction is applicable and in which jurisdiction the registration must be made. Certain types of property are also subject to federal regulation and filing regimes (for example, intellectual property, shipping, aircraft and railways).

Québec, Canada's only civil law jurisdiction, has a European style Civil Code (the *Québec Civil Code*) that codifies the province's general principles of law. The hypothec, Québec's only form of consensual security, may be granted by a debtor to secure any obligation, and may create a charge on existing and after-acquired movable (personal) or immovable (real) property. It may be made with or without delivery, allowing the grantor of the hypothec to retain certain rights to use the property.

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

A lender may take collateral security over land or real estate (i.e. real property) by way of a mortgage of the land, a mortgage of lease, a debenture, or, if the real property charged is in Québec, an immovable deed of hypothec. Interests in real property are registered in the land registry system of the relevant province. In Québec, the immovable hypothec is usually registered by filing a hard copy of the deed of hypothec at the registry office for the relevant registration divisions.

It should be noted that a higher rate of interest on amounts in arrears secured by a real estate mortgage may not be enforceable under the *Interest Act* (Canada).

The procedure for taking security over plant, machinery and equipment that constitutes personal property under the PPSA or movables under the *Québec Civil Code*, is described in question 3.2 above.

Personal property may include materials that become fixtures but if the security interest has not attached prior to affixation, the creditors registered against the land gain priority, with limited exceptions. What constitutes a fixture affixed to the land is a factual question and the common law has taken a contextual approach. To protect the priority of its interest in a fixture, a secured party must both perfect its security interest under the PPSA and also register its interest in the land registry system. Under the *Québec Civil Code*, the rules for determining what constitutes movable or immovable property are different – but the end results are similar.

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

Yes. The procedure for taking security over receivables is described in question 3.2 above.

Notice to account debtors is not required to create a perfected security interest in accounts receivable under the PPSA. However, account debtors for the receivables are only obligated to pay the receivable directly to the secured party after receiving notice from the secured party directing them to do so. In addition, an assignment of receivables constitutes a "security interest" regardless of whether it secures any obligations.

Under the *Québec Civil Code*, an assignment of receivables must be registered to be set up against third parties (i.e. perfected) if the assigned receivables constitute a "universality of claims". If the receivables do not constitute a universality of claims, the assignment may be perfected with respect to Québec obligors only by actual notice of the assignment to such obligors.

Under Canadian federal legislation, subject to prescribed exceptions, receivables owed by the federal government can be assigned only absolutely (not as security) and only with appropriate notice to the government, which must be acknowledged. Some provinces have similar legislation covering receivables owed by the provincial government. In Canada, asset-based lenders frequently exclude government receivables from the borrowing base.

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

The PPSA and *Québec Civil Code* permit a lender to take security over deposit accounts. Deposits in bank accounts are treated as receivables owed by the depository to the debtor owner. Accordingly, security interests (or hypothec) in deposit accounts are perfected by registering a financing statement (or application for registration) in the province where the debtor's chief executive office (or domicile) is situated (see question 3.2 above). Traditionally, a bank lender that operated deposit accounts for a debtor and wished to take cash collateral in such accounts would do so by way of set off and a "flawed

asset" approach, however in light of recent Canadian case law, the lender should also register a PPSA financing statement against the debtor. Unlike the UCC, there is no concept of perfecting security in deposit accounts by "control" in Canada, however, the Ontario government has announced its intention to amend the PPSA to adopt an approach similar to Article 9 of the UCC, which, if the legislation were to pass, would introduce this concept in Ontario. Similarly, the Québec government has introduced proposed amendments to the *Québec Civil Code* that will provide for perfecting security on deposit accounts by "control" in the Province of Québec. The draft legislation is still being debated by Québec's National Assembly so it remains to be seen when such proposals would come into force.

3.6 Can collateral security be taken over shares in companies incorporated in Canada? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

A pledge of shares may be documented by way of a standalone pledge agreement or included in a general security agreement. While the jurisdiction governing validity, perfection or non-perfection of the pledge will be determined under applicable conflict of laws rules, the pledge may be granted under a document governed by New York or English law, subject to the principles discussed in question 7.1 below.

Under the PPSA and the *Securities Transfer Act, 2006* (STA), versions of which are in force in most Canadian jurisdictions (harmonised legislation is in force in Québec), a secured party can perfect its security interest in shares by registering under the PPSA or by taking control under the STA (or both). An interest perfected by control has priority to one perfected only by registration.

Shares may be either certificated or un-certificated. For certificated shares, taking physical possession of the share certificates (endorsed, if applicable) meets the STA requirement for control. Control in other forms of investment property, such as book-based securities, can be achieved by other means, such as a control agreement with the relevant intermediary. A private company's constating documents must include a restriction on the right to transfer its shares. This restriction usually states that each transfer of the company's shares requires approval by the company's directors or shareholders.

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

Yes. The procedure is described in question 3.2.

The PPSA also provides that secured parties that have financed the purchase of inventory (either as sellers or by way of third party financing) may obtain priority in the financed inventory and its proceeds over any other security interest in the same collateral given by the same debtor, even if that other security interest was registered first. A purchase money security interest (PMSI) receives super-priority in inventory if, before the debtor (or a third party) obtains possession of the collateral, the secured party: (i) perfects its security interest by registration; and (ii) gives notice in writing to every other prior registered secured party with an interest in inventory or accounts. The *Québec Civil Code* does not offer a comparable regime. Hence, to ensure that the supplier/vendor of inventory has a first ranking security on such inventory in Québec requires obtaining a subordination or cession of rank from any prior ranking secured creditor.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, it can.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Registration fees are payable in connection with the filing of PPSA financing statements, increasing with the length of the registration period.

A modest tax is payable upon registering real property security in certain Canadian jurisdictions. The tax is based on a fee and where the face amount of the registration exceeds the value of the lands, one is permitted to pay on the basis of a percentage of the property value.

In Québec, if a notarial deed of hypothec is used, the notary will generally charge a fee for execution, keeping it in their notarial records and for issuing copies, however there is no additional material cost.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The registration requirements in most cases are relatively uncomplicated and inexpensive.

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

For certain special types of regulated property, consents or approvals may be required by governmental authorities or quasi-administrative bodies for both the creation and enforcement of security. Governmental licences, permits and quotas are subject to specific regimes requiring notice or consent in many cases. See question 3.4 regarding government receivables.

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

A security interest and hypothec in personal property or moveable property can secure present and future advances.

Generally, advances on a mortgage made without actual notice of a subsequent claim will typically have priority over such subsequent claims and, accordingly, mortgages securing revolving credit normally provide that subsequent liens are prohibited. Certain priority exceptions apply such as in respect of construction liens. Mortgages securing revolving credit should be properly worded to address situations where the borrowing is fully or partially repaid and thereafter readvanced.

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

In Québec, security over immovable property or in favour of a collateral agent on behalf of multiple secured parties requires execution of the deed of hypothec before an authorised Québec notary.

Each province has different requirements with respect to real property including specific registration forms, evidence of corporate authority, affidavits and, in some jurisdictions, originals for registration.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Most Canadian corporations are not subject to such restrictions, except those created under the laws of a few maritime provinces (New Brunswick, Prince Edward Island and Newfoundland) and the territories (the Northwest Territories, the Yukon and Nunavut).

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Canada recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes. The agency concept is recognised in Canadian common law and agents are commonly used in syndicated lending for both administration of loans and holding collateral security in Canada. Indenture trustees are typically used in public bond transactions.

5.2 If an agent or trustee is not recognised in Canada, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

For purposes of holding collateral security in the province of Québec, the mechanism commonly used requires the appointment of the collateral agent as a "*fondé de pouvoir*", together with the issuance of a bond to the agent secured by a notarial deed of hypothec.

5.3 Assume a loan is made to a company organised under the laws of Canada and guaranteed by a guarantor organised under the laws of Canada. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Assignments of debt, guarantees and security can be effected by contract pursuant to a standard assignment and assumption agreement. Where the assignor is also the secured party of record (whether as collateral agent or otherwise), PPSA financing statements (and the Québec equivalent) are typically amended to recognise the assignment. Mortgage or security assignments are required to be filed under the applicable land registry to give effect to the assignment.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

There are generally no requirements to deduct or withhold tax on payments of interest by a debtor or guarantor (whether by voluntary payment, enforcement or otherwise) made to domestic lenders.

Conventional interest payments made to arm's length lenders that are non-residents of Canada are generally not subject to Canadian withholding tax, regardless of their country of residence. In addition, conventional interest payments made to certain non-arm's length US resident lenders may qualify for an exemption from Canadian withholding tax under the Canada-US Tax Treaty. In the absence of these or other applicable exemptions under treaties or under the *Income Tax Act* (Canada), withholding tax on interest payments may apply at rates of up to 25%.

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

Generally, there are no material tax or other incentives provided preferentially to foreign investors or creditors and no taxes apply to security documents for the purposes of effectiveness or registration.

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

While each lender's tax position must be examined individually, generally the non-resident lender's income should not be taxable in Canada solely because of a single secured loan transaction in the absence of a fixed presence in Canada or other connecting factors.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

(See questions 3.9 and 3.10 for the filing and notarial fees.) There are no stamp taxes, registration taxes or documentary taxes that are generally applicable in connection with authorisation, delivery or performance of loans, guarantees or security.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Thin capitalisation rules under the *Income Tax Act* (Canada) determine whether a Canadian corporation may deduct interest on

the amount borrowed from a "specified non-resident shareholder" of the corporation or from a non-resident person who does not deal at arm's length with a "specified shareholder" (collectively "specified non-residents"). A "specified shareholder" of a corporation is, in general terms, a person who, either alone or together with persons with whom they do not deal at arm's length, owns 25% or more of the voting shares, or the fair market value of the issued and outstanding shares of the corporation.

Under the thin capitalisation rules, Canadian corporations are effectively prevented from deducting interest on the portion of loans from specified non-residents that exceeds one and a half times the corporation's specified equity (in highly simplified terms, retained earnings, share capital and contributed surplus attributable to specified non-residents). In addition, any interest expenses that are disallowed under these rules are deemed to be dividends paid to the lender for non-resident withholding tax purposes, and subject to withholding tax.

The thin capitalisation rules also apply (with appropriate modifications) to (i) Canadian resident trusts, (ii) non-resident corporations or trusts that carry on business in Canada (in respect of loans that are used in the course of that Canadian business), and (iii) partnerships in which a Canadian resident corporation or trust or a non-resident corporation or trust is a member.

7 Judicial Enforcement

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

Subject to certain exceptions and conditions, Canadian courts will recognise and apply the parties' choice of governing law.

Canadian courts will not apply the foreign law if it is contrary to public policy. Additionally, Canadian courts will apply Canadian procedural law and certain provincial and federal laws that have overriding effect, such as bankruptcy and insolvency statutes, federal crime legislation, employment legislation and consumer protection legislation.

7.2 Will the courts in Canada recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

A foreign monetary 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.

Canadian courts may also enforce a foreign non-monetary judgment in certain circumstances.

There are certain limited defences which preclude recognition related to circumstances under which the foreign judgment was obtained and whether there is any reason it would be improper to recognise the foreign judgment.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Canada, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Canada against the assets of the company?

(a) In Ontario, if no defence is filed in response to a claim, default judgment may be obtained 20 days following the commencement of an action. After any judgment is obtained, and subject to it being stayed by the filing of a notice of appeal, enforcement proceedings may be commenced immediately.

(b) An application hearing to enforce a foreign judgment in Ontario may generally be obtained within approximately two to three months.

Procedural and substantive law differs by province, but the timing described above is similar in most other provinces.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

A secured creditor must give the debtor reasonable time to pay following demand, before taking action to enforce against its collateral security (even if the debtor purported to waive these rights).

Where a secured creditor intends to enforce security over substantially all of an insolvent debtor's inventory, accounts receivable or other property used in relation to the debtor's business, in addition to delivering a demand, the secured creditor must also deliver a notice of intention to enforce security in the form prescribed under the *Bankruptcy and Insolvency Act* (BIA) at least 10 days before such enforcement, unless the debtor consents to an earlier enforcement.

If a secured creditor intends to deal with the collateral itself or through a privately appointed receiver (where applicable), it must also give advance notice to the debtor and other interested parties of its intention to dispose of the collateral or accept the collateral as final settlement of the debtor's obligations. This notice period is typically 15-20 days depending on the applicable PPSA and can run concurrently with the BIA enforcement notice.

Although there is no requirement for a public auction, a secured creditor (and any receiver) must act in good faith and in a commercially reasonable manner when selling or otherwise disposing of the collateral. However, if a lender wishes to buy the collateral, it may only do so at a public sale, unless otherwise permitted by a court. Generally speaking, no regulatory consents are required to enforce on collateral security.

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

(a) To maintain an action in certain provinces, foreign lenders may be required to become extra-provincially registered.

(b) There are no specific restrictions on a foreign lender's ability to enforce security in Canada. However, if the lender chooses to exercise those remedies to either foreclose on the collateral security or to credit bid its debt, such that the

foreign lender ends up owning the debtor's Canadian assets, the foreign lender may be subject to restrictions imposed by the *Investment Canada Act* or the *Competition Act*.

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

Yes, a stay of proceedings may affect the rights of secured and unsecured creditors in some circumstances to the extent set out in question 8.1.

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

Provincial arbitration acts provide for the enforcement of arbitral awards by application to the court. Canadian courts will not re-examine the merits of an arbitral award, however the award may be set aside on specified grounds including, but not limited to, an invalid arbitration agreement, an award outside of the jurisdiction of the arbitrator or a reasonable apprehension of bias on the part of the arbitrator.

The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and the *UNCITRAL Model Law on International Commercial Arbitration* have been adopted in all Canadian provinces and provide rules for the enforcement of international arbitral awards. Subject to limited grounds on which enforcement of an international arbitral award may be refused, the awards are generally enforceable in Canada.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Bankruptcy and insolvency in Canada is primarily governed by two federal statutes: the BIA; and the *Companies' Creditors Arrangement Act* (CCAA). BIA cases will typically be administered by a third party trustee or receiver, whereas CCAA proceedings are controlled by the debtor and supervised by a court-appointed monitor. Although some aspects of creditors' rights are determined by provincial statutes, bankruptcy and insolvency law is mostly uniform across Canada. Insolvency proceedings under the BIA or CCAA will result in the imposition of a stay of proceedings either by a Canadian court or pursuant to the relevant statute.

If the BIA case becomes a liquidation proceeding, the automatic stay of proceedings imposed upon commencement will not prevent a secured creditor from realising or otherwise dealing with its collateral.

If a debtor files a notice of intention to make a proposal (NOI) or a proposal to creditors under the BIA, a secured creditor's enforcement rights will be automatically stayed during the reorganisation proceeding, unless: (i) the secured creditor took possession of the collateral before the filing; (ii) the secured creditor delivered its BIA enforcement notice more than 10 days prior to the filing of the NOI; or (iii) the debtor consents to the secured creditor exercising its enforcement rights.

Reorganisation proceedings under the CCAA are commenced when an initial order is granted by the court. The CCAA explicitly empowers a court to grant a stay of proceedings against the debtor on any terms that it may impose. The stay provision in the CCAA initial order typically prohibits secured creditors from enforcing their security interests against the debtor's property during the proceeding. In a court-appointed receivership, receivership orders also routinely contain substantially similar stay language.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

(a) Preferential transactions

Under the BIA and the CCAA, certain transactions, including the granting of security, the transfer of property and other obligations are not enforceable if incurred during specified pre-bankruptcy time periods. Subject to certain conditions and exemptions, if such transactions are made with a view to giving one creditor a preference over others, they may be set aside if entered into during the period that is: (i) three months before the initial bankruptcy event for transactions at arm's length; and (ii) one year before the initial bankruptcy event for transactions not at arm's length.

Transfers in which the consideration the debtor receives is less than the fair market value, subject to certain other conditions and exemptions, may be set aside under the BIA or CCAA if entered into during the period that is (i) one year before the initial bankruptcy event for transactions at arm's length, and (ii) five years before the initial bankruptcy event for transactions not at arm's length.

There is also provincial legislation providing for setting aside other fraudulent conveyances or preferential transactions.

(b) Statutory priority claims

In Canada, a number of statutory claims may "prime" or take priority over a secured creditor. Priming liens commonly arise from a debtor's obligation to remit amounts collected or withheld on behalf of the government. Such amounts include unremitted employee deductions for income tax, government pension plan contributions and government employment insurance premiums and unremitted federal goods and services taxes, provincial sales taxes, municipal taxes and workers' compensation assessments. In Ontario, statutory deemed trusts may give rise to a priority claim for certain unpaid claims of employees, including a deemed trust arising upon wind-up of a defined benefit pension plan for any deficiency amounts. In addition, there are a number of statutes that create priming liens in specific industries (for example, repair and storage liens, construction liens and brokerage liens). These priming liens may attach to all of the property of the debtor. In some cases, the priority of statutory claimants and secured creditors is sometimes reversed by the commencement of an insolvency proceeding against the debtor.

(c) Priority claims – insolvency

An insolvency proceeding in respect of the debtor may give rise to a number of additional liens that would rank in priority to a secured creditor's claims.

The BIA provides employees of a bankrupt employer or an employer in receivership with a priority charge on the employer's "current assets" for unpaid wages and vacation pay (but not for severance or termination pay) for the six-month period prior to bankruptcy or receivership to a maximum of $2,000 per employee (plus up to $1,000 for certain travelling expenses). The priority charge ranks ahead of all other claims, including secured claims, except unpaid supplier rights.

The BIA also grants a priority charge in bankruptcies and receiverships for outstanding current service pension plan contributions, subject only to the wage earners' priority. The pension contribution priority extends to all assets, not just current assets, and is unlimited in amount.

The pension charge secures (i) amounts deducted as pension contributions from employee wages but not contributed to the plan prior to a bankruptcy or receivership, and (ii) amounts required to be contributed by the employer to a pension plan for "normal costs". The charge does not extend to unfunded deficits arising upon a wind-up of a defined benefit plan and should not include scheduled catch-up or special payments required to be made by an employer because of the existence of a solvency deficiency.

The CCAA and the reorganisation provisions of the BIA expressly prohibit a court from sanctioning a proposal, compromise or arrangement or a sale of assets, unless it is satisfied that the debtor has arranged to pay an amount equal to the amounts secured by the wage and pension priority charges discussed above.

(d) Priority claims – court charges

In CCAA and BIA reorganisations, debtors may obtain interim financing (often referred to as debtor in possession (DIP) financing). Both the CCAA and the BIA expressly authorise the court to grant fresh security over a debtor's assets to DIP lenders in priority to existing security interests up to a specified amount approved by the court.

In addition to the priming liens noted above, in a CCAA or BIA reorganisation, the court has the authority to order priming charges to secure payment of directors' post-filing liabilities and to secure the fees and disbursements of experts, court-appointed officials and certain other "interested parties" in the court's discretion. The court may also order priming charges to secure payment to designated "critical suppliers", typically, restricted to securing payment for post-filing supply.

The priority of the DIP charge, directors' charge, expense charge and any critical supplier charge in respect of the debtor's assets is determined by the court.

(e) Unpaid suppliers' rights

The BIA provides certain unpaid suppliers with a right to repossess goods sold and delivered to a purchaser within 30 days before the date of bankruptcy or receivership of such purchaser. The unpaid supplier's right to repossess goods effectively ranks ahead of a secured creditor.

An unpaid supplier claim is rarely successful as the supplier has the burden of demonstrating that all requirements have been met, including: (i) that the bankrupt has possession of the goods; (ii) that the goods are identifiable; (iii) that the goods are in the same state; and (iv) that the goods have not yet been sold.

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

Banks (including the Canadian business of foreign banks authorised to do business in Canada), insurance companies and trust corporations are excluded from the BIA and CCAA and their wind up is governed by the *Winding-Up and Restructuring Act* (Canada). The BIA and CCAA also exclude railway and telegraph companies. However, in a recent case a court granted a railway company relief under the CCAA. Both the BIA and CCAA apply to income trusts.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Upon default, a secured creditor may exercise "self-help" remedies to take possession and control of collateral individually or through the appointment of a private receiver (if provided in its security documents). Secured creditors may also seek court appointment of an interim receiver to preserve and protect collateral on an expedited basis.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Canada?

The submission by a party to the non-exclusive jurisdiction to the laws of a foreign jurisdiction should be recognised as valid, provided that service of process requirements are complied with.

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

The *State Immunity Act* (Canada) governs sovereign immunity of foreign states and any separate agency of a foreign state (e.g. state trading corporations). Private corporations that are not "organs" of a foreign state are not entitled to sovereign immunity.

Sovereign immunity may be waived if the state or agency submits to the jurisdiction of the Canadian court by agreement, either before or after commencement of the proceedings. Sovereign immunity is subject to certain exceptions (e.g. commercial activities and property damage actions, terrorist activities and certain maritime claims).

10 Other Matters

10.1 Are there any eligibility requirements in Canada for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Canada need to be licensed or authorised in Canada or in their jurisdiction of incorporation?

There are no specific eligibility requirements for lenders solely as a result of entering into a secured lending transaction as lender or agent.

Under the *Bank Act* (Canada), a "foreign bank" is generally not permitted to engage in or carry on business in Canada except through a foreign bank subsidiary, an authorised foreign branch or other approved entity. A "foreign bank" is broadly defined in the Act and includes any foreign entity that (i) is a bank under the laws of a foreign country in which it carries on business or carries on business in a foreign country which would be considered the business of banking, (ii) provides financial services and uses the word "bank" in its name, (iii) is in the business of lending money and accepting deposit liabilities transferable by cheque or other instrument, (iv) provides financial services and is affiliated with a foreign bank, or (v) controls a foreign bank or a Canadian bank.

However, the *Bank Act* would not prohibit a foreign bank from making a loan to a Canadian borrower as long as the nature and extent of its activities in Canada do not amount to engaging in or

carrying on business in Canada. Whether a foreign bank would be considered to be engaging in or carrying on business in Canada by reason of making a particular loan to a Canadian borrower will depend on the relevant facts and circumstances.

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

For example, the *Criminal Code* (Canada) makes it a criminal offence to receive interest at a criminal rate, defined as an effective annual rate of interest that exceeds sixty per cent. Interest in the *Criminal Code* (Canada) is broadly defined to include interest, fees, fines, penalties, commission and similar charges and expenses that a borrower pays in connection with the credit advanced. This section has arisen almost exclusively in civil, not criminal, cases where the borrower seeks to avoid repayment by arguing that the contract was illegal. Courts have struggled with which, if any, contractual provisions should be enforced when a contract imposes a criminal rate of interest.

Readers are cautioned against making decisions based on this material alone. Rather any proposal to do business in Canada should be discussed with qualified professional advisors.

Note

Please note that the answers in this chapter are up to date as of January 31, 2015 and some laws are due to be updated in the coming year.

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Cayman Islands

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1 Overview

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

There have been no changes to the Companies Law (2013 Revision) of the Cayman Islands in the last 12 months that impact the Cayman Islands' reputation as an influential, innovative and creditor-friendly jurisdiction. Financial institutions and corporate borrowers alike continue to rely on the current regime that recognises bilateral and multilateral set-off and netting upon the insolvency of a Cayman Islands company and statutory provisions allowing secured creditors to enforce their security, without the leave of the court or a liquidator. These legislative provisions continue to support the view that the Cayman Islands is the leading, preferred offshore jurisdiction of choice for any lending and security structure.

We have seen an increased focus on securities and netting principles in the last 12 months, specifically following the introduction of the Basel III Capital Adequacy requirements applicable to lenders in the market. This increased focus has led to increased opinion requirements and extended analysis on security issues, in particular, in relation to perfection and priority of security interests.

1.2 What are some significant lending transactions that have taken place in the Cayman Islands in recent years?

The most significant lending transactions continue to occur in the investment funds space, especially to Cayman Islands domiciled private equity funds. These transactions tend to be governed by New York and English law finance documents with security taken over Cayman Islands assets being governed in many cases by Cayman Islands law (although there is no strict legal requirement for the governing law to be Cayman Islands law as the courts in the Cayman Islands generally recognise foreign law documents).

The main types of security are, in the case of funds established in the form of exempted limited partnerships, security over capital calls and more generally security over Cayman Islands equity interests either in the form of registered shares or limited partnership interests. This is particularly common where there is a "master-feeder" structure or underlying blocker entities are used to hold assets.

In both private equity and hedge funds, borrowings are used for both leverage and liquidity purposes using a variety of different instruments including subscription facilities, variable funding notes and also total return swaps.

2 Guarantees

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

Yes, a company can grant a guarantee in these circumstances assuming there is sufficient commercial rationale and benefit to the company.

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

The directors of the company providing a guarantee must ensure that any proposed transaction is in the best interests of the company as a whole. Guarantee arrangements may be construed as not being in the best interests of a company (and not for the company's corporate benefit) if the granting company receives no commercial benefit from the underlying financing arrangements.

2.3 Is lack of corporate power an issue?

In accordance with the Companies Law (2013 Revision), the lack of capacity of a company to enter into a transaction by reason of anything in the company's memorandum will not affect the validity of the transaction. However, where the company is acting without the necessary capacity, shareholders may issue proceedings prohibiting the company from performing its obligations under the transaction (including disposing of any property) and proceedings may be brought against present and past directors or officers of the company for loss or damage caused by them binding the company in this manner contrary to the objects in the memorandum.

If a shareholder brings proceedings to restrict the company from performing its obligations, we believe such action would not affect the other party's rights under the transaction. If the company fails to perform, the other party would have the usual remedies.

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

Subject to any licensing restrictions that may apply to a regulated entity, no authorisations or consents are required by law from any

governmental authorities or agencies or other official bodies in the Cayman Islands in connection with the grant of a guarantee. In addition, it is not necessary to ensure the enforceability or admissibility in evidence of a guarantee that any document be filed, recorded or enrolled with any governmental authority or agency or any official body in the Cayman Islands.

The directors of the company giving the guarantee should approve the terms and execution of the guarantee by way of board resolution in accordance with the company's articles of association. If there is any question of lack of corporate benefit or a potential breach of director's duties, it is recommended that the company also obtain a shareholders' resolution also approving the grant of the guarantee.

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

There are no legislative restrictions imposed on the amount of any guarantee due to net worth or the solvency of a company. However, the directors of a company should, as part of fulfilling their fiduciary duties, consider the terms of any guarantee particularly in the context of the company's asset base.

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

There are no exchange control regulations imposed under Cayman Islands law that would act as an obstacle to enforcement of a guarantee.

3 Collateral Security

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

There are no legislative restrictions on the form of collateral and, accordingly, all property of a company is potentially available as security for lending obligations.

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

It is possible for security to be taken by means of a general security agreement over a range of asset types, such as a debenture. The main types of security under Cayman Islands law are mortgages (legal and equitable), charges (fixed and floating), liens and assignments of rights by way of security (albeit that this is deemed to be a form of mortgage). Formalities and perfection of such security interests will depend upon the nature of the underlying collateral and the applicable *lex situs* of such collateral.

Special regimes apply to the taking of security over certain assets, including ships, aircrafts and land.

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

Security over land is usually granted by way of legal or equitable mortgage and by way of fixed charge over plant, machinery and equipment. In relation to chattels, security can also be created by a conditional bill of sale which must be recorded in accordance with the Bill of Sale Law (2000 Revision).

A legal mortgage is granted by execution of a mortgage agreement between the mortgagor and the secured creditor. The terms of the mortgage will vary, but essentially a mortgage (i) requires transfer of legal title in the land to the secured creditor, subject to a requirement to re-transfer the land upon satisfaction of the underlying secured obligations, and (ii) grants the secured creditor certain powers to deal with the land upon a default.

An equitable mortgage can be created by (i) the execution of an equitable mortgage, (ii) an agreement to create a legal mortgage, (iii) a transfer of land which is not perfected by registering the secured creditor in the Land Registry in accordance with the Registered Lands Law, and (iv) the deposit of the relevant title deeds by way of security.

Fixed and floating charges are usually evidenced by an agreement between the parties reflecting the grant of the security interest and setting out the commercial terms.

A company must make an entry in its register of mortgages and charges in respect of any security interest created by it in order to comply with section 54 of the Companies Law (2013 Revision). However, failure to comply with this requirement does not invalidate the security interest.

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

Receivables arising under contract are examples of "choses in action", being a right which can only be asserted by bringing an action and not by taking possession of a physical thing. Receivables can be mortgaged or charged where that mortgage or charge takes the form of an assignment with an express or implied provision for reassignment on redemption. If a chose in action is charged, the charge can be either fixed or floating.

An assignment can be either legal or equitable, depending on the circumstances. The key requirements of a legal assignment are that 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.

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

A security interest over cash deposits is most commonly created by either a fixed or floating charge, depending on the commercial intention of the parties and the level of control maintained over such cash deposits. The secured creditor should ensure that there is an agreement (usually a deed). Cash deposits are classified as chose in action. Accordingly, the analysis in question 3.4 above applies.

In accordance with Cayman Islands conflict of law rules, the appropriate law to govern any security over cash deposited with a bank will be the law applicable where the bank is located (or the location of the bank branch with which the deposit is made).

3.6 Can collateral security be taken over shares in companies incorporated in the Cayman Islands? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Security over shares in Cayman companies, where the register of members is maintained in the Cayman Islands, is usually taken in the form of a legal or equitable mortgage, depending on whether the secured party wishes to take legal title to the shares prior to a default of the secured obligation. Different rules may apply if the register of members is maintained outside of the Cayman Islands or if the shares are in bearer form.

In accordance with Cayman Islands conflict of law rules, the appropriate law to govern any security over registered shares in a Cayman Islands company is determined according to the law applicable to the location of the register of members. Whilst it is possible to grant security over shares as a matter of other laws, enforcement of such security may prove problematic or difficult.

It is not possible to pledge registered shares under Cayman Islands law because title to the shares cannot be transferred by physical delivery. Any grant of security over registered shares that is called a "pledge" will typically fall into one of the mortgage categories, depending on its terms, or it may be entirely ineffective.

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

Security can be taken over inventory or stock by way of a fixed or floating charge. A floating charge is more common given the changing nature of inventory in the usual course of a grantor's business.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company can grant a security interest in order to secure its obligations as a borrower under a credit facility or as a guarantor of the obligations of other parties. Usual fiduciary duties applicable to directors' actions will apply in each case.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

No stamp duties or other similar taxes are payable, unless the applicable security document is executed in or brought into the Cayman Islands. The amount of any applicable stamp duty will vary depending on the type of security document and the identity of the assets subject to the security interest. Unless the document needs to be executed in the Cayman Islands, it is common practice to execute documents outside of the Cayman Islands so that stamp duty is not levied. Court fees (of a nominal value) will fall due as part of any enforcement process.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

A company must make an entry in its register of mortgages and charges in respect of any security interest created by it in order to comply with section 54 of the Companies Law (2013 Revision). This step is usually undertaken by the registered office service provider of the company and can be completed in a very short time period.

Charges over certain assets, such as land, intellectual property rights, ships and aircraft, need to be registered at other specialist registries related to the asset in question.

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

Subject to any licensing restrictions that may apply to a regulated entity, no authorisations or consents are required by law from any governmental authorities or agencies or other official bodies in the Cayman Islands in connection with the grant of a security interest.

The directors of the company granting the security interest should approve the terms and execution of the security document by way of board resolution in accordance with the company's articles of association. If there is any question of lack of corporate benefit or a potential breach of directors' duties, it is recommended that the company also obtain a shareholders' resolution also approving the grant of the security interest.

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

There are no special priority concerns regarding a revolving credit facility.

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

A number of key documentation issues exist, each of which depend on the form of the security document, whether the document contains a power of attorney and if they are to be executed by way of deed. The key issues of note are: (i) an agreement to create a legal mortgage over land should be executed and delivered as a deed; (ii) a legal assignment must be in writing and signed by both parties; (iii) any power of attorney or security document containing a power of attorney must be executed by way of a deed to ensure compliance with the Powers of Attorney Law (1996 Revision); (iv) where a deed is required, the relevant execution formalities are set out in the Companies Law (2013 Revision); and (v) in the case of virtual completion conducted by email, certain special execution protocols should be followed in compliance with the Companies Law (2013 Revision), following the recent Mercury case in England.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

(a) Shares of the company

No, there are no legislative prohibitions or restrictions under Cayman Islands law equivalent to the English law financial assistance rule.

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

No, there are no legislative prohibitions or restrictions under Cayman Islands law equivalent to the English law financial assistance rule.

(c) Shares in a sister subsidiary

No, there are no legislative prohibitions or restrictions under Cayman Islands law equivalent to the English law financial assistance rule.

5 Syndicated Lending/Agency/Trustee/ Transfers

5.1 Will the Cayman Islands recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Cayman Islands law recognises the role of an agent or trustee, acting on behalf of all lenders, assuming the transaction documents provide for the relevant trust mechanics and the trust is properly constituted.

5.2 If an agent or trustee is not recognised in the Cayman Islands, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

5.3 Assume a loan is made to a company organised under the laws of the Cayman Islands and guaranteed by a guarantor organised under the laws of the Cayman Islands. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

There are no special requirements under Cayman Islands law to make the loan and guarantee enforceable by Lender B, provided that the novation/transfer mechanics in the applicable facility agreement are adhered to as a matter of the applicable governing law.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

The Cayman Islands currently have no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax. Accordingly, no taxes, fees or charges (other than stamp duty) are payable either by direct assessment or withholding to the government of another taxing authority in the Cayman Islands under the laws of the Cayman Islands.

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

There are no tax incentives or other incentives under Cayman Islands law.

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

No income of a foreign lender will become taxable in the Cayman Islands.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Other than the payment of stamp duty and applicable court fees on enforcement, no other significant costs should be incurred by foreign lenders in the grant of any loan or the taking of the benefit of any guarantee or security interest.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Assuming that the lenders are not connected to the borrower, in principle there are no adverse consequences if the lenders are organised in a jurisdiction other than the Cayman Islands.

7 Judicial Enforcement

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

The courts of the Cayman Islands will observe and give effect to the choice of the applicable governing law (the "**Relevant Law**") of a contract assuming that the choice of the Relevant Law as the governing law of the applicable contract has been made in good faith and would be regarded as a valid and binding selection which will be upheld by the courts of that jurisdiction and any other relevant jurisdiction as a matter of the Relevant Law and all other relevant laws.

7.2 Will the courts in the Cayman Islands recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Assuming that the choice of the Relevant Law (as defined in question 7.1 above) as the governing law of the applicable contract has been made in good faith and would be regarded as a valid and binding selection which will be upheld by the courts of the applicable jurisdiction (the "**Relevant Jurisdiction**") and any other relevant jurisdiction (other than the Cayman Islands) as a matter of the Relevant Law and all other relevant laws (other than the laws of the Cayman Islands), then although there is no statutory enforcement in the Cayman Islands of judgments obtained in the Relevant Jurisdiction, a judgment obtained in such jurisdiction will be recognised and enforced in the courts of the Cayman Islands as common law, without any re-examination of the merits of the underlying dispute, by an action commenced on the foreign judgment debt in the Grand Court of the Cayman Islands, provided such judgment is given by a foreign court of competent jurisdiction.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in the Cayman Islands, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in the Cayman Islands against the assets of the company?

Timing of any litigation will inevitably be dependent on a large number of variable factors (such as location of the defendant, defences raised, complexity of the proceedings and resistance to enforcement). Assuming the defendant is in the Cayman Islands and the matter is straightforward and uncontested, it is possible to obtain default or summary judgment within a short time period. Assuming there is no resistance to enforcement, it may be possible to complete the process in six months. If the defendant is outside the jurisdiction, the process may take substantially longer. The timing for enforcement of a judgment is also dependent on a number of variable factors. It may be possible to complete the process in two to three months, but it could take substantially longer.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Whilst there are no legislative requirements for a public auction or similar process in the Cayman Islands, liquidators owe fiduciary duties to the creditors and shareholders of a company to recover the best price possible (usually market value) for all assets of a company upon a liquidation. Recent case law has set a precedent for this in the case of enforcement over land located in the Cayman Islands. Receivers owe their primary duty to the secured party and will seek to recover sufficient funds to repay the debt due; however, they also have a duty to the obligor to recover the best price reasonably obtainable on a sale of the secured assets. Accordingly, public auction or a similar process may be appropriate in certain circumstances. Certain consents may also be required from the Monetary Authority if the obligor is a regulated entity.

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

There are no legislative restrictions on foreign lenders filing suit against a company in the Cayman Islands assuming that they can establish that the Cayman Islands court has jurisdiction over the suit. There are no legislative restrictions applicable to foreclosure on collateral security.

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

Under the Companies Law (2013 Revision), there is no formal corporate rehabilitation procedure as in England and Wales or in the United States that would give a company the benefit of moratorium provisions in the payment of its debts, including certain secured debts. A Cayman Islands company is subject to voluntary or involuntary winding up proceedings under the Companies Law (2013 Revision) although it is possible for a court to appoint a provisional liquidator after the presentation of a petition for the winding up of a company but before an order for the winding up of a company is made where, for example, there is an immediate need to take actions to safeguard actions for creditors. There is a growing practice in the Cayman Islands for provisional liquidators to be appointed with the principal objective of preparing a scheme of arrangement with the aim of avoiding a formal winding up. Although there is an automatic stay of proceedings against the company when an order for winding up has been made and there is a discretionary stay on the appointment of a provisional liquidator, the stay does not prevent a secured creditor from enforcing its security interest.

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

The courts of the Cayman Islands will recognise and enforce arbitral awards made pursuant to an arbitration agreement in a jurisdiction which is a party to the United Nations Convention on

the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**").

Although there is no statutory enforcement of arbitral awards made in jurisdictions not party to the New York Convention, the courts of the Cayman Islands will recognise and enforce such arbitral awards provided that (a) the parties have submitted to the arbitration by an agreement which is valid by its governing law, and (b) the arbitral award is valid and final according to the law which governs the arbitration proceedings. The arbitral award will not be regarded as final by a Cayman Islands court unless the arbitral tribunal has disposed of all the issues itself. A Cayman Islands court will not, however, recognise or enforce such arbitral awards if: (a) under the submission agreement and the law applicable thereto, the arbitrators have no jurisdiction to make the award; (b) it was obtained by fraud; (c) its recognition or, as the case may be, enforcement would be contrary to public policy; or (d) the proceedings in which it was obtained were opposed to natural justice.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In accordance with the Companies Law (2013 Revision), when a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court may impose. This prohibition in our view extends to judicial proceedings and does not include security enforcement methods which do not require an order of the court in the Cayman Islands. Furthermore, subject to any debts preferred by law, the Companies Law (2013 Revision) also provides that secured creditors may enforce their security notwithstanding that a winding up order has been made in respect of the applicable company.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The enforceability of any security document will be subject to general insolvency rules applicable to companies in the Cayman Islands including voidable preferences and transactions effected at an undervalue.

A secured party holding a fixed charge will, notwithstanding that a winding up order has been made, be entitled to enforce his security without the leave of the Cayman Islands court and without reference to the liquidator. However, if the security created by the relevant security document is treated as a floating charge then debts preferred under Cayman Islands law will have priority over the secured party on a liquidation of the company.

In addition, subsequent purchasers, mortgagees, chargees, lienholders and execution creditors in respect of the assets subject to the floating charge are likely to have priority over the secured party, although this will depend upon such factors as the terms of the floating charge, in particular the scope of any restrictions, whether any subsequent purchasers, mortgagees or chargees have knowledge of any restrictions and the circumstances in which any subsequent transactions arise.

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

Companies incorporated in the Cayman Islands are not excluded from proceedings under the Companies Law (2013 Revision) or any other applicable laws or regulations.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

The Companies Law provides that, at any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may (a) where any action or proceeding against the company, including a criminal proceeding, is pending in a summary court, the Cayman Islands court, the Court of Appeal or the Privy Council, apply to the court in which the action or proceeding is pending for a stay of proceedings therein, and (b) where any action or proceeding is pending against the company in a foreign court, apply to the court for an injunction to restrain further proceedings therein, and the court to which application is made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit. On a voluntary winding up, there is no automatic moratorium. The Cayman Islands court does, however, have discretion to impose a moratorium on a blanket or a case-by-case basis. In practice, the court would only exercise its discretion if there was any doubt about the company's solvency.

A creditor of a company may have a compromise or arrangement imposed upon him under the Companies Law if a majority in number representing three fourths in value of the creditors (or class of creditors including the affected creditor) have approved the compromise or arrangement and it has been sanctioned by the Grand Court of the Cayman Islands. Although this is not a mandatory insolvency provision, it is a circumstance in which a creditor of a company may be made subject to an arrangement or compromise affecting his rights without his consent. It would not, however, affect the enforcement of security rights.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of the Cayman Islands?

The submission by a company in a security document to the jurisdiction of the courts of a particular jurisdiction will be legal, valid and binding on the company assuming that the same is true under the governing law of the security document and under the laws, rules and procedures applying in the courts of that jurisdiction.

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

Companies can, as a matter of contract, waive immunity for any legal proceedings in the Cayman Islands. However, subject to certain exceptions, companies may receive the benefit of sovereign immunity under the State Immunity Act of the United Kingdom, which has been extended to the Cayman Islands by statutory order.

10 Other Matters

10.1 Are there any eligibility requirements in the Cayman Islands for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in the Cayman Islands need to be licensed or authorised in the Cayman Islands or in their jurisdiction of incorporation?

There are no eligibility requirements under Cayman Islands law for lenders to a company. Assuming that the lenders are not incorporated in nor registered under Cayman Islands law and all the activities of such parties have not been and will not be carried on through a place of business in the Cayman Islands, then the lenders will not be required to be licensed in the Cayman Islands solely in order to provide a loan to a company.

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

The questions and answers set out in this chapter cover the main legal considerations for secured financings under Cayman Islands law.

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MAPLES

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China

Carolyn Dong

DLA Piper

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1 Overview

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

The gradual easing of regulatory restrictions has been the main theme for legal developments in China in 2014 and early 2015, not only in relation to cross-border financings but also with respect to cross-border investment. Government controls have been relaxed in many significant aspects, from the banking industry to the energy sector and from foreign exchange controls to foreign direct investment regulations.

In 2014, as a way of easing restrictions on China's heavily regulated banking industry, the China Banking Regulatory Commission (CBRC), approved a trial programme to establish five privately owned banks, including banks established by Alibaba Group Holding Ltd. and Tencent Holdings Ltd. in the cities of Shanghai, Tianjin and in Guangdong and Zhejiang provinces.

Chinese regulators have for a long time been preparing for the establishment of a national deposit insurance system and the People's Bank of China (PBOC) has finally promulgated draft rules in 2014. According to the draft rules, the system will insure deposits of as much as RMB500,000 per saver at each bank covered and the annual premium is expected to range from 0.04% to 0.12% depending on the type of bank. Establishment of the deposit insurance system has been presented by regulators as a monumental step toward the further liberalisation of China's banking system and the eventual abolishment of remaining controls over lending rates and deposit rates.

China's banking regulators have also continued to focus their efforts on curbing the banking sector's systemic exposure to "shadow lending". The CBRC issued draft rules to tighten supervision on entrusted lending (commonly used to structure shadow banking products). Entrusted loans (which are generally inter-company loans that are advanced and repaid through bank intermediaries) may be used to structure loans and other debt products that are unsupervised by bank regulators. The new rules prevent banks from lending funds that are raised from bond issuances or other investment products. The rules also target margin trading activities, over-leveraged local government debt and other systemic risks in China's financial system.

China has also significantly simplified foreign exchange controls for foreign debt registration, foreign direct investment, and outbond investment. Perhaps the most significant change affecting cross-border lending and security arrangements are the new SAFE rules concerning cross-border guarantee/security, which came into force in June 2014. The new rule allows domestic onshore entities and individuals in China to grant security and provide guarantees to offshore creditors without the need for SAFE approval. Prior to the new rule, the provision of such outbound security was subject to SAFE's review of whether a set of onerous requirements had been satisfied, including those relating to the principal debtor's profitability and the security provider's net assets position, total foreign currency revenues, and affiliation with the principal debtor. In many cases, these requirements effectively rendered such security arrangements prohibited or at least impractical. The new rule significantly facilitates debt financing of offshore companies with assets/subsidiaries in China.

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

Outbound investment activity continues to remain strong and has given rise to several significant lending transactions, including the $6.96 billion financing for Hong Kong-listed MMG Ltd's purchase of the Las Bambas copper mine in Peru from Glencore Xstrata Plc. Other acquisition financings of note including the HK$38.4 billion (US$4.95 billion) financing for Singapore's OCBC Bank's takeover of Hong Kong-based Wing Hang Bank, COFCO Corp's $3.2 billion financing for its acquisition of Noble Group's agribusiness and the HK$37 billion financing for Power Assets Holding's spinoff of Hongkong Electric Co Ltd.

It is expected that in 2015, outbound investment activities of Chinese companies will continue to grow, particularly with private companies also being encouraged to make acquisitions overseas. Despite the historical focus on fixed-asset investment, lending fuelled by new property development and infrastructure projects are expected to gradually ease in the future. In 2014, Outbound M&A loans, project and infrastructure financing in China still accounted for the bulk of transaction activity. The recent significant drop in oil prices may also trigger M&A and related financing opportunities the oil & gas sector and related industries.

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 such 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. In 2014, SAFE significantly changed its administrative approach by adopting a post registration requirement instead of the previous balance administration and item-by-item approval.

As a result, an onshore entity or individual may provide security or guarantees to an offshore creditor to secure the obligations of an offshore principal debtor ("Outbound Security") without the need for SAFE approval. The new rules also abolished requirements relating to the security/guarantee provider and principal debtor, but the purpose of the debt being secured in an Onshore Security transaction is subject to certain restrictions.

Generally, the debt incurred should be in relation to expenditures in the debtor's ordinary course of business and not be for the purpose of carrying out speculative transactions. Furthermore, debts incurred for the following purposes are not permitted under this structure (unless otherwise approved by SAFE):

(1) making direct or indirect equity investments in onshore entities or intercompany lending to onshore entities;

(2) financing the acquisition of an offshore company that has more than 50% of its assets onshore;

(3) refinancing debt that has been used to make an equity investment in or a loan to an onshore entity; or

(4) initial payments to an onshore entity for goods or services, if the payment is made more than a year before taking delivery on such goods or services, the amount of prepayment is more than US$1 million, and such amount of prepayment exceeds 30% of the total price.

SAFE registration is itself not a condition to the validity of the guarantee or security interest, but without such registration, the guarantor may subject to administrative obstacles when performing its obligations and making payments outside China.

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 registrations and (in limited cases) consent in respect of foreign exchange administration as stated in question 2.6, and in respect of pledges over shares in an FIE, referred to in question 3.6.

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

To secure obligations under a revolving credit facility, the security is usually created in the form of a "maximum amount security" because the obligations under a revolving credit facility depend on the borrower's drawdown and repayment within a period of time. A maximum amount security is created to secure obligations incurred within a period of time and the aggregated secured amount is limited to a fixed maximum amount. It will not be enforceable if a maximum amount security document provides that the secured obligations are the loan principal, interest accrued and all fees and costs incurred under the credit facility agreement. When taking a maximum amount security for a revolving credit facility, the lender needs to calculate or estimate the maximum loan amount and interest for the maximum secured amount.

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

There are no particular requirements unless the signing party is a non-PRC party – please refer to question 3.9. Execution must be duly authorised (please refer to question 2.3) and, if under seal, the company chop should be used. Execution by a legal representative will bind the company.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

There is no general prohibition on financial assistance. However, the restrictions in respect of granting of a guarantee, as stated in question 2.1, are also applicable for granting security interests. This has in practice led to obstacles in cross-border transactions using conventional leveraged finance structures where FIEs (other than WFOEs) are required to provide upstream guarantees.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will China recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

This is recognised. As a general practice for a syndicated loan, lenders will appoint a facility agent and/or security agent to act for and on behalf of the syndicate. The agent bank will claim the whole amount of the loan from the borrower and distribute the proceeds obtained therefrom to the syndicated banks in accordance with their proportion of participation in the loan.

5.2 If an agent or trustee is not recognised in China, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Generally, an agent or a trustee will be recognised, and, if not, the circumstances would need to be considered on a case-by-case basis.

5.3 Assume a loan is made to a company organised under the laws of China and guaranteed by a guarantor organised under the laws of China. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

According to the PRC Contract Law, unless otherwise provided in a contract (i) a party to the contract may assign its rights to a third party by notifying the obligor of the assignment of the contractual rights, and (ii) the transfer by one party of its obligations under a contract shall be subject to prior consent of the obligee under the contract.

If Lender A has already disbursed a loan to the borrower, it may assign all its rights in respect of the loan to Lender B by giving a notice to the borrower. Unless otherwise provided in the loan agreement, such notice shall be in writing and shall generally be served by Lender A.

If Lender A has not disbursed a loan to the borrower, it shall get prior written consent from the borrower before transferring the loan to Lender B, unless the loan agreement provides that no such consent is required.

No consent from the guarantor is required in respect of the assignment or transfer of the loan from Lender A to Lender B. Depending on the provisions of the guarantee, usually a notice shall be given to the guarantor in respect of the assignment or transfer.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Profits received by a lender from its loans to a PRC borrower shall be subject to PRC income tax. Interest payable on loans and proceeds (to the extent of indemnifying interest instead of principal) of a claim under a guarantee or of enforcing security is therefore subject to income tax.

For foreign lenders, income tax will be withheld from the domestic borrower's payment.

In principle, the income tax rate is 25% of the interest amount. However, a standard EIT tax rate of 10% on interest income (in the case of a PRC borrower and foreign lender) usually applies and is prescribed as a withholding tax, and this may then be reduced to 5% if a tax treaty applies. The 25% tax rate only applies for pure domestic borrower-lender transactions. This preferential rate will be applied in accordance with treaties entered into by the PRC government and the government of the foreign lender's place of business. As of the end of May 2011, the PRC government has entered into tax treaties with 96 countries (of which 93 have come into force) and Hong Kong and Macau Special Administrative Regions. Most tax treaties provide a preferential rate of 10%. For a Hong Kong lender, and if the conditions provided in the agreement between the PRC and the Hong Kong SAR are satisfied, a preferential rate of 5% will apply.

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

Since the reform of China's tax laws in 2007, foreign investors or creditors have the same status as PRC investors or creditors in terms of taxes. There are no tax incentives solely applicable for foreign investors or creditors except for those preferential rates provided in tax treaties between the PRC government and foreign governments.

In addition to income tax, stamp duty is payable at 0.05% of the loan amount by both the lender and the borrower. There is no other tax in relation to a loan transaction.

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

Only the income of a bank from its loan to a PRC borrower is taxable in China.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Except for stamp duty, registration fees and (if applicable) notary costs, there are no other governmental fees or costs.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Under PRC law, the level of foreign exchange loans or debts that an FIE is allowed to borrow is subject to the difference between the "total investment" and "registered capital" of the FIE, and such difference is the maximum amount of foreign exchange loans that the FIE can legally borrow (see further analysis below).

"Registered capital" refers to the total amount of equity or capital contributions to be paid in full by the investors in the FIE. "Total investment" is the projected amount of funds necessary for an FIE to attain production or operational capacity set out in its articles of association.

The Provisional Regulations of the State Administration For Industry and Commerce Concerning the Ratio Between the Registered Capital and the Total Amount of Investment of Sino-Foreign Joint Ventures, promulgated on March 1, 1987 sets the minimum ratios between the registered capital to the total investment of an FIE as the following:

Total Investment	Minimum Registered Capital (% of Total Investment)
US$ 3,000,000 or less	70%
US$ 3,000,001 to US$ 10,000,000	50% or US$ 2,100,000 (whichever is higher)
US$ 10,000,001 to US$ 30,000,000	40% or US$ 5,000,000 (whichever is higher)
US$ 30,000,001 or more	33.3% or US$ 12,000,000 (whichever is higher)

Since total investment is equal to registered capital plus permissible debt, these minimum equity ratios are an indirect expression of the "statutory minimum debt-equity ratios" of an FIE.

7 Judicial Enforcement

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

According to the PRC General Principles of Civil Law, unless otherwise provided by law, the parties to a contract may choose that the contract be governed by foreign laws if there is a foreign element in the contract, for example, if one of the parties to the contract is a foreign party or if the subject matter is located outside of China. The choice of foreign governing law must not violate China's social public interest.

7.2 Will the courts in China recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The PRC Civil Procedure Law prescribes that if a legally effective judgment or written order made by a foreign court requires

recognition and enforcement by a Chinese court, the party concerned may directly apply for recognition and enforcement to the intermediate court which has jurisdiction.

If and only if the preliminary examination by the Chinese court reveals (a) that a bilateral judicial assistance treaty exists, (b) that both countries have joined an international convention on recognising and enforcing foreign court judgments or written orders, or (c) that precedents of reciprocity exist, should the court undertake further examination on that foreign judgment or written order to determine whether it can ultimately grant recognition and enforcement.

The Chinese court will not examine the substance of the foreign court judgment or written order. To grant recognition and enforcement, the Chinese court must confirm satisfaction of the following conditions:

(1) A foreign court judgment or written order claiming recognition and enforcement must be a legally effective judgment or written order in accordance with the law of the applicant's foreign country. After the Chinese court accepts the application, if the court is uncertain as to whether it is legally effective, the applicant should present to the court evidence from the foreign court issuing the judgment or order.

(2) The judgment must not be in contravention of the basic principles of Chinese law, national sovereignty, security and public interest.

(3) Treaty obligations and the relevant provisions of Chinese law must be satisfied in recognising and enforcing judgments or written orders. These conditions normally include: (a) the foreign court had sufficient jurisdiction over that the subject matter; (b) the result of the judgment or written order strictly accords with the procedural requirements of the law of the foreign country, and that the other party had an adequate opportunity to defend; and (c) Chinese courts have not yet accepted or heard the same case, or have neither reached a judgment nor recognised the judgment or written order made by that foreign court.

No framework exists for the reciprocal enforcement of judgments between China and the United Kingdom or the United States.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in China, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in China against the assets of the company?

Depending on the complexity of a dispute, it could take 6 to 12 months or longer to obtain a judgment from a Chinese court and enforce the judgment against the assets of the company.

Since there is no reciprocity of enforcement of judgments between China and United Kingdom or the United States, a New York court or English court judgment may not be enforceable in China and may require a re-hearing on the merits.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There is no concept of "self-remedy" under PRC security law. If a creditor intends to enforce the collateral, it may firstly negotiate with the security provider with a view to agreeing on the realisation of the collateral by conversion to value (in effect an agreement on foreclosure value), auction or sale. Should no agreement be reached or no consent or authorisation be obtained from the security provider, the creditor may, according to the revised PRC Civil Litigation Law (effective since 1 January 2013), file an application with the court of first instance at the place where the secured assets are located or at the place of registration of the security interest. After accepting an application, if the application complies with legal provisions upon examination, the court will issue a ruling to auction or sell the property posted as security, and the parties may, based on the ruling, apply for enforcement to the People's Court; or if the application does not comply with legal provisions, the court shall issue a ruling to dismiss the application, and the party may institute an action in a court.

The trial of a case for enforcing security shall be completed within 30 days after the case is docketed.

If the application for security enforcement is dismissed, the secured party would have to commence litigation proceedings, which, if no foreign element involved, will take 6 months for the first instance trial and 3 months for second instance trial. For proceedings involving a foreign element, there is no statutory time limit and the timeframe may vary on a case-by-case basis.

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

In general, no additional restrictions apply (other than as mentioned under question 7.4 above) provided the lender has *locus standi* (a recognised right to seek relief), demonstrated by use of loan proceeds to acquire assets in China or a security interest.

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

Moratoria apply. After the Chinese court accepts an application for bankruptcy: (a) any preservation measures in respect of the bankrupt company's assets shall be released and enforcement shall be suspended; and (b) any civil action or arbitration in respect of the bankrupt company's assets shall be suspended and may be resumed after the bankruptcy administrator has taken possession of the bankrupt company's assets.

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

Chinese courts will not examine the substance of the arbitral award and will give effect to and enforce the award provided it is in compliance with the New York Convention.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

According to the PRC Bankruptcy Law (effective as of June 1, 2007), when a bankruptcy proceeding is commenced (i.e. the court has accepted an application to petition a company into bankruptcy),

the secured creditor of the company together with unsecured creditors, without exception, need to declare their rights to the bankruptcy administrator, to have their rights ascertained by the bankruptcy administrator and to participate in the distribution of the bankrupt's assets.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

A bankruptcy administrator may apply to the People's Court to revoke any of the following transactions of a debtor incurred within 1 year before the People's Court accepts an application for bankruptcy: (a) transferring the assets free of charge; (b) trading at an obviously unreasonable price; (c) provision of inappropriate security; (d) uneconomical discharge of debts; or (e) waiver of the creditor's right to claim the debt.

A bankruptcy administrator may also apply to the People's Court to claw back any payment made by the debtor, if: (a) the payment was made within 6 months before the People's Court accepts an application for bankruptcy; and (b) the debtor was insolvent when making the payment.

Where the debtor has given security over its assets, the secured creditor has a right of priority payment in respect of such assets. If the value of the security is insufficient to repay the entire obligations due, the creditor can claim for any shortfall as an unsecured creditor.

The secured creditor's rights rank behind any outstanding salaries, pensions for the disabled, basic pension insurance, basic medical insurance or other compensation incurred before 27 August 2006 (the date on which the PRC Bankruptcy Law was adopted and promulgated) and payable to the employees of the bankrupt company according to relevant laws and regulations. These employee's claims, if incurred after 27 August 2006, will rank behind the secured creditor's secured obligations.

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

The PRC Bankruptcy Law does not apply to financial institutions. The bankruptcy proceeding of a financial institution is subject to special measures promulgated by the State Council.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

A creditor must apply to the court to seize the assets of a company, although in practice, self-help remedies are often deployed. Title retention provisions (Romalpa clauses) should be deployed where possible to preserve title to unpaid goods and substantiate seizure rights.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of China?

The submission to a foreign jurisdiction is valid if: (a) the subject matter is not under exclusive jurisdiction of the Chinese courts; and (b) the foreign court has jurisdiction over the subject matter.

The enforcement of judgment made by foreign courts is subject to the applicable bilateral treaties.

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

A waiver of immunity is not legally binding and enforceable if it is made by any Chinese governmental body. China adopts the principle of "absolute immunity", which provides complete immunity to the sovereign state and does not have regard to the underlying nature of the transaction. Any waiver of sovereign immunity by any Chinese governmental body is invalid and not enforceable.

10 Other Matters

10.1 Are there any eligibility requirements in China for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in China need to be licensed or authorised in China or in their jurisdiction of incorporation?

In China, a corporate lender must have a financial licence according to the PRC Banking Supervision Law and the Measures for the Administration of Financial Licences. Lending between Chinese enterprises is not permitted. This finance licence requirement, however, does not apply to foreign entities. A foreign entity can lend money to a company without holding a financial licence provided it complies with applicable laws and regulations.

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

In addition to all other issues covered in this chapter, it is worth noting the following in relation to foreign lending or equity investments:

(1) On February 28, 2014, the State Administration for Industry and Commerce (SAIC) launched a centralised online database containing searchable information for all existing domestic companies in China (including most foreign invested enterprises). Prior to this, there was no centralised registry for conducting company searches in China, though several local branches of the SAIC had begun to create their own websites publishing information on locally-registered companies.

(2) Foreign investment in China is subject to approval from MOFCOM or its local branch, depending on the amount of investment. MOFCOM together with the National Development Reform Commission has issued a Catalogue of Industries for Guiding Foreign Investment, which lists industries that are encouraged, restricted or prohibited for foreign investors, and this must be complied with.

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The authors would like to acknowledge the contribution of Peter Li in providing his input and reviewing the contents of this chapter. Peter is a Registered Foreign Lawyer in the Finance & Projects group in DLA Piper's Hong Kong office and acts for financial institutions and borrower/sponsors on a variety of finance transactions, particularly in the energy, resources and chemicals sectors. Peter also has experience in real estate finance, project finance, and acquisition finance transactions in Asia, Europe and North America.

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DLA Piper is a global law firm with 4,200 lawyers located in more than 30 countries throughout the Americas, Asia Pacific, Europe and the Middle East, positioning it to help companies with their legal needs anywhere in the world. In Asia Pacific, we have 12 offices spread across six countries. Our lawyers have a wealth of knowledge and understanding of the legislative and administrative systems of Australia, Hong Kong Special Administrative Region (SAR), Japan, People's Republic of China (the PRC), Singapore, South Korea and Thailand. In addition, we have developed country practices that focus on Indonesia, Korea and Vietnam and have experience in other jurisdictions within the Asia Pacific region, including Bangladesh, Cambodia, India, Laos, Macau, Malaysia, Mongolia, Myanmar, the Philippines, Papua New Guinea and Taiwan. Our knowledge of, and close involvement with, Asia Pacific markets enables us to provide strategic and commercial advice to a diverse number of international clients on all aspects of doing business in the region. We can also support our clients with their local, national, regional or international operations. All our lawyers are fluent in English and individuals speak a wide range of Asian languages including Bahasa Indonesia, Cantonese, Japanese, Korean, Mandarin, Thai and Vietnamese.

Costa Rica

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1 Overview

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

Lending markets in Costa Rica shall continue to benefit from a relatively stable economic and political environment and as a result, should follow the trend of steady growth. Based on this stability, different financial entities have been developing innovative products and services that try to add value to regular personal and corporate loan businesses. The most significant sectors that continue to surge are infrastructure, construction, residential real estate and services. In this regard, infrastructure will most probably prevail as the overall winner, as the recently elected government has shown clear intentions to promote projects related to ports on the Caribbean coast, several important roads in the northern region of Costa Rica and significant work related to public services.

With regard to recent developments, there have been some changes in the lending markets regarding local and international players. In the past year several South American, specifically financial entities from Colombia have acquired local banking operations in Costa Rica, bringing significant changes to the local market. Based on recent announcements, these sort of acquisitions, far from ceasing, shall continue to bring in new actors from other parts of the world, enhancing further changes to the lending market in Costa Rica.

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

For part of 2014 and the first quarter of 2015, some of the most significant transactions that have taken place have been related to infrastructure projects in Moin (Caribbean Coast), as a major port investment has been taking place in this region. In addition, several large-scale hydroelectric plants and wind farms have been developed by the state-owned *Instituto Costarricense de Electricidad*.

2 Guarantees

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

Yes, it can. However, there should be no limitation to undertaking such act or contract in the company's corporate statute or by-laws.

Notwithstanding the above, and assuming that the corporate statute or by-laws establish no limits, in order to comply with corporate mandate rules established in articles 1262 and 1263 of the Costa Rican Civil Code, the guaranteeing company shall hold an Extraordinary Shareholders' Meeting in which it analyses the terms and conditions of the transaction and authorises its legal representative (or any other person) to act on behalf of the company in order to guarantee the borrowings of that related third party (a member of its corporate group or an independent third party 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?

Pursuant to Costa Rican laws, if a company intends to guarantee or secure related third party borrowings, it is required to show or justify a benefit or expressly indicate that it shall receive in some way an economical retribution. As indicated in question 2.1 above, in order to comply with corporate mandate rules, the company should analyse such retribution (whether small or significant) and expressly authorise its legal representative, by means of an Extraordinary Shareholders' Meeting, to represent the company in such act or contract.

2.3 Is lack of corporate power an issue?

Yes. All corporate undertakings must be executed by a legal representative of the company with sufficient power or else duly authorised – by the company's shareholders in a duly held shareholders' assembly – to execute the corresponding act or contract. If there is a lack of corporate power by the legal representative, then the act or contract may be rendered null and void. In addition, if a guarantee is subject to registration and the legal representative's power or authorisation is not duly recognised, then the guarantee will not be properly recorded and as a result the guaranteed party may be negatively affected. The corporate powers for legal representatives are governed pursuant to Title VIII of the Costa Rican Civil Code.

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

Under Costa Rican law, government filings or consent 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 may have in its corporate statute or by-laws. If there are no registered limitations to the corporate statute or by-laws, shareholder approval is not required for guaranteeing its own borrowings as long as the legal representative has the sufficient corporate power to execute the corresponding act or contract. As indicated in question 2.1, this shareholders' approval shall be required for guaranteeing the borrowings of its own shareholders and/or officers of the company and it is also required for borrowings of third parties. If there are registered limitations or restrictions to the corporate statute or by-laws and/or limitations or restrictions to the appointment of legal representatives, then as established in question 2.3 above, the shareholders' approval is also 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 granting a guarantee to a lender, the debtor should not be under a critical financial position that may be considered a technical insolvency affecting other lenders. Any acts or contracts executed under a technical insolvency may render those acts and contracts null and void. Upon the confirmation of a company's insolvency, acts or contracts executed up to six months prior to that confirmation (of insolvency) may be presumed null and void.

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

No. There are no obstacles of this sort in order to enforce a guarantee.

3 Collateral Security

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

Based on the definition of collateral as "*property that is pledged as security against a debt or property subject to a security interest*", the following are some collaterals available to secure lending obligations in Costa Rica: mortgage or common mortgage ("*hipoteca*"); pledge ("*prenda*"); mortgage certificate ("*cédula hipotecaria*"); trust agreement ("*fideicomiso de garantía*"); assignment of rights ("*cesión de derechos*"); and leasing agreement, etc. These types of collateral shall be explained in detail below. Most recently, a new form of moveable guarantee ("*garantía mobiliaria*") was accepted and shall enter into effect later this year.

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

Yes, it is possible. In Costa Rica, trust agreements (also referred to as guarantee trust agreements) are usually used as a general security agreement in which real property (fee simple), concession rights, moveable assets, machinery, equipment and assignable rights can be transferred or assigned by the debtor or a third party (also referred to as the "Trustor") to a designated third party identified as a Trustee. The Trustee shall hold the title of the assets or rights placed in trust as a collateral guarantee towards the lender (also referred to as the "Beneficiary") and shall execute the Trust Agreement according to the instructions expressly indicated in such document. It is required that the instructions established in the Trust Agreement follow certain minimum due process rules of procedure.

The transfer of assets or rights to the Trustee can be executed by means of a private agreement, with the exception of registrable assets such as real property and certain vehicles and machinery which have to be transferred through a public deed ("*escritura pública*") executed exclusively by a Notary Public.

Upon the occurrence of an event of default by the debtor or Trustor under the Trust Agreement or the other loan documents, and failure to cure or at least take specific actions to cure the default, the Beneficiary shall give written notice of the default to the Trustee and to the debtor and/or Trustor. If the debtor and/or Trustor fail to timely cure the event of default within the term granted in the Trust Agreement for this purpose, the Trustee shall proceed to execute the auction of the Trust Estate.

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

Yes. Collateral security can be taken over real property (fee simple) and moveable assets such as any type of plant, machinery, equipment, inventory or fungible goods as well as assignable rights.

The most common type of collateral security over real property is through a mortgage in which the debtor provides a property as a security to guarantee a specific loan. The lender and debtor agree on all terms and conditions, such as, but not limited to, mortgage grade, lender's name, debtor's name, loan amount, term, advance payment penalty, interest, loan currency, place of payment and the usual contractual clauses that will govern the loan and the mortgage. 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 a mortgage certificate that identifies the amount for which a 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 moveable assets that are legally subject to an auction and judicial persecution may be pledged to secure or guarantee a loan. Like mortgages, the pledge agreement must include certain terms and conditions such as: lender's name; debtor's name; loan amount; term; advance payment penalty; interest; loan currency; place of payment, and the characteristic contractual clauses that will govern the financing. The pledge lien imposed over registered or registrable moveable assets shall be granted through a public deed before a Notary Public and recorded before 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. Later this year a new moveable guarantee registry will be created in order to be able to give as collateral other types of moveable assets not included through the civil or commercial pledge described above. This new type of moveable guarantee shall provide more flexibility to the owner and the lender to receive other type of moveable assets as collateral and register that collateral in a verifiable registry.

In addition to the above-indicated collateral security (mortgage and pledge), as indicated in question 3.2 above, another type of security is the trust agreement.

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

Pursuant to Costa Rican law, a pledge of collateral security can be taken over receivables as well as any other debt or credit. In order for the pledge to have legal value, it is required for the debtor to deliver or assign the receivable to the lender by way of a formal assignment, who is automatically appointed legal depositary (free of charge) of the receivable.

The lender shall not be allowed to dispose or take control of the collateral 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 these types of documents 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 that 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 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 is not allowed to dispose or take control of the shares unless the established execution process is followed. In order for this execution to be valid it should follow the established due process. Any agreement that violates the above due process 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. Inventory in Costa Rica is described as the moveable assets that a person or entity holds for its sale or lease in the due course of its normal business activity, such as raw materials and/or goods required for transformation into sellable assets. As indicated in question 3.3 above, any moveable asset that is legally subject to an auction and judicial persecution may be pledged as a security or a guarantee. These types of assets may also be subject to the registration as a moveable guarantee before a special registry for these type of assets. 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, notarisation, registration, stamp duty and other fees are established pursuant to the following legislation: (i) Public Registry Tariff Law No. 4564; (ii) Notarial Code No. 7764; and (iii) General Tariff for Fees for Law and Notary Public Professionals No. 36562-JP. In this regard, depending on the act or contract that is being executed, there is a standardised cost for the notarisation and registration of security. In all instances, if the act or contract has an estimated amount, such fees and stamps are proportional to the estimated amount. If for some reason the amount cannot be estimated, then the fees and stamps are going to be subject to the type of act or contract and type of security taken.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The time required to execute a specific security shall ultimately depend on the type of security. For example, registration of a mortgage, mortgage certificate or pledge over registered or registrable assets before the Public Registry shall take approximately ten (10) working days, as long as no formal or draft errors are identified by the Public Registry.

With regards to expenses, it also varies depending on the type of security. In general, a 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/registrable 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 applicable to/enforceable on 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 guarantee the total amount of the facility with a type of secured collateral such as mortgage, mortgage certificate, pledge or trust agreement. As established in question 8.1, creditors with these types of collateral shall have a privilege over non-secured creditors.

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

Pursuant to Costa Rican laws and general practice, most securities are executed through a public deed before a Notary Public. Notarised documents such as public deeds ("*escritura pública*") are subject to very detailed formalities 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). Notwithstanding the above, in recent years the trend has been to liberalise loans from these general formalities in order to grant more access to credit and financing possibilities.

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 are all the lenders, the Trustor is the borrower and/or that who provides the collateral, and the Trustee shall be a third party which receives the assets and holds them in trust (see question 3.2). Under Costa Rican law, 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 that should always be a representative from the Trustee.

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. If such interest payment is made to a foreign lender which is part of a bank group that supervised locally, there is a withholding tax that ranges from 5.5% to 15%. In addition if such interest payments are made by Costa Rica corporations to multilateral banks, development banks and other non-profit financial entitles, the above indicated withholding tax shall not 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?

Please see question 6.1.

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

Costa Rica has a territorial tax system, thus, if a foreign lender grants a loan from abroad to a company established in Costa Rica, income generated through that loan or guarantee or grant of security shall not be taxable in Costa Rica. Nevertheless, as established in question 6.1 above, remittances of interest may be subject to a withholding tax depending on the type of entity.

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, a lawsuit can be prepared and filed immediately. In order to obtain a judgment, assuming that the debtor raises procedural issues, an approximate time would be 6 to 10 months, minimum. In addition, enforcement of the judgment against assets of the company can take an additional 4 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 6 and 10 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 law, some of the most important restrictions which impact the timing and value of enforcements is when it is required to serve notice of the commencement of the legal proceeding. This first step in an enforcement case can be cumbersome and delay the proceeding. Once this is executed in accordance with due process and the established notification laws, there are no consents that might delay the process. Notwithstanding the above, the most recent notification laws have significantly reduced the notification process, making the entire enforcement process less problematic.

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 on interest payments is declared upon all borrowings not secured by means of a mortgage, mortgage certificate, pledge or similar. Although this moratorium does not apply to secured lenders, they cannot demand payment of the interest until the assets have been auctioned and proceedings paid.

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

Yes. Please see question 7.2.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Under Costa Rican law, lenders who have collateral security such as 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 of any act or contract that has been 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 limited debts and obligations that have preference with respect to security. These have to be declared by a judge and the resulting liens are also known as legal mortgages which are established such as unpaid taxes, duly executed homeowners association fees and some administrative charges. In this regard, these types of obligations have a priority with respect to the security.

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

There are only certain legal entities not subject to bankruptcy. These include the Government of Costa Rica, all public and autonomous institutions, local municipalities and State-owned banks and financial institutions.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes, there are several processes other than court proceedings available to seize the assets of a company during enforcement.

Under most trust agreements in which assets are transferred to the Trustee to hold them in trust to secure an obligation, upon the occurrence of an event of default by the debtor or Trustor (according to the terms and conditions of the Trust Agreement or the other loan documents) and failure to cure or at least take specific actions to cure the default, the creditor – also referred to as the Beneficiary – shall give written notice of the default to the Trustee and to the Trustor. If the Trustor fails to timely cure the event of default within the term granted in the Trust Agreement for this purpose, the Trustee shall proceed to execute the auction of the Trust Estate. The trust agreement shall establish the rules to hold a private auction of the entrusted assets and, if there are no offers in 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 law 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?

Lenders – whether local or foreign – 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 must 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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Cordero & Cordero Abogados is a full service law firm that specialises in Business and Financial Law in Costa Rica. Among our main areas of practice are: Banking & Finance; Corporate and Contract Law; Foreign Investment; Real Estate; Insurance & Reinsurance; Mergers & Acquisitions; Civil Litigation Practice; Intellectual Property; Labour & Immigration; Energy; and Information Technologies & Telecommunications. The firm, established in 1940, currently has offices in San José and Guanacaste, and has been ranked by international directories such as Chambers & Partners, ILFR and The Legal 500 and is currently referred to by the U.S. Commercial Service as well as other regional bar associations. Cordero & Cordero Abogados is a member of the prestigious International Lawyers Network (www.iln.com), an association of 91 high-quality, full-service law firms with over 5,000 lawyers worldwide.

Cyprus

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1 Overview

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

The main trend or significant development is the continued lack of corporate lending in the local market. The lending market continues to be affected by the fall-out from the March 2013 "bail-in" of Cyprus banks. Whilst the Cyprus banks have been recapitalised, there is no significant lending activity by Cyprus banks due to a lack of liquidity; the recapitalisation has served only to bolster regulatory capital. The European Investment Bank has recently agreed the provision of loans to Cyprus banks (€50m to Bank of Cyprus and €35m to Hellenic Bank) to be used by the banks to fund loans to small and medium-size enterprises which should help to kick-start the economy and also result in banks returning to the financing of business.

Amongst the most important developments in the local lending market is the ever increasing number of non-performing loans (NPLs), which currently stand at over 50% and will trigger large numbers of restructuring and refinancing. As part of the memorandum of understanding signed with the European Commission, European Central Bank and the International Monetary Fund, Cyprus has to introduce new insolvency legislation and foreclosures legislation making necessary amendments to the legal framework to facilitate and aid the management of NPLs and assist with restructuring.

The financing by foreign banks of foreign assets held by Cypriot companies has not been greatly affected by the bail-in of Cypriot banks but has slowed due to world economic conditions. However, it seems that there is presently a pick-up on such transactions.

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

As mentioned in question 1.1 above, the local lending market in 2014 was flat with little or no activity due to lack of liquidity and/or lack of appetite of local banks. In 2014 the primary concern of local banks was ensuring the satisfaction of regulatory capital requirements. The lending by foreign banks collateralised on foreign assets has remained steady with some noticeable increase in 2014.

2 Guarantees

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

As a general principle there is no restriction on a company guaranteeing the borrowings of one or more members of its corporate group and such guarantee can be upstream, downstream or cross-stream. There are, however, certain considerations such as *vires*, power and benefit which need to be contemplated, and will be considered in the following questions.

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 is much debate amongst practitioners as to the existence or not of a doctrine of corporate benefit under the Cyprus Companies Law and, unfortunately, there is no judicial pronouncement on this. It is the authors' view that there is no such strict doctrine under Cyprus law. Certainly, it is a trite principle of Cyprus law that the directors must act in good faith in the best interests of the company as a whole ,which is measured by what is in the interests of *all* shareholders of the company and not of any one shareholder or of the group. Given that the guarantee or security is given to secure the indebtedness of a group company, and provided the directors have acted in good faith, it can be shown that the directors have acted in the best interests of the company. Securing loan finance granted to a group company will have benefits for the entire group and for the collateral giver, particularly, in the case of a downstream guarantee.

2.3 Is lack of corporate power an issue?

As a matter of practice, it is usual to determine if the grant of a guarantee or security is within the powers or objects of the company as stated in its memorandum and articles of association. In the event that there is no express prohibition or restriction on the grant of a guarantee or security, it will be held *intra vires* the company and will be binding. Section 33A of the Companies Law, cap.113

(as amended) (the "**Companies Law**"), attempted to abolish the doctrine of *ultra vires* by providing that a company shall be bound by transactions concluded by its officers even where such transactions are outside the objects of the company unless it can be shown that the transactions exceed the powers conferred on the officers by law or the party dealing with the company was aware or in the circumstances should have been aware that the transaction was outside the objects of the company. Publication of the memorandum and articles of association by filing same with the Registrar of Companies is not enough to fix a third party with knowledge. Furthermore, any limitations or restrictions in the powers of the officers of a company, whether contained in the memorandum or articles or any resolution, cannot be relied upon by the company to suggest a transaction is *ultra vires*. Whilst section 33A may seem to place a premium on ignorance, in financing transactions it is better practice to perform diligence and obtain a legal opinion on capacity, power and authority.

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

In general, there are no governmental or other consents or filings required in connection with the grant of a guarantee and any formalities are of a limited nature and in essence relate to the following:

(a) the guarantee must satisfy all formality requirements to amount to a valid and binding contract;

(b) all necessary corporate authorities of the guarantor being obtained. In principle, this will mean a resolution of the board of directors but there may be circumstances, such as financial assistance (see question 4.1 below), where a resolution of the shareholders may be required; and

(c) stamp duty may be payable – see question 3.9 below.

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

Cyprus law does not impose any net worth, solvency or other similar limitations when giving a guarantee. However, the directors in the proper exercise of their fiduciary duties should take such matters into consideration when deciding whether or not to grant the guarantee. The guarantee will not be for an unlimited amount but will be co-terminus with the loan agreement and will be limited in value to the underlying debt.

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

There are no exchange controls under Cyprus law that would impact on the enforcement of a guarantee.

3 Collateral Security

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

In principle under Cyprus law, a security interest can be taken over any kind of property or class of property, tangible or intangible, present or future, including land, goods, negotiable and non-negotiable instruments, shares and other securities, bank deposits, intellectual property rights, etc. The type of security interest will, however, depend on the subject matter of the security interest.

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?

There is nothing in Cyprus law that prevents granting security by means of a single general or global security agreement, however it would be necessary to specifically describe in such agreement what type of security (for e.g. mortgage, fixed charge, floating charge, hedge, etc.) is being given over what property. Furthermore, to ensure full enforceability and validity it may be necessary to carry out a number of statutorily prescribed perfection steps. In practice, however, it is more common to have an asset-specific security agreement for particular types of property, e.g. land, shares, ships, aircraft, and then have a general sweep-up security agreement (a debenture) granting security over all other assets or property of the collateral giver. The debenture will typically grant fixed and floating charges and assignments over all other assets or classes of assets and undertakings of the collateral giver.

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 and is usually taken in the form of a mortgage. The Immovable Property (Transfer & Mortgage Law), Law 9/1965 (as amended) prescribes the form of mortgage and further prescribes that to be valid and enforceable against the mortgagor, it must be registered in the District Lands Office where the real property is located.

Collateral security can also be taken over plant, machinery and equipment. The mortgage over real property can extend to plant, machinery and equipment if sufficiently attached to the real property; however it is more common and advisable to take further security. This in practice is done by granting a fixed charge under a debenture over these assets.

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

Receivables are capable of being the subject matter of security, which usually takes the form of an assignment. Two important points need to be emphasised here:

(a) an assignment by way of security must be distinguished from an absolute assignment which involves a transfer of title or sale of the receivables to the assignee. An assignment by way of security, whilst including language akin to an absolute assignment, contains a provision that upon discharge of the underlying secured obligation, the receivables are re-assigned to the assignor; and

(b) Cyprus law only recognises equitable assignment; there is no concept of legal assignment as exists under English law.

The taking of collateral over receivables can also take the form of a fixed charge – where the assignee will take control over the receivables – or, a floating charge – where the assignee will be able to deal with the receivables in the ordinary course of business.

As a matter of Cyprus law, the giving of a notice of assignment is a requirement in order to perfect the security and to establish priority as against any possible subsequent creditors. It is usual practice to require acknowledgment of notice from the debtor, but failure to obtain the acknowledgment does not impact upon the validity, enforceability or priority of the security.

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

Cash deposits can be the subject matter of a security interest, which is typically given by way of fixed charge or, more rarely, by way of floating charge. The type of bank account will determine the nature of the security taken. If the account is a deposit or blocked account, the security will be by way of fixed charge which gives control to the chargee with respect to all drawings. If the account is an operating or trading account, the security would be a floating charge thus allowing the chargor to withdraw or make payments from the account in the ordinary course of business. In practice, floating charges are given where the chargor needs to use certain assets in the course of its business in order to trade to allow for servicing of the loan; thus, it will typically be granted over trading accounts, inventory, stock, materials, etc. A floating charge ranks in priority after a fixed charge and statutorily preferred creditors – see question 8.2 below.

3.6 Can collateral security be taken over shares in companies incorporated in Cyprus? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares in Cyprus incorporated companies are capable of being the subject of security either as a pledge or a fixed charge. With respect to the shares of private and (non-listed) public companies, the most common form of security is a pledge. The Cyprus Contract Law, cap. 149 (as amended) prescribes the form of the pledge and certain perfection requirements.

Formal Requirements

The pledge must be in writing, signed by the pledgor before two witnesses of contractual capacity. Whilst the Contract Law only requires the signature of the pledgor, in practice it is signed by both pledgor and pledgee.

Enforceability Requirements

The Contract Law provides that for the pledge to be valid and enforceable, notice of the pledge must be given by the pledgee to the company whose shares are pledged (together with a certified copy of the pledge) who then enters a memorandum of pledge in its register of members and issues a certificate confirming the entering of such memorandum of pledge.

It is the authors' view that in accordance with the provisions of the Financial Collateral Arrangements Law, Law 43(I)/2004 (transposing the provisions of Directive 2002/47/EC), these enforceability requirements are no longer necessary in order to have a valid and enforceable pledge; however the formality requirements remain necessary.

The Cyprus law pledge is in essence a self-enforcing security as there are normally delivered under the pledge (i) share certificates (as the pledge is a possessory security), (ii) executed instruments of transfer, and (iii) undated letters of resignation of the officers of the company. This allows for swift and immediate enforcement on a default and allows the taking of ownership and title to the shares. There is no requirement to take any court or other proceedings prior to or upon enforcement on the occurrence of a default.

As mentioned above, a pledge is a possessory security and, thus, requires the delivery of actual or constructive possession. Accordingly, contractual possession is delivered to the pledgee by delivering possession of the share certificates under the pledge. Where the shares are shares of a publicly traded company which are in dematerialised form, a pledge under Cyprus law is not possible, and the usual or better form of security in such circumstances is a fixed charge over the shares.

The pledge or fixed charge can be governed by New York or English law as the parties are free to choose what law will govern the transaction. However, as it involves shares in a Cyprus company as a matter of conflict of laws, Cyprus law will apply in any event to most elements of the validity and enforceability of the pledge. As a result, in practice the pledge or fixed change will be governed by Cyprus law.

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

Yes, security can be taken over inventory. Given the nature of the asset and the chargor's wish to have unfettered use of the asset in the ordinary course of business, the type of security granted will be a floating charge. The characteristics of a floating charge are that it hovers, until crystallisation, over an asset or class of assets and allows disposal of the assets or class of assets in the ordinary course of business without the need for consent from the chargor. As noted above however, the floating charge ranks in priority after fixed charges and statutorily preferred creditors.

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)?

Cyprus law permits the granting of security for one's own debt obligations (including under a guarantee) or the debt obligations of others (third party security), subject to issues discussed in the answers to questions 2.2 and 2.3 above. See further issues discussed in question 4.1 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?

Looking at each of these issues in turn:

Notarisation

There are no requirements for notarisation of any form of security interest granted under Cyprus law.

Registration

Under Cyprus law, registration is a perfection requirement, and not a priority point. Registration arises in three contexts, *viz*. under (i) Companies Law cap.113, (ii) statutorily created registration systems, and (iii) financial collateral arrangements.

(i) Companies Law, cap.113

Section 90 provides that any security interest granted by a company falling within section 90(2) must be registered at the Registrar of Companies within 21 days (42 days where executed out of Cyprus) of the date of creation in order to be enforceable against any other creditor or liquidator. The list of security contained in section 90(2) is an exhaustive list; however, regrettably the practice has developed and persists of registering every conceivable security created by a Cyprus company even if not covered by section 90(2) and the Registrar of Companies accepts registration of all security interests filed with it.

(ii) Statutory Perfection Schemes

Certain pieces of legislation require, in addition to perfection under Companies Law, perfection under those pieces of legislation. Presently, this is the case only with respect to (i) mortgages over real property which must be registered under the Immovable Property (Transfer & Mortgage) Law, Law 9/1965 (as amended), (ii) mortgages over ships which must be registered with the Department of Merchant Shipping under the Merchant Shipping (Registration, Sales and Mortgages) Law, Law 45/1963 (as amended), and (iii) perfection of Cyprus share pledges under section 138 of the Contract Law, cap. 138. It should be emphasised that these are asset-specific requirements and are not alternatives to a section 90 registration under the Companies Law, where applicable. The issue, however, arises in light of the Financial Collateral Arrangements legislation if these are still required in the context of financial collateral arrangements (as defined). In the opinion of the authors, such perfection requirements are not required.

(iii) Financial Collateral Arrangements

The EU Financial Collateral Arrangements Directive (2002/47/EC) as transposed by Financial Collateral Arrangements Law, Law 43(I)/2004, attempts to aid effective realisation of collateral. In that regard, it is provided that the "creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral is not dependent on the performance of any formal act". Thus, where the financial collateral consists of cash, financial instruments or credit claims there is no requirement for any formal act, e.g. registration, to be carried out.

Stamp Duty

This is an area of some controversy in the context of cross-border secured lending and there is little consensus between practitioners and the stamp duty authority, which leads to uncertainty in implementation of complex structures. Section 4 of the Stamp Duty Law, Law 19/1963, provides that a charge to stamp duty arises where the security instrument relates either (a) to an asset located in Cyprus, or (b) to a matter or thing to be done or performed in Cyprus. The place of execution of the instrument is irrelevant to a determination of chargeability, and even if the instrument is executed out of Cyprus, once it is brought into Cyprus, say for perfection purposes, if applicable, the obligation to pay stamp duty is triggered once it comes into Cyprus. The chargeability to stamp duty needs to be examined on a case-by-case basis. The non-payment of stamp duty does not impact the validity or enforceability of the security instrument; rather it goes only to its admissibility in evidence before a Cyprus court or arbitral tribunal. As a matter of practice it is rare for a document to be excluded solely on the basis of non-payment of stamp duty.

Other Fees

The only other fees that arise in respect of security are these relating to registration, where applicable. See the answer to question 3.10 below.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Where filing or registration has to be done, the timing required and fees to be paid are not prohibitive.

In the case of:

(a) filing at the Registrar of Companies – a flat fee of €680 is paid and registration is considered done on the date of filing;

(b) filing at the Department of Merchant Shipping – the fees payable depend upon the gross tonnage of the vessel (€0.034172 per gross tonne up to 10,000 tonnes and half of that thereafter). Again registration is deemed to occur on filing; and

(c) filing at the Lands Office – a fee of 1% of the secured amount and registration is completed and effective on the date of filing.

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

There are no regulatory or similar consents required under Cyprus law for the grant of a security interest, save where the collateral giver is a regulated entity where regulatory approval may be required.

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

There is no special priority or other concerns with the giving of security for a revolving credit facility; however, the security interest in terms of drafting needs to also cover all future borrowings.

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

Save for a pledge over shares in a Cyprus company, there are no particular documentary or execution requirements for granting a security interest under Cyprus law. As discussed under the answer to question 3.6 above, a Cyprus share pledge must be in writing, signed by the pledgor before two competent witnesses.

If a document is to be executed as a deed, it is not, *per se*, required to be signed under seal. Where, however, it is intended to be signed under seal, the seal must be affixed in accordance with the company's articles of association.

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 current position under the Companies Law distinguishes between private and public companies. In the case of private companies there is a qualified prohibition, *viz.* financial assistance is prohibited unless it is "whitewashed" by a resolution of the shareholders of the company. This whitewash exemption will not apply where the private company is the subsidiary of a public company. The whitewash resolution requires a 90% resolution of all issued shares in the company. The whitewash exemption does not apply to financial assistance provided by a public company.

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

The financial assistance prohibition also extends to providing financial assistance to acquire shares in a holding company. This restriction applies as per (a) above.

(c) Shares in a sister subsidiary

There is no such restriction in this instance.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Cyprus recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Cyprus law recognises the concept of a security trustee or agent, who will be able to enforce on behalf of the lenders syndicate all security granted. The security trustee will then be allowed to apply the proceeds of enforcement in discharge of the loan obligations. The provisions of the loan documentation delineating the powers and role of the security agent/trustee will be enforceable as a matter of Cyprus law.

5.2 If an agent or trustee is not recognised in Cyprus, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable – see the answer to question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of Cyprus and guaranteed by a guarantor organised under the laws of Cyprus. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Subject only to the provisions of the loan and security documentation, there are no specific requirements of Cyprus law that need to be met. There are some formality requirements which in particular relate to registration, in the case of registrable security of any amendments to the security.

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) A distinction needs to be made between foreign and domestic lenders. In the case of foreign (i.e. non-Cyprus tax resident) lenders there is no deduction or withholding on any payment made by a Cypriot company to a foreign lender free and clear of any tax or withholding. In the case of an interest payment to a Cyprus lender, assuming it is earned in the ordinary course of business, it is subject to a Special Contribution for Defence levy of currently 30% on the gross amount of the interest payable.

(b) As regards the proceeds of a guarantee claim or security enforcement, there is no requirement to make a deduction or withholding.

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 particular tax or other incentives provided to foreign lenders, save that foreign (non-resident) lenders are not subject to any deduction or withholding in Cyprus in respect of any payment under loan documentation in Cyprus. A non-resident foreign lender is not subject to any taxes in Cyprus.

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

The entry into any loan and/or security arrangement with a Cypriot entity will not render a foreign lender liable to Cypriot tax or otherwise be considered as tax-resident in Cyprus. The Cyprus tax system is one firmly based on residence.

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.?

A foreign lender will not be exposed to any significant costs in connection with the entry into a loan and/or security arrangement in Cyprus.

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 thin capitalisation rules under Cyprus law. There are no other adverse consequences.

7 Judicial Enforcement

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

The Cyprus courts adhere to the principle, as enshrined in Rome I Regulation (Council Regulation (EC) No. 593/2008), of the autonomy of the parties to a contract to choose the governing law.

Under the Regulation, if the law chosen is that of a country other than that relating most closely to the contract, the provisions of the latter law need to be respected. If the contract relates to one or more Member States, the applicable law chosen, other than that of a Member State, must not contradict the provisions of Community law.

Where the parties have not chosen applicable law the courts will determine the governing law in accordance with the provisions of the Regulation. The chosen foreign law will be recognised and enforced in Cyprus subject to being pleaded and proved except when it relates to procedural provisions, penal or revenue laws or is inconsistent with Cyprus public policy.

7.2 Will the courts in Cyprus recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

EU judgments are enforced in Cyprus through the procedures laid down in Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and Council Regulation (EC) No. 805/2004 of the European Parliament of 21 April 2004 creating a European Enforcement Order for uncontested claims.

Council Regulation (EC) No. 805/2004 offers significant advantages when compared with Council Regulation (EC) No. 44/2001. It accelerates and simplifies access to enforcement in a Member State by enforcing automatic recognition and enforcement and disposing of any other measures needed to be taken prior to enforcement. Unlike Council Regulation (EC) No. 44/2001, there is no need to obtain a declaration of enforceability in a Member State where enforcement is sought under Council Regulation (EC) 805/2004 and its recognition cannot be opposed, thus making the whole procedure efficient and less expensive. However, it is necessary to note that Council Regulation (EC) No. 805/2004 only applies to "uncontested claims" as defined in Article 3(1) of the Regulation.

A judgment given in an EU country is to be recognised and enforced in another EU Member State without any special procedure being required. Under no circumstances may a foreign judgment be reviewed as to its substance; therefore the court's jurisdiction extends to either accepting or refusing recognition of a judgment without interfering with the substance of the case. A Cyprus court may refuse to recognise a judgment issued in another EU country only in the limited circumstances specified in Article 34 of the Regulation, namely if:

(i) such 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; and

(iv) it is irreconcilable with an earlier judgment given in another EU or non-EU Member State involving the same cause of action and the same parties.

As soon as the judgment is recognised, the procedure followed will be that stated in the Regulation itself. According to EU Regulation 44/2001, a party seeking recognition or applying for a declaration of enforceability shall file an application by summons at the court where judgment enforcement is sought and produce a copy of the judgment that satisfies the conditions necessary to establish its authenticity together with a certification that the judgment is enforceable in the Member State of issue. The court or competent authority of the Member State where judgment was given shall issue, at the request of any interested party, a certificate using the standard form in annex V to the Regulation. The applicant must also give an address for service of the respondent within the area of jurisdiction of the court applied to.

Recognition and Enforcement of judgments given by New York courts:

There is no bilateral treaty between Cyprus and the United States regarding the enforcement of foreign judgments. As a matter of conflicts of laws principles, a judgment of the New York court will be recognised but will not be immediately enforced. The enforcement of such award falls under the Recognition, Enforcement and Execution of Foreign Judgments Law, Law No. 121(1)/2000, which applies to all cases in which recognition, registration and enforcement of decisions of foreign courts is requested. According to section 5, an application by summons accompanied by an affidavit must be filed at the District Court and in accordance with the applicable Civil Procedure Rules in Cyprus; the application will be fixed for hearing within four weeks from the filing date and the respondent must be served with a copy of the application without any delay. The respondent is given the opportunity to contest the application by filing a written objection accompanied by an affidavit at least two days before the date of the hearing. The Court will normally refuse to extend the time period for filing an objection unless special reasons are put before the court justifying the granting of such an extension.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Cyprus, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Cyprus against the assets of the company?

From a point of view of practice, this question raises a number of discrete questions. Turning to each one:

(a) suit can be filed immediately. The fact that there is a foreign law as the governing law does not delay filing of the suit. Obtaining a judgment is dependent on a number of variables, including adherence to timing of filings, any interlocutory filings made, defences raised, adjournments and delays allowed, complexities of the case, understanding or otherwise of the court. Obtaining judgment can take a number of years and enforcement even longer; and

(b) the enforcement of a foreign judgment being an EU judgment under Regulation 44/2001 will be almost immediate in accordance with the terms of the Regulation. Enforcement of a New York judgment raises issues of merit and can result in a full trial on and re-examination of the merits before a Cyprus court.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Under Cyprus law the enforcement of collateral security does not require or dictate the pursuit of a public auction or the obtainment of regulatory or other consents. The enforcement of security is a private party matter implemented in accordance with the terms of the security documents subject to applicable law. With respect to regulated entities (investments firms, funds, etc.) there may be a requirement for regulatory approval. In the context of the exercise of rights of enforcement, a secured creditor owes an obligation to act in good faith and to act reasonably.

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

There are no restrictions applicable to foreign lenders with respect to filing suits or foreclosing on security. Security can be enforced in accordance with its terms without the aid of court or other proceedings. There is nothing preventing a foreign lender enforcing

its security and to the extent required (if at all) filing suit against a Cyprus company.

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

Currently there is nothing under Cyprus law that provides for any form of moratorium on enforcement of claims of secured lenders. Under present draft legislation amending Companies and Insolvency laws, there will be circumstances where a moratorium, without impacting priority or validity of security, will be provided. The application of this is not yet known but if it follows existing precedents (in Ireland and the UK), enforcement may be delayed pending some form of arrangement or reorganisation of the defaulting company.

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

Any award given by an arbitral tribunal covered by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York) will be recognised and enforced in Cyprus without any re-examination of the merits subject to compliance with the provisions thereof.

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 current legislative provisions, a secured lender holding collateral from a Cyprus collateral giver can look to the security to recover the underlying debt. If there is a shortfall, the secured lender can prove in the liquidation for the shortfall as an unsecured creditor. If there is a surplus, the secured creditor will have to account for it to the liquidator. In order to be able to look to or enforce the security, the secured lender must have, if applicable, completed all prescribed perfection steps.

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 Companies Law, cap.113 does provide for preference periods and other clawback rights and also sets out who are preferred creditors. Section 301 of the Companies Law provides that any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company within 6 months before the commencement of a winding up shall be considered as a fraudulent preference and is void. In order to constitute a fraudulent preference the company must go into liquidation within 6 months of the transaction relating to the company's assets and the transaction must have been entered into with the dominant intention of providing such preference. In the case of a transaction entered into on an arm's length basis on commercial terms, it is unlikely to amount to a fraudulent preference.

Section 303 of the Companies Law also provides for clawback rights with respect to floating charges granted within 12 months of the company going into liquidation. In such circumstances the floating charge is invalid save to the extent that monies have been advanced following the grant of the security unless it can be proven by the creditor that the company was at the time of grant of the security, solvent.

The company provides for the priority (after secured creditors other than floating charge holders) of certain claims of creditors, being in essence: (a) all government and local taxes and duties due at the date of liquidation, having become due and payable within 12 months before that date and in the case of assessed taxes, not exceeding one year's assessment; and (b) all sums due and payable to employees by way of salaries and other entitlements such as accrued holiday pay, deductions from wages and any compensation for injury due.

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

In general, all companies registered under the Companies Law or to whom the Companies Law applies, are subject to winding-up proceedings under the Law. In respect, however, of a company that carries on business in more than one Member State of the EU, a court will only have jurisdiction under the EU Insolvency Regulation, to wind up the company, even if it is a Cyprus company, where it has its centre of main interests (COMI). Secondary liquidation proceedings can be brought in other jurisdictions where the company has an establishment. In addition, there are specific pieces of legislation dealing with regulated entities that provide for proceedings to be followed in their winding up – for e.g. banks, insurance companies, investment firms, etc.

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 a general principle, the enforcement of a security interest is a matter that is dealt with in some detail in the instrument creating the security and in particular will set out (i) the procedures to be followed in enforcement, and (ii) the powers that the secured lender has on enforcement such as (a) to take possession of the asset(s), (b) to sell the assets at such price as it may reasonably realise, and (c) appoint a receiver or receiver and 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 Cyprus?

A submission to a foreign jurisdiction is legally binding and enforceable under Cyprus law, subject only to public policy requirements. In usual finance transactions there are no public policy reasons to disapply such a submission. Furthermore, in the context of the EU, the provisions of the EU Convention on jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters will also apply to give effect to the choice of jurisdiction of the parties.

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

The waiver of sovereign immunity will be legally binding and enforceable under Cyprus law.

10 Other Matters

10.1 Are there any eligibility requirements in Cyprus for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Cyprus need to be licensed or authorised in Cyprus or in their jurisdiction of incorporation?

There are no eligibility requirements in Cyprus. Foreign licensed lenders do not need to be licensed in Cyprus to enter into loan transactions.

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

Save for the matters considered above, there are no other issues that need to be considered in entering into a loan transaction in Cyprus.

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Thomas, who is one of the two founding partners, has over twenty years of experience in the profession. His areas of practice include all areas of corporate and commercial law but with particular focus on banking, asset finance, corporate finance, project finance (across all sectors), capital markets, M&A, structured products, financial services, EU & competition and arbitration.

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Thomas also has experience with drafting legislation and has in the past drafted legislation relating to investment funds for Central Bank of Cyprus.

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Professional Memberships: Member of the Cyprus Bar.

Keane Vgenopoulou & Associates LLC was established in November 2012 by the two named partners Thomas Keane, Barrister at law and Christina Vgenopoulou, Advocate.

The underlying objective of the partners has been the creation of a law firm able to cater for the complex needs of business in the 21st century by offering legal knowledge of the highest level as well as a keen understanding of the modern business environment and the needs of our clients. To that effect the firm applies a cross-disciplinary approach combining, legal, regulatory as well as tax considerations. We are a full-service law firm but have particular experience and expertise in the areas of financial services, banking, capital markets, corporate, M&A, EU law, anti-trust (EU and Cyprus), corporate finance, asset and project finance, intellectual property, energy, taxation and public procurement.

With over thirty years of collective experience, the firm stands for technical excellence, quality of service and integrity. We are well placed to provide full and complete solutions to the most demanding standards to meet the needs of our clients.

Czech Republic

Roman Šťastný

JŠK, advokátní kancelář, s.r.o.

Patrik Müller

1 Overview

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

Loan documentation is becoming increasingly covenant heavy, and banks tend to use documents based on the loan market association standards even for smaller bilateral loan facilities. The banking loan market has started growing after the recent feeble years.

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 the last two years has been the credit provided for the purpose of acquisition of the Czech subsidiary of Telefónica by PPF group. A substantial part of the total purchase price of CZK 60,000,000,000 has been financed through the banking loan. Other significant banking transactions occurred in the real estate and corporate markets with volumes between 2 and 10 billion Czech koruna.

2 Guarantees

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

Yes, but certain restrictions may apply.

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

Guarantees are regarded as unilateral acts under Czech law and so no consideration 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 interests of their company. If a company grants a guarantee (be it for the borrowings of a related or an unrelated party) and the relevant director is not able to demonstrate adequate benefits of the guarantee to the company, she/he can become personally liable for the damage caused to the company by issuing the guarantee. In addition, if a controlling company uses its influence over a controlled company to make the controlled company issue a guarantee, the controlling company will be liable to the controlled company for any resulting damage.

Certain guarantees provided without adequate consideration can be set aside (be considered ineffective) in insolvency proceedings over the party issuing the guarantee.

Additionally, in case of guarantees issued on behalf of a related party without any consideration or benefit, tax authorities could consider the guarantee as a gift to the party on whose behalf it is issued and assess a gift tax on such transaction.

2.3 Is lack of corporate power an issue?

Generally, any business company can issue guarantees regardless of its object of activity. Bylaws of the company can restrict the power of its directors to issue guarantees but such restriction will not normally be opposable to third parties acting in good faith.

However, in certain cases, the law requires the shareholders' consent or at least a notification of the shareholders before a company can issue a guarantee and the lack of the consent/notification can invalidate the guarantee.

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

Business companies do not need a governmental or similar consent for issuing a guarantee. However, if a company intends to issue a guarantee securing the obligations of its related party (including members of the same group, its directors or proxies) it must first obtain consent of or at least inform the general meeting of its shareholders. The shareholders may prohibit the company from granting such a guarantee.

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

Not specifically. However, a guarantee provided by a company with no adequate consideration when the company was insolvent or in the stage that lead to the insolvency of the company (including the company's overindebtedness) will be set aside in insolvency proceedings.

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

Currently, no. However, the law authorises the government to adopt

certain restrictive measures on the flow of capital during economic or financial emergencies in the Czech Republic.

3 Collateral Security

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

A broad range of assets can be used as a fixed collateral security including real estate (land and buildings), movable (personal) assets, shares, bonds, receivables and certain rights (including certain intellectual property rights).

The law also enables the creation of floating charges over 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 that are not a part of the land) 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 is verified by a notary. The mortgage must be registered in the cadastral register in order to become effective.

A pledge over real property that is not subject to registration in the cadastral register (certain petty or underground constructions) is taken through a notarial deed and registration in the notarial register of pledges.

The perfection of security over certain specific types of assets requires registration in specific registers (for example a mortgage over an aircraft registered in the Czech Republic must be registered with the Czech aviation register).

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

Yes. The pledge agreement must be entered into in writing and must specify the pledged receivable as well as the secured obligation.

The pledge is not enforceable against the debtor of the pledged receivable until the pledge is notified to the debtor by the pledgor or evidenced by the pledgee.

Alternatively, the pledge agreement can be made in the form of a notarial deed and the pledge entered into the notarial register of pledges. Then the pledge becomes enforceable upon its registration.

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

Yes. It is usually created as a pledge over the account holder's receivables for payments from the account. Certain financial transactions can be secured by the pledge over the cash directly.

3.6 Can collateral security be taken over shares in companies incorporated in the Czech Republic? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, a pledge can be taken over the shares issued by a Czech joint stock company as well as over the ownership interests in a Czech limited liability company. Each must be created under a pledge agreement entered into in writing between the owner of the share (ownership interest) as pledgor and the beneficiary of the secured obligation as pledgee and specifying the pledged shares (ownership interest) and the secured obligation.

Shares of a Czech joint stock company can be issued in a certificated form (only in case of registered shares) or book-entered. The perfection of a pledge over certificated registered (*au nom*) shares requires a pledge endorsement in addition to the hand-over of the shares to the pledgee or a custodian.

A pledge over book-entered shares is perfected by its registration with the central depositary. A pledge over immobilised shares is perfected by the notification of the relevant depositary of the pledge. A pledge over an ownership interest in a limited liability company requires registration with the commercial register.

The relevant pledge agreement could be in theory governed by a foreign law but would still have to satisfy the requirements of Czech law in respect of the creation of the pledge if it was to be enforced in the Czech Republic.

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

Yes, a floating pledge can be taken over the inventory defined as a certain set of assets. A fixed pledge can be created over the individual assets forming part of the inventory (but not over an asset which is pledged as a part of a set of assets). For procedure, see the answers to questions 3.2 and 3.3.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company can use its assets as 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 in section 2).

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Where a pledge agreement must be made in the form of a notarial deed, the fee is set accordingly to the value of the secured obligation. The rate ranges from 1% to 0.05% of the obligation (the higher price the lower the rate); the minimum fee is *ca*. EUR 32 and is charged only for secured amounts 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.

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, pledges of receivables in certain cases 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. If such pledge agreement is executed under power of attorney also the power of attorney will have to be made in the form of notarial deed.

Signatures of parties on mortgage/pledge agreements in respect of real estate registered in the cadastral register or in respect of ownership interests in limited liability companies must be officially authenticated (by a notary public, an attorney or a municipal office).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

Yes, Czech companies are generally prohibited from providing financial assistance (in the form of loans, credits, guarantees or other security) with the acquisition of their shares or the shares of their holding companies. There are however certain white wash procedures available to the companies that may enable them to provide financial assistance in certain cases.

Financial assistance restrictions have not been found to apply to acquisitions of shares in sister companies.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will the Czech Republic recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

New provisions that should allow the use of security trustees have been recently introduced into Czech law. However, these provisions are not tested yet and banks tend to avoid them for now.

5.2 If an agent or trustee is not recognised in the Czech Republic, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Yes, a parallel debt or a similar provision needs to make the security agent a joint and several beneficiary (creditor) of each secured obligation with each primary creditor (lender) of the obligation. The Czech law security is then created to the benefit of the security agent to secure all the obligations owed to the agent as the joint and several creditor with the lenders. The security agent can then enforce the security in its own name to the full extent of the secured obligations and distribute the proceeds to the lenders under the facility agreement.

5.3 Assume a loan is made to a company organised under the laws of the Czech Republic and guaranteed by a guarantor organised under the laws of the Czech Republic. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

No (subject to different provisions in the facility agreement or the guarantee), but the transfer will be enforceable against the borrower and the guarantor only after Lender A notifies them of the transfer or Lender B evidences the transfer to them.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest payable by a Czech tax resident to a foreign entity which has no permanent establishment in the Czech Republic is subject to a 15 per cent withholding tax. The withholding tax does not apply to interest payable to beneficiaries resident for tax purposes in EU or European Economic Area countries or in jurisdictions which have entered into a treaty with the Czech Republic reducing the withholding tax to zero. No specific withholding tax is applicable in respect of the proceeds of a claim under a guarantee or enforcement of security. However, to the extent the proceeds are used to satisfy the secured interest, the tax withholding from interest payments may apply.

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

There are no incentives aimed at foreign lenders in the Czech Republic. For the applicability of withholding tax and various notarial or registration fees see other parts of this questionnaire.

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 provided 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 State without any re-examination.

Recognition of judgments of other jurisdictions in the commercial matters is subject among other conditions to a reciprocity having been demonstrated. Several judgments of New York courts have already been recognised in the Czech Republic and the reciprocity is believed to have been established between the Czech and New York courts.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in the Czech Republic, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in the Czech Republic against the assets of the company?

A suit can be filed within days (depending on the complexity of the matter and time it requires to prepare it). In cases of a receivable lower than *ca*. EUR 40,000 an electronic action is available. The period for obtaining a judgment varies from one to several months depending on the cooperation of the defendant and complexity of the case. The process can take even up to 3 years in case of an appeal.

Once a final judgment is obtained, it is enforced by an executor (i.e. authority appointed to execute judgments). Enforcement proceedings are usually faster and last a few months.

The enforcement of a foreign law judgment should not take longer than a judgment of a Czech court.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Generally a secured creditor can satisfy its claim from the collateral only through a public auction or in a court-ordered auction. New provisions that should allow a direct enforcement of collateral security by the creditor have been recently introduced into Czech law but have not been tested in practice yet.

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

No, the position of foreign lenders does not differ from that of their Czech counterparts. However, in practice they must expect that any documents presented to Czech courts or other authorities need to be translated into Czech.

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

Yes. The enforcement of lenders claims and security is generally restricted after insolvency proceedings are initiated against the borrower or the owner of the collateral. For more details, see our answer to question 8.1.

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

Yes. The Czech Republic is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958. Pursuant to this Convention, arbitration awards are recognised in the Czech Republic and enforced under 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, except 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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JŠK, advokátní kancelář, s.r.o. (JSK) has serviced Czech and international clients since 2004. All of JSK's partners have spent many years in major global law firms before they joined JSK to accomplish their desire to provide top-class international services in close contact with the clients and the market.

JSK works a lot for banks and insurance companies, as well as for local and multinational businesses ranging from energy generation to motorway construction and nanotechnology.

At the time of writing, JSK has 4 partners and 15 other lawyers. In financing, JSK normally works for banks or for borrowers.

Dominican Republic

QUIROZ SANTRONI Abogados Consultores

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1 Overview

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

The most significant progresses in the lending markets in the Dominican Republic result from the enactment in 2011 of a new law aimed towards the Development of the Mortgage Market and Trusts in said jurisdiction, followed by the adoption of its rulings of enforcement by the Monetary Board and the Executive Branch of the Dominican Republic. The law incorporated into Dominican legislation the possibility of settling trusts, made significant improvements in the legislation and regulation on securitisation of mortgage loans, allowed for the use of security or collateral agents, and simplified the process of foreclosure over conventional mortgages. This law also allowed for trusts to be used for security purposes by conveying collateral directly to the trustee as security of a financial obligation. More recently, the Dominican Republic has embarked on the process of adopting a new law on securities over personal property, in an attempt to create uniform processes for the creation of securities over all types of personal property, providing better access to financial services, and allowing for alternative methods of enforcement of the collateral, *in lieu* of conventional judicially administered foreclosure proceedings.

1.2 What are some significant lending transactions that have taken place in the Dominican Republic in recent years?

Major lending transactions in recent years include secured financing transactions over important mining concessions in the country, including a USD1.035bn finance operation over the Pueblo Viejo gold mine, leased to Barrick Corporation and Goldcorp, and corporate loans granted to one of the major energy generators in the country, EGE Haina, for the construction and/or expansion of conventional plants and wind farms.

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)?

Any subsidiary, local branch or other affiliates of a borrower can guarantee obligations of its parent or related company or other members of its corporate group under Dominican law.

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

There are no enforceability concerns in this respect addressed under Dominican law.

2.3 Is lack of corporate power an issue?

Lack of corporate power may invalidate a borrowing or its collateral; accordingly, presenting evidence of authority to enter into and execute any loan or security documents in the Dominican Republic is inexorably required, especially in connection with mortgages where presentation of such evidence to local registries is mandatory to allow recording of a security interest over real estate.

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

Shareholder approvals may be required under the bylaws of any company in the Dominican Republic, and such approval is mandatory in connection with the pledge over quotas in a limited liability company (SRL) under our Business Associations Law. Governmental consents are typically required to allow security interests to be granted over any governmental or municipal concessions or licences. Filings before special registries (Land Registry offices, Justices of the Peace, Mining Rights registries, etc.) and notices to third parties will also be typically necessary to perfect a security interest.

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

Limitations may result from asset valuation norms applicable and enforced by financial authorities in the Dominican Republic over local commercial banks. Limitations of the same nature apply in connection with non-possessory pledges over personal property and equipment under Law 6186 which limits borrowings to an amount not exceeding 70% of the value of the collateral.

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

Since the enactment of Monetary and Financial Law 183-02 in 2002, monetary obligations are to be paid in the agreed currency; accordingly, a secured lender may benefit from security interests granted and enforceable in the same currency of the borrowing.

3 Collateral Security

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

Conventional mortgages over real property, along with non-possessory pledges over personal property and equipment, remain the main types of security interests granted over assets in the Dominican Republic. However, security interests are also available over other types of property and interests including intangible assets such as stock, funds in bank accounts, account receivables, interests in contracts, concessions or licences, and over other types of tangible typically deemed immovable property such as aircraft, naval craft and mining concessions.

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?

Currently, since almost all types of security interests are governed by different laws demanding for different creation and perfection requirements depending on the nature of the collateral, an agreement is typically required in relation to each type of asset. A mortgage agreement requires execution by both secured parties and the owner of the real estate as guarantor and must include all mandatory details required under the Land Registration Law and its rulings of enforcement, including a legal description of the land. Signatures placed on the agreement must be certified by a Notary Public.

For purposes of perfecting a non-possessory pledge, the law includes in this respect a requirement of specificity, which means that the assets subject to the security interest must be identified as well as possible. In the case of equipment, there must be a description of each machine and its serial number. Indicating the value of the pledge is also a requirement, as well as its location. The agreement embodying the pledge must be signed in the presence of a notary public or Justice of the Peace.

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

Security may be taken, as expressed above, over real property, under the general provisions of the Civil Code of the Dominican Republic and the Land Registration Law, while security over machinery and equipment will typically be granted under non-possessory pledges, a type of security similar to the chattel mortgage and originally intended for crops and agricultural equipment but later expanded to cover virtually all sorts of personal property or movable assets, including industrial machinery and motor vehicles. This type of security is governed by the Agricultural Incentives Law 6186.

A mortgage will require filing before a Land Registrar's Office with jurisdiction over the real estate depending on its location. Recording fees include a 2% tax based on the secured amount; pledges over personal equipment will require the pledge agreement to be placed on record at the office of the Justice of the Peace of the debtor's domicile in the Dominican Republic, except that in the case of motor vehicles, the document must be, additionally, recorded before the Tax Administration authorities. Recording fees are nominal.

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

Account receivables, being intangible assets, may be subject to pledges. These types of securities are governed by the provisions set forth in Article 91 of the Commercial Code which relate to the commercial pledge. A commercial pledge is usually the type of security considered for purposes of pledging all types of intangible assets.

Applicable to all pledges over intangible assets, perfection takes place through a notice of the pledge agreement by an appointed bailiff. The notice which includes a copy of the corresponding pledge agreement is given to the guarantor's counterpart under the relevant pledged agreement; in this case, the lessor. Costs for perfection are nominal. The bailiff act is also registered before the Civil Registry held by the municipality; costs in connection with this registration process are also nominal.

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

Security may be taken over cash deposited in local bank accounts. The process is the same as required for the perfection of a security interest over intangible assets. The parties however will typically enter into special account control agreements with the depositary bank.

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

Collateral may be taken over shares in companies incorporated under Dominican law. Shares are usually issued in certificated form, except in connection with limited liability companies, where interests of the partners are represented by quotas, which may not be represented by negotiable instruments.

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

A non-possessory pledge over inventory may be granted under Law 6186 in similar fashion to a pledge over equipment and machinery, provided however that the pledge agreement clearly identifies the assets comprising the inventory by including their nature and their quantity. Failure to include these details may render the security interest unenforceable.

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 over its own assets and interests to secure its own obligations, and to secure the obligations

of other borrowers or guarantors under a credit facility, whether affiliated persons or third parties.

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 mandatory for any mortgage agreement and non-possessory pledge agreements. Recordation of a mortgage will entail recording taxes determined as 2% of the secured amount; recording fees for pledges are nominal. Mortgages over non-registered land, aircraft, naval craft and mining concessions must be documented in authenticated form before a Notary Public and witnesses. Recording tariffs over these types of security interests may also be required by the registry authorities.

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 costs for recording mortgages, whether over registered land or non-registered properties, including over movable assets and interests deemed under the law as immovable property (aircraft, mining concessions, etc.) are certainly significant and although filing may be carried out in a timely fashion, the process of obtaining a security certificate or certification further evidencing the recordation of the security interest by the corresponding registry can take several months. Filings and notices are required in connection with pledges however only involve nominal costs and may be carried out quickly.

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

Consents from governmental authorities will typically be required in connection with pledges over concessions or similar licences over public services or works, including mining concessions, telecommunication concessions, energy generation or distribution concessions, and other general concessions granted by municipal authorities or the Central Government.

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

Revolving credit facilities may be secured by any type of security interest available under Dominican law, and the same may be perfected before any amount is disbursed under the facility. The amount secured under the facility or any disbursement thereof is limited to the amount stated in the corresponding security agreement.

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

As explained above, certain mortgages are required to be documented in authenticated form before a Notary Public who maintains the original statement of the security in its protocol or records, and issues a certified copy for further registration or enforcement processes. The rest of the security interests may be documented in private form although signatures placed on the agreements are required to be certified also by a Notary Public. Under Dominican law, any agreement must be executed in as many counterparts as parties thereto, and in connection with security agreements, additional counterparts may be required to be executed for recordation in public registries.

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

Restrictions may apply in connection with limited liability companies (SRLs), and simplified stock companies (SASs) organised under Dominican law, where partners are prohibited from assuming financial commitments to be secured by the company when (i) the transactions exceed 15% of the net value of the company in the case of SRLs, and (ii) during the time the SAS is owned by a sole shareholder, the transactions exceed 25% of the net value of the company.

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

The same restrictions explained above apply to the extent the borrowing is taken by a partner or shareholder of the guaranteeing company.

(c) Shares in a sister subsidiary

The same restrictions explained above apply.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will the Dominican 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?

Following the enactment of Law 189-11, a security may be granted solely to a collateral or security agent, provided it is authorised to act as such by the monetary and financial authorities in the Dominican Republic, or by a trustee, also authorised to act as such under Dominican law and regulation. The security may be granted accordingly through security documents signed only with the security agent, and may also be enforced by said agent rather than by the lenders acting separately.

5.2 If an agent or trustee is not recognised in the Dominican 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?

The simple solution to avoiding any risks associated with an agent or trustee not being recognised in the Dominican Republic is for the security to be recorded in the name of each lender or secured party. This however would become too cumbersome if secured parties include holders of notes.

Parallel debt or similar structures, including schemes under which a mirror (parallel) debt is created in favour of the security or collateral

agent (such as debt resulting from a guarantee granted for the benefit of the original lenders by such agent, which would allow the agent to collect against the main guarantor or borrower) and such as the debt that is secured by the local guarantor, could be considered in these scenarios, although in practice, these risks are often overlooked by law practitioners in the Dominican Republic, and no structures are designed whatsoever to mitigate the same, especially if security packages do not include mortgages over real estate properties, where registration costs and processes could result in being considerably high and cumbersome. Lenders may also resort to participation schemes where the security is only granted and perfected in the name of the lender of record, to be enforced directly by the same, although ultimately for the benefit of participants in the loan which will be deemed to have a claim only against the lender of record, and not directly against the borrower or guarantor.

5.3 Assume a loan is made to a company organised under the laws of the Dominican Republic and guaranteed by a guarantor organised under the laws of the Dominican 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?

Any assignment of a loan from one lender to another, unless through a participation scheme where the assignor remains as the lender of records, requires, for the loan and its security to be enforceable against the borrower or the guarantors directly by the assignee, that the assignment is notified to the borrower and the guarantors under Article 1690 of the Civil Code of the Dominican Republic, which governs in general assignments or intangible assets, including account receivables. This notice is usually carried out with the assistance of a bailiff.

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, any payment made abroad or credit to a non-domiciled or residing person which is deemed income of Dominican source will demand the application of a withholding tax by the payer. In the case of loans payable to foreign lenders, the withholding tax is currently set at 10% over the interest portions of the payments. Principal portions of the loan are not subject to a withholding tax, nor are payments on interest paid to local lenders, provided these are corporations and not individuals.

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 are only available in connection with special legal regimes in force, including for the development of tourism projects and renewable energy projects. Certain concessions over public works or services may also include tax exemptions for the persons providing finance to the underlying projects and operations of these concessions, provided the concession agreements are previously approved by the National Congress.

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

Interests from loans made to a Dominican company, or loans secured by real property in the Dominican Republic, are deemed income of Dominican source and are therefore taxable in the Dominican Republic, typically through a withholding tax as explained in previous questions. Typically, foreign lenders limit the ability to local borrowers in applying deductions over any payments, by having borrowers undertake the obligation to gross up payments – allowing the lender to receive net payments in amounts equal to those it would otherwise receive should no withholding or deduction for local taxes be applicable.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are no other significant costs to be incurred by foreign lenders in relation to those which would be otherwise incurred by a domestic 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.

A company operating locally, taking loans from a lender which is organised in a tax haven or other jurisdiction with lower income tax rates, may have problems in deducting paid interest as an expense for purposes of determining its own net and taxable income, or if in connection with such interest payments the withholding tax failed to apply.

7 Judicial Enforcement

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

Courts in the Dominican Republic will recognise a foreign governing law and enforce a contract subject to a foreign governing law in general; however, security interests over assets or interests deemed to be located in the Dominican Republic can only be created and enforced under Dominican law.

7.2 Will the courts in the Dominican 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?

In general, the courts of the Dominican Republic would recognise as a valid judgment, a final and conclusive judgment obtained from foreign courts and would give a judgment based thereon, provided that such judgment rendered by the foreign court is declared enforceable through the issuing of a writ of execution (locally called

"*exequatur*") by the corresponding Dominican court. Based on existing law, Dominican courts will issue such writ of execution or *exequatur* without need for a retrial: (i) if there exists a treaty with the country where the judgment was issued; or (ii) if such judgment: (a) complies with all formalities required for the enforceability thereof under the laws of the country where the same was issued; (b) has been translated into Spanish, together with related documents, and satisfies the authentication requirements of Dominican law; (c) was issued by a competent court after valid service of process upon the parties to the action; (d) was issued after an opportunity was given to the defendant to present its defence; (e) is not subject to further appeal; and (f) is not against any public policy of the Dominican Republic.

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 Dominican 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 Dominican Republic against the assets of the company?

As with any litigation matter in the Dominican Republic, the process to obtain a favourable judgment from Dominican courts, enforceable against a defendant or its assets, could take in the best case scenario up to 6 months from the inception of the relevant judicial action, but up to 1 year or more in normal circumstances. The process of obtaining an *exequatur*, although it does not require a re-examination of the merits of the case since there is no special procedure under Dominican law, can take the same time mentioned above for other general lawsuits.

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?

Foreclosure on any type of collateral will demand judicial intervention, and in the case of security interests over real estate or personal property, public auctions are generally mandatory. In certain proceedings including governmental concessions and mining concessions, any bidder in a public auction may be required to be pre-approved by the granting authority. The same would apply if the concession is adjudicated to the secured party holding the security interest in the same, but intending to assign or sell it privately to a third party.

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

Foreign lenders may be at a disadvantage when it comes to asserting their rights in Dominican courts by the potential need to post security to cover attorney fees and court costs incurred by the defendant, as well as any damages for wrongful prosecution in case the latter is successful. This requirement is referenced in Article 16 of the Civil Code, which reads: "*In all branches of the law and before all courts, a foreigner in transit acting as plaintiff or intervener is obligated to post security for the payment of the costs and damages resulting from the lawsuit, unless he possesses real property in the Republic of a value sufficient to cover the payment thereof.*" The same principle is in force under Articles 166 and 167 of the Code of Civil Procedure. The defendant can request the placement of this security at the inception of the suit. In practice, the demand is for a very large bond and to the extent the request is granted, the foreign lender could be placed in a dilemma of either freezing a considerable part of its assets or of appealing against the amount of the bond, arguing that it is excessive, in which case the action will be stayed for a considerable amount of time until the amount of the bond is reset by the Court of Appeals. If it is lowered by any amount, the defendant, in order to gain time, can appeal to the Supreme Court. The need for foreign claimants to post security has thus become a means to prevent them from having their day in court. Foreign and international lenders are, however, in principle, able to protect themselves by inserting a waiver to these provisions found in Dominican Codes into their loan agreements. In our opinion, such waivers are considered valid. Under certain laws including the Dominican Labour Code, the Laws on Industrial Property and copyrights and more recently under the current Business Associations Law of the Dominican Republic, the litigation bond requirement should not apply, and some courts have also found the requirement to violate Constitutional rights; however the incorporation of the waiver explained above is still highly recommendable.

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

Under current insolvency laws in the Dominican Republic, proceedings governed by the same only affect unsecured creditors, or unsecured portions of a claim. Accordingly, most secured creditors may continue to enforce their collateral security against the bankrupt borrower, and would not be affected by moratoriums otherwise applicable upon the entry into force of a bankruptcy judgment.

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

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, as approved by Congress on July 10, 2002, will apply to a foreign arbitral award enforced in the Dominican Republic, provided it is final and conclusive between the parties thereto. In accordance with Article 3 of the aforementioned Convention, each of the contracting States undertakes the obligation to recognise the authority of arbitral awards and to grant its execution in accordance with the norms of procedure in force within the territory where the award is being invoked, with conformity to the conditions established in the Convention, while providing that the recognition and enforcement of arbitral awards will not be subject to conditions appreciably more rigorous, or higher fees or expenses, than those applicable to the recognition and enforcement of national arbitral awards. Based on the above, a debate had emerged on the enforceability of a foreign arbitral award within Dominican territory following the ratification of the New York Convention in said jurisdiction. Currently however, based on judicial precedents and the terms of the Commercial Arbitration Law in force in the Dominican Republic as adopted in 2008, the enforcement of an arbitral award is subject to basically the same rules to be observed in connection with the enforcement of foreign judgments, i.e., the obtainment of a writ of execution, called an *exequatur*.

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?

Current insolvency laws of the Dominican Republic, except for the rules concerning regulated entities such as banking institutions and insurance companies, among others, are based on outdated provisions on bankruptcy, dating back to the early nineteenth century and which remain virtually unchanged in the Dominican Republic. These provisions only relate to merchants, will generally only affected unsecured creditors, and will often only aim at liquidating a business, and not its reorganisation, thereby offering very little protection for a debtor. Accordingly, secured creditors may continue to charge interest on their loans against the bankrupt debtor and enforce their collateral.

8.2 Are there any preference periods, claw back rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

If a formal bankruptcy is declared against a person in the Dominican Republic, preferential payments and transfers of assets, and the granting of security for antecedent debts made by the debtor prior to bankruptcy during the time it was insolvent, can be set aside. This period, during which the effect of bankruptcy is retroactive, is known as the suspect period. Its inception is determined by the judge. Upon entry of a bankruptcy order, the judge will determine a date of cessation in payments. The following transactions by a debtor may be declared null and void should they be carried out after said date of cessation in payments or within the preceding 10 days of said date: all transfers of personal property or real property without consideration; all payments for unmatured debts; all other payments unless made in cash or with a negotiable instrument; and any security interest on property of the debtor, granted by the same as security for pre-existing debts. Any other transaction may be declared null and void should it be proven that the other party had knowledge of the debtor's state of insolvency.

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

Special insolvency, reorganisation and liquidation proceedings apply to banking institutions under Monetary and Financial Law 183-02, to insurance companies under the Insurance and Bonds Law 146-02, pension funds under the Social Security Law 87-01, and Trusts under Law 189-11. The general rules on insolvency in the Dominican Republic will only apply to merchants, including corporations, excluding therefrom individuals not deemed as such. There are no special rules in connection with public 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 enforcement?

Creditors in general may resort to prejudgment liens and cautionary measures to set aside assets or interests of the debtor in their benefit and to secure payment or their claims against the same, including: should the claim be for a liquid sum duly evidenced in a valid instrument such as a promissory note or approved invoices, the possibility to garnish bank accounts and account receivables of the debtor; or, with an authorisation from a judge, to attach personal property of the borrower and register judicial mortgages on real estate owned by the same.

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 Dominican Republic?

In general, a party's submission to a foreign jurisdiction is legally binding and enforceable under the laws of the Dominican Republic, although certain matters relating to real estate or other matters of public policy are of the exclusive competition of local courts.

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

A party's waiver of sovereign immunity is legally binding and enforceable under the laws of the Dominican Republic.

10 Other Matters

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

Unless the lenders also carry out financial intermediation activities in the Dominican Republic, i.e., the process of collecting funds from depositors in said jurisdiction, lenders need not to be authorised or licensed to grant credit facilities or loans to a Dominican borrower, in their jurisdiction of incorporation or in the Dominican Republic. To act as a security agent in connection with collateral located in the Dominican Republic, such agent needs to obtain a licence from the monetary and financial authorities of the Dominican Republic; the process is open to local and foreign banking institutions, and business associations incorporated solely for purposes of acting as security agents. Additional authorisations may be required from the Securities Superintendence if a person intends to act as a security agent in connection with publicly traded securities.

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

As per the terms of Article 63 of the Currency Exchange Regulation, as adopted by the Monetary Board of the Dominican Republic, although provided solely for statistical purposes, failure by any local person or entity to report before the International Department of the Central Bank of the Dominican Republic obligations assumed in a foreign currency, may be construed by local monetary and financial

authorities as an infraction punishable under the Monetary and Financial Law 183-02. Therefore, although explicitly provided as an obligation of the obligor, we recommend foreign lenders to require from their borrowers fulfilment of this reporting obligation, which is carried out by delivering a special form available from the Central Bank of the Dominican Republic.

Finally, in addition to proposed legislation relating to security interest over personal property and equipment creating uniform rules and publicity requirements for such type of guarantee, irrespective of the nature of the collateral, lenders should also take into account proposed insolvency legislation which may be adopted by the Dominican Republic. Such proposed legislation intends to extend insolvency proceedings, including towards the reorganisation of a failed business, to secured creditors, enforcement actions of which may be stayed upon initiation of the bankruptcy proceedings.

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Hipólito García is a partner at QUIROZ SANTRONI, leading the Banking and Finance practice of the firm. His vast experience and practice includes project and corporate finance, M&A, taxes, bankruptcy, and corporate law in general, having participated in several of the most important transactions in the country, including the financing of one of the biggest investments in the Dominican mining sector, in which he acted as local attorney for the lenders. He has also been involved in the merger of major commercial banks and insurance companies in the country. He has assisted many of the most important international finance institutions, including development and multilateral banks, in the structuring of numerous corporate finance transactions for major energy and road infrastructure projects, characterised by the complexity of syndication, the use of trust and collateral agency schemes and the intricacy of regulated sectors. He studied law at the Pontificia Universidad Católica Madre y Maestra, graduating with honours in 1999. He was a recipient of the Fulbright Scholarship, and later obtained the degree of Master of Laws (LL.M.) from Tulane University (USA) in 2002, where he focused on studies in financial law, payment systems and insurance law.

QUIROZ SANTRONI is an environmental, consulting, and business law firm, considered the leading environmental law firm in the Dominican Republic. It is also recognised for its corporate-commercial practice as well as for its assistance in connection with major tourism and real estate projects. Its particular strength lies in its ability to integrate legal, corporate and environmental aspects into investment projects, transforming them into truly sustainable businesses. Its team of lawyers and consultants implement an approach that is both different and proactive when advising their clients, having taken on a project management role in several cases assigned to the firm.

England

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1 Overview

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

The combination of a shortage of suitable targets, significant capital needing to be put to work and the return of trade buyers to the M&A market has meant that bid situations have become highly competitive. High yield has continued to be a prominent feature in European leveraged deals and has evolved as a main stream financing product for European corporates and sponsors. The convergence of the US and European markets has continued and it is now commonplace to see US investors investing in European assets and European borrowers looking to adopt US-style financings in the European loans market. Banks are having to consider the US Leveraged Lending Guidelines on all new deals and this, combined with the increasingly strict regulatory capital environment applicable to banks, has created opportunities for direct lending funds who are less regulated and position themselves as being able to pitch on higher leverage multiples, albeit this is still generally limited to mid-market deals. The leveraged market is still considered to be a sponsor-friendly market as evidenced by the emergence of European cov-lite structures and, later in 2014, a push by sponsors to have term loans subject to bond-style undertakings only.

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

Telecoms remains one of the most active sectors as evidenced by some of the largest deals of 2014, such as Altice's acquisition of SFR from Vivendi for more than €17bn and Liberty Global's €10bn acquisition of Ziggo. Both deals involved significant high yield issuances with the high yield raising for the SFR acquisition being the largest cross-border high yield bond offering ever, the second-largest US offering and includes the third-largest single tranche ever sold. Ceva Sante's €818m facility also delivered Europe's first pure cov-lite deal as European investors continued to move to financings executed on US-style terms.

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, provided there is adequate corporate benefit and the company has the capacity to give such guarantee.

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 are required to act in good faith and have a duty to promote the success of the company for the benefit of its members as a whole. Director duties are to the company and therefore it is generally only the company and/or the shareholders that can enforce them, however if the company is insolvent the directors duties are then to the creditors of the company with a view to minimising the creditor losses. In certain circumstances a guarantee may be set aside as a preference or due to the insolvency of the company (see question 8.2).

2.3 Is lack of corporate power an issue?

Lack of corporate power would not necessarily make a guarantee void, however the capacity for a company to enter into a guarantee should be diligenced by looking at its memorandum and articles of association. The company's objects may not include an express power to grant guarantees but may be wide enough to cover granting guarantees if that is ancillary to the business.

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

Generally no, however there may be particular requirements in the case of regulated entities. A shareholder resolution is also often provided to alleviate corporate benefit concerns.

A guarantee is required to be in writing, signed by the guarantor and for good consideration.

Guarantees are often executed as a deed to avoid any arguments regarding due consideration.

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

No, although directors should consider the solvency of the company as part of promoting its best interests.

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

No, although it is prudent to check whether non-English exchange control or sanctions considerations will apply.

3 Collateral Security

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

It is possible to take security over all the assets of an English company.

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 over all or substantially all of a company's assets is generally covered by a single debenture.

The debenture usually includes:

(a) a fixed charge over assets which are identifiable and can be controlled by the creditors (e.g. restricted accounts);

(b) a floating charge which is used to capture fluctuating and less identifiable assets (e.g. inventory);

(c) an assignment of receivables and contracts; and

(d) mortgages over real estate and shares.

If the debenture includes a real estate mortgage or a power of attorney it must be executed as a deed (see question 3.13).

Consideration should be given to whether additional formalities or documents should be used when securing assets of an English company which are not based in England or when taking security over particular types of assets e.g. ships.

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

Security over land is ideally taken by way of a legal mortgage. A legal mortgage transfers legal title to the creditor and restricts the chargor from taking certain actions while the asset is subject to the mortgage e.g. disposing of or mortgaging the asset further without consent. A legal mortgage cannot be granted over future acquired assets.

It is also possible to have an equitable mortgage over land where the beneficial title in the land is transferred to the creditor but legal title remains with the chargor. We often see an equitable mortgage where the parties have agreed that a legal mortgage will only come into effect if certain events occur or where the formalities required for a legal mortgage cannot be met.

When taking security over land consider whether the chargor is required to obtain third party consents (for example from the freeholder).

Security over plant, machinery and equipment may be caught by any legal mortgage over the land if those assets are sufficiently attached to the mortgaged land; however, a fixed charge is usually granted over these types of assets. A fixed charge is generally only used for identifiable assets and where a creditor is able to show sufficient control over the asset. There are no specific documentation formalities required for creating a fixed 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, usually by way of an assignment (subject to such receivables being assignable) but can also be covered by a fixed charge (see question 3.2 above) or a floating charge (see question 3.5 below).

An assignment of receivables can be legal or equitable. A legal assignment must be in writing, signed by the assignor, absolute (unconditional and irrevocable) and notice must be given to the relevant third parties. If any of these conditions are not met then the assignment will be an equitable assignment. The main benefits of a legal assignment are (a) the creditor can sue in its own name (if it is an equitable assignment the creditor would have to join the assignor as a third party to any suit), and (b) the third party (once notice has been served) will only be able to discharge its obligations to, or as directed by, the creditor.

It is common for certain assignments to be equitable assignments until a trigger event occurs and the assignor is then required to give notice to the third party (and the legal assignment is perfected), but this is dependent upon negotiation. Acknowledgment of the notice by the third party is often requested but does not affect the nature of the assignment.

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

Yes, by a fixed or floating charge.

A fixed charge over a bank account is generally only effective where the account is blocked such that the chargor can only make withdrawals with the creditor's permission. A floating charge allows the chargor to continue to deal with the account in the ordinary course until there is a trigger event (usually a default) at which point the creditor may notify the account bank that it controls the account. A trading account would only be subject to a floating charge as the business would need constant access to the account and seeking lender consent would be impractical.

Whether a charge is fixed or floating will be dependent on the level of control the creditor has over the account.

3.6 Can collateral security be taken over shares in companies incorporated in England? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares in English companies are required to be registered and may be certificated or uncertificated (and held in a clearing system).

Shares are usually charged by way of a mortgage or fixed charge.

A legal mortgage over certificated shares involves transferring ownership of the shares to the creditor and registering the creditor in the shareholder register. The share certificate in the chargor's name will be cancelled and replaced with one in the creditor's name. A legal mortgage allows the lender to vote the shares, receive any dividends and any information about the shares until the debt is discharged.

Often an equitable mortgage is granted subject to the creditor being able to create a legal mortgage if certain trigger events occur. This is achieved by delivering share certificates and a signed but undated stock transfer form to the creditor. If the security becomes enforceable the creditor can complete the undated stock transfer form and any formalities required to become legal holder of the shares. Prior to the security being enforceable all voting rights, dividends and any communication about the shares will remain with the chargor.

Uncertificated shares can be secured by an equitable or legal mortgage. In order to hold uncertificated shares the creditor will need a securities account. A legal mortgage will be perfected by an instruction to the clearing system to transfer the shares to the securities account of the creditor.

An equitable mortgage of shares in a clearing system is created by depositing the shares into an escrow account with the clearing system and restricting withdrawals without the creditor's permission.

Other considerations include: stock exchange notification requirements; tax implications; and restrictions in the company's constitutional documents (such as liens, pre-emption rights or a right to refuse to register a transfer).

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

Yes, typically by a floating charge given the fluctuating nature of inventory and inability to show sufficient control for a fixed charge. See question 3.5 above.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, subject to corporate benefit and solvency considerations (see questions 2.1 to 2.3 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?

Registration requirements depend on the type of secured asset. The majority of charges created by an English company must be registered at Companies House within 21 days of its creation. Failure to register within this time means that the charge will be void against the liquidator, administrator or any creditor of the company and the money secured by the charge becomes immediately payable.

A prescribed form must be completed to register the security along with supporting documentation and payment of a fee (£13 paper filing and £10 online filing).

Security over English real estate must be registered at the land registry and security over certain other assets, such as IP, ships and aircraft, needs to be registered at applicable registries.

There are no notarisation requirements for security documents under English law.

See question 6.2 regarding stamp duty.

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, prescribed forms need to be completed (see question 3.9 above) and payment of minor fees.

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

Generally no, however consider requirement for third party consents under underlying contracts. Additional consents may be required if involving regulated entities or assets.

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

Generally, no.

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

Creditors generally expect to receive board and/or shareholder minutes approving the documentation for evidentiary purposes and to ensure corporate benefit issues have been considered.

A legal mortgage over land must be in writing, signed by all parties, incorporate all terms expressly agreed and fulfil the requirements of a deed.

A deed must be in writing, clear from its face that it is a deed, validly executed as a deed and must be delivered.

Security agreements usually contain a power of attorney and therefore will need to be executed as a deed.

Other guidelines should be considered, such as law society practice notes and recent case law which states that each party must approve and intend for their signature to be attached to a final form document. Exchanging pre-signed signature pages is not sufficient to execute certain documents effectively.

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 can provide financial assistance (including guarantees and security) for the acquisition of its own shares.

Subject to limited exceptions, a public company is prohibited from giving financial assistance for the acquisition of its own shares.

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

Private companies can provide financial assistance for the acquisition of shares in a private holding company but not a public holding company.

Public companies are prohibited from providing financial assistance to both public and private holding companies subject to limited exceptions.

(c) Shares in a sister subsidiary

There is no prohibition on financial assistance provided for the purchase of shares in a sister subsidiary.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will England recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes, this is usually governed by the agency provisions in the loan documentation and intercreditor or security agreement. The intercreditor will govern how proceeds from security enforcement will be applied.

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?

Agency and trust relationships are well established in England.

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?

Loans are generally structured so that they are transferrable from one lender to another by using a prescribed form of transfer certificate subject to any restrictions in the loan documentation. A transfer of the loan will also transfer the benefit of any English security or 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?

Yes, a company paying "yearly interest" that arises in the UK is required to withhold income tax from that interest at a rate of 20% (currently). Interest will be "yearly interest" for these purposes if, in broad terms, the debt is capable of being outstanding for a year or more.

There are several exceptions. In the context of a commercial bank loan, the most important is that for interest payable on an advance from a "bank", where the person beneficially entitled to the interest is within the charge to UK corporation tax in respect of the interest, or would have been but for the UK corporation tax exemption for foreign branches of UK companies.

Additional possible exemptions include: interest paid by a bank in the ordinary course of the bank's business; interest paid to a company within the charge to UK corporation tax; and interest able to be paid without deduction under a direction to pay gross pursuant to a double tax treaty.

UK law is not entirely clear on the treatment of payments made under a guarantee. They could be characterised as being of the same nature as the underlying obligation (i.e. interest or principal), or as a separate obligation.

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 preferential tax incentives for foreign lenders lending into the UK.

Note that UK stamp duty could be payable on the transfer or assignment of certain loans (whether foreign or local lenders). In addition, if the loan is a "chargeable security", UK stamp duty reserve tax (SDRT) could apply to an agreement to transfer the loan.

However, an exemption from those duties applies to loans which are "exempt loan capital". A typical bank loan is likely to be "loan capital". However, if the loan carries certain equity-like characteristics (e.g. convertibility, results-dependency), it will not be "exempt". It is rare for bank loans to carry such rights, although there may be concerns where loans carry a margin ratchet or are limited recourse. Where a loan is not exempt loan capital, other exemptions from stamp duty and SDRT may be available.

The grant of security over assets should not be subject to UK stamp taxes. There may be a liability to UK stamp taxes on enforcement of security over shares or securities of a UK company or UK real estate.

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?

By themselves, these factors should not bring a non-UK lender into the charge to UK tax (although, as discussed above, a foreign lender may be subject to UK 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.?

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.

Results-dependent interest will be characterised as a non-deductible distribution of the borrower for UK tax purposes. There is an

exemption from this rule where the recipient of the interest is within the charge to UK corporation tax. Therefore, a borrower might theoretically be disadvantaged by a lender outside the UK tax net in such circumstances, although there is a separate exemption for certain margin ratchets which does not depend on the location of the lender.

Otherwise, the location of an unconnected lender should not concern the borrower.

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 English courts will generally apply a foreign law as the governing law of a contract if it is expressly chosen by the parties, subject to the following: (i) where all elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of law will not prejudice the application of non-derogable laws of that other country; (ii) where all elements relevant to the situation at the time of the choice are located in one or more EU Member States, the choice of a non-EU Member State law will not prejudice the application of non-derogable provisions of EU community law; (iii) the chosen law will not restrict the application of overriding mandatory provisions of English law; (iv) effect may be given to overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful; (v) the English courts may refuse to apply a provision of the chosen law if such application is manifestly incompatible with English public policy; (vi) in relation to the manner of performance and the steps to be taken in the event of defective performance, regard will be given to the law of the country in which performance takes place; and (vii) the chosen law may not be applied to determine certain questions in relation to the existence and validity of a contract.

As well as potentially applying local public policy and mandatory rules, the English courts may in limited circumstances also apply non-derogable or mandatory rules of another country. Given that the circumstances in which the English courts will refuse to apply the chosen law are narrow, the basic position is that the English court will generally respect the chosen law.

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?

A judgment of this nature would be treated as constituting a cause of action against the judgment debtor and could be sued upon summarily in the English courts. The English courts should enter judgment in such proceedings, without re-examination of the merits of the original judgment, provided that, in addition to the factors described in question 7.1 above: (i) the original judgment is not for multiple damages; (ii) its enforcement is not contrary to English public policy; and (iii) enforcement proceedings are instituted within six years after the date of the judgment.

Different considerations may apply if the judgment debtor is a state entity.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in England, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in England against the assets of the company?

The answer is context specific and dependent upon the court diary.

(a) If the enforcement of an English law governed contract in England is uncontested and there is no dispute as to jurisdiction, a judgment in default could be obtained in 1-2 months. If the company files a defence but the foreign lender is able to obtain summary judgment this could take 2-3 months. If the enforcement is heavily contested and there is a material dispute about the facts then it could take longer. If the governing law of the contract is not English law then the proceedings may take longer since the court will need to hear expert evidence on that foreign governing law. In terms of enforcing a judgment, once given, against assets, the time taken will depend upon which assets and what method of enforcement is chosen.

(b) For enforcement of a foreign judgment against assets, the timing would be no different.

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 no but regulatory consents may be required if the company is a regulated entity or the assets are regulated.

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

No, foreign lenders are essentially treated the same as foreign lenders. It may, however, be easier to get security for costs against 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?

In liquidation, the aim is to realise the unsecured assets of the company for the benefit of creditors as a whole (save for secured creditors). Security rights against the company remain enforceable but there is a moratorium on legal proceedings. In a compulsory liquidation, no action or proceedings can be commenced or proceeded with against the company or its property without court permission. In the case of a creditors' voluntary liquidation, the liquidator may apply for a stay of such proceedings to ensure equal distribution of the assets.

In administration, a statutory moratorium on creditor action comes into effect on the presentation of an administration application in court or the filing in court of a notice of intention to appoint an administrator. This prevents the enforcement of security and the commencement of legal proceedings.

A limited 28-day moratorium is available in a CVA but only for "small companies".

Subject to certain conditions, the enforcement of financial collateral security is exempt from the security enforcement moratorium.

A scheme of arrangement does not impose a moratorium on creditor action but may cram down dissenting secured creditors who will be bound by the scheme if approved.

Special insolvency measures apply to credit institutions and investment firms under the Banking Act 2009, pursuant to which the resolution authorities have wide powers to impose a variety of stays.

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

The award of an English seated arbitration tribunal may be enforced, with the permission of the English court, in the same manner as a judgment or order of the court to the same effect without any re-examination of the merits. This is subject to a challenge as to the substantive jurisdiction of the tribunal, on grounds of a serious procedural irregularity or an appeal on a question of law (the latter may be excluded by the parties in their agreement to arbitrate).

The grounds for refusing an award of a tribunal seated in a jurisdiction which has ratified the New York Convention are limited. They are: (a) that a party to the arbitration agreement was (under the law applicable to it) 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 it was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present its 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 tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place; and (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.

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?

A statutory moratorium may restrict a creditor from enforcing its security rights by, for example, appointing a receiver.

However, if a secured creditor appoints an administrative receiver first, it will not be possible for an administrator to be appointed (and the moratorium on enforcement of security will not apply). This 'trumping' of appointments only applies where the receiver appointed is an administrative receiver. Where a non-administrative receiver is appointed, an administrator can still be appointed and the administrator can require the receiver to vacate office even though the receivership enforcement process has commenced, although there are certain protections for secured creditors.

The ability to appoint an administrative receiver is only available in limited circumstances. For this reason, a secured creditor who is a 'qualifying floating charge holder' (a holder of a floating charge over the whole or substantially the whole of the company's assets) may instead be able to appoint an administrator out of court as a means of enforcing its security. Unlike a receiver, an administrator is required to act in the interests of all creditors.

A scheme once approved by the requisite number or class of creditors will bind all secured creditors and may restrict a creditor's ability to enforce its 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?

Liquidators and administrators are granted wide anti-avoidance powers to challenge certain types of transactions entered into by a company before insolvency. Clawback could be available in relation to certain transactions, such as transactions at an undervalue, preferences or floating charges.

Certain conditions must be met for clawback to be available including:

- the company must be either in liquidation or administration;
- the company must have been unable to pay its debts when the transaction was entered into or as a result of entering into the transaction;
- an unfair advantage was gained by the party contracting with the company, or there is an absence of adequate consideration flowing to the company, as a result of the transaction; and
- the transaction was entered into during the relevant look-back period which varies (generally ranges from 6 months to 2 years).

Certain claims are treated as preferential and hence the order of priority in which a company's assets will be distributed is broadly: (i) fixed-charge holders' claims; (ii) insolvency expenses; (iii) preferential claims (primarily employee and certain pension contribution claims, but not tax claims); (iv) prescribed part fund (paid *pro rata* to unsecured claimants out of floating charge assets ahead of floating charge creditors – up to a maximum of £600,000 per company); (v) floating charge claims; and (vi) unsecured claims.

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

The starting position is that the corporate insolvency regimes under the Insolvency Act 1986 apply to companies registered under the Companies Act 2006.

However by virtue of EC Regulation, insolvency proceedings can only be opened as main proceedings in the place where the debtor has its 'centre of main interests' (COMI). The Insolvency Act 1986 therefore provides that insolvency proceedings are available to a company which is incorporated in an EEA State other than the UK and a company not incorporated in an EEA State but having its COMI in a Member State (other than Denmark), subject to the overriding requirement that the COMI must be in the UK. Secondary proceedings can be opened in a Member State where the debtor has an "establishment" but these are limited to local assets in the jurisdiction.

Modified versions of the Insolvency Act regimes also apply to certain types of debtors/businesses, such as partnerships.

Special legislation and special insolvency regimes may apply to certain businesses (e.g. banks/credit institutions and investment firms).

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 five main (out-of-court) remedies generally available to a creditor to enforce its security are:

1. going into possession;
2. exercising the power of sale;
3. appointment of a receiver;
4. appointment of an administrator; and
5. appropriation of financial collateral.

Foreclosure is also an enforcement process but requires a court order. Appropriation of an asset does not require a court order but can only be used to enforce financial collateral and is subject to certain conditions.

The preferred method for enforcing security is usually the appointment of a receiver.

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?

The English courts will usually decline jurisdiction if the parties have agreed that a foreign court is to have exclusive jurisdiction. However, the English courts may assume jurisdiction in special cases, for example: (i) if they have exclusive jurisdiction, such as in a dispute relating to rights *in rem* in land or corporate constitutional issues; (ii) in relation to certain insurance, consumer and employment contracts; (iii) if the defendant has taken steps in the proceedings in the English courts; and (iv) in certain narrow circumstances, if the court considers that it is the appropriate forum to hear the dispute. This principle is rarely applied where exclusive jurisdiction has been conferred on a foreign court. It is not applied where the chosen court is that of an EU Member State.

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

The English courts will normally give effect to a waiver of state immunity from jurisdiction, enforcement and pre-judgment freezing orders, subject to some minor exceptions.

10 Other Matters

10.1 Are there any eligibility requirements in England for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in England need to be licensed or authorised in England or in their jurisdiction of incorporation?

Generally no, although certain types of lending are regulated in England (e.g. consumer credit).

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

No, but given the cross border nature of most secured lending transactions, each transaction would need to be assessed individually.

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France

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1 Overview

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

The number of financing transactions in France has slightly decreased in 2014 compared to 2013. But there is still a high level of liquidity in the market resulting from the availability of new sources of financing originating in particular from capital markets, but also from debt funds providing capital solutions to borrowers directly rather than as primary or secondary participants in syndicated financings. Traditionally, French corporates have relied heavily on banks for external funding, but this no longer seems to be the case as French corporates have turned to capital markets (GDF Suez has just raised €2.5 billion with a zero coupon) and to debt funds on a large scale throughout 2014.

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

The French financing market saw several financing transactions exceeding one billion euros. One of the most important transactions in 2014 was the €2 billion acquisition of Vinci Park by Ardian and Predica with a financing of €1.2 billion which is the largest infrastructure transaction in France in 2014.

2 Guarantees

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

Yes, subject to certain conditions, restrictions and limitations relating in particular to the French law requirement of corporate benefit and the prohibition of financial assistance – see questions 2.2, 2.3, 2.4, 2.5 and section 4 below for details.

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

All guarantees and security interests granted by a French company must be in that company's corporate benefit. If only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown, the guarantee/security may be deemed as not being in the corporate benefit of the guaranteeing/securing company and may trigger the criminal liability of the managers/directors of the company (for misuse of corporate assets). Some French courts have also declared void guarantees/security interests which were not in the corporate benefit of the guaranteeing/securing company on the ground that such guarantees/security interests have been granted for an illicit cause (the misuse of corporate assets).

In case of a group of companies, French courts assess such corporate interest at the group level, but some strict criteria must be met, among which: (i) the guarantee/security interest must be granted in the common interest of the group within the framework of a common policy defined for the group as a whole; (ii) there must be some consideration for the guarantee/security interest; and (iii) the guarantee/security interest must not exceed the financial capabilities of the grantor.

A guarantee/security interest granted in order to guarantee the obligations of a subsidiary is usually unlimited as it is generally admitted that a holding company has a corporate interest in guaranteeing its subsidiary's obligations. As for upstream and cross-stream guarantees/security interests, the most commonly accepted corporate benefit justification is the granting of an intercompany loan by the guaranteed company to the guarantor out of loan proceeds made available to the guaranteed company (the guaranteed amount under the guarantee/security interest being in such case limited to the amount of such intercompany loan).

2.3 Is lack of corporate power an issue?

Guarantees granted by the legal representatives of a company are deemed to be validly granted and enforceable (as long as the granting of such guarantees does not fall outside the corporate object of the company, save for the case where (i) it has been authorised by a unanimous shareholders' resolution, or (ii) it was granted by a joint stock company (i.e., a *société anonyme*, a *société par actions simplifiée* or a *société européenne*) or by a limited liability company (i.e., a *société à responsabilité limitée*)). This rule does not, however, cover (i) guarantees which are prohibited by law, or (ii) guarantees which are subject to prior authorisation by the board of directors or by the shareholders (see question 2.4 below).

If a guarantee agreement is signed by a person who is not the legal representative of the company (and if such person does not act under a power of attorney granted by a legal representative of the company) such guarantee may be voided, save for cases where the company has confirmed the guarantee either explicitly or implicitly by performing its obligations thereunder.

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

No governmental consents or filings are required. Shareholder approval is not required by law (save for the case of a *société civile* offering securities to the public), but the by-laws of a company may contain clauses pursuant to which shareholder approval is required with respect to the granting of guarantees. Also, guarantees granted by a *société anonyme* are subject to authorisation by the board of directors.

If the guarantee is granted by an individual, the signature of such person must be preceded by a specific handwritten statement specifying the maximum guaranteed amount and the duration of the guarantee. A similar requirement is provided by French law with respect to guarantees granted by non-commercial companies.

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

See the answer to question 2.2 above with respect to upstream and cross-stream guarantees granted in the context of a group of companies.

Guarantees granted by a French company which is insolvent (*en état de cessation des paiements*) may be declared null and void by a French court – see question 8.2 below for more details.

A guarantee granted by an individual must be proportionate to its income and assets (otherwise, a court may declare that such guarantee is not enforceable).

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

There are no exchange control or similar obstacles to enforcement of a guarantee.

3 Collateral Security

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

Collateral security can be taken over tangible or intangible assets among which are: real property; shares; financial securities; bank accounts; receivables; intellectual property rights; business as a going concern; equipment and machinery; inventory; cash, etc. Security interests may be granted in the form of a pledge, a mortgage (real property), a lien (real property), a transfer by way of security (receivables, cash), a delegation (receivables) or a security trust (*fiducie*).

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

A separate agreement must be entered into in relation to each type of asset. There are, however, some types of security interest agreements which encompass several types of assets: (i) a pledge over business as a going concern, which includes security over assets such as the company's logo and commercial name, goodwill (customer relationship) and lease rights and may also include intellectual property rights, equipment and machinery; and (ii) a securities account pledge which includes a pledge over shares or other financial securities and a pledge over the bank account on which cash proceeds relating to such shares/financial securities are credited (such as dividends).

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

Collateral security can be taken over real property (land or buildings) by way of a mortgage (*hypothèque*), a lender's lien (*privilege du prêteur de deniers*) or a *gage immobilier*. These security interests must be entered into by way of a notarised deed and must be registered with the relevant land registry.

Collateral can also be taken over machinery and equipment by way of a pledge, but (if not included in a pledge over business as a going concern) only in favour of certain beneficiaries among which the vendor of the machinery and equipment, and the lender having made available the facilities used to finance the acquisition of the machinery and equipment. The pledge agreement relating to machinery and equipment must be entered into within a maximum period of two months following the delivery of the machinery and equipment to the pledgor and must be registered with the relevant commercial registry within 15 days from its execution for validity purposes.

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

Yes, collateral can be taken over receivables by way of: (i) a pledge over receivables; (ii) an assignment of receivables by way of security (*Dailly* assignment); or (iii) a delegation (*délégation*).

A pledge over receivables may be granted by an obligor in favour of any type of beneficiaries (as opposed to a *Dailly* assignment of receivables – see the paragraph below). The notification of the pledge to the debtor(s) is not required for validity purposes but in order to render the pledge enforceable against the debtor(s). As from such notification, the debtor(s) must make payments directly to the secured creditor, unless otherwise agreed in the pledge agreement.

A Dailly assignment of receivables by way of security may only be granted by a borrower (and not by a guarantor or a third party security grantor) and only in favour of a French licensed credit institution (*établissement de credit*) (or a foreign credit institution which is licensed to carry out bank activities in France under the 2000/12 directive under a so-called "European passport"). The notification of the assignment to the debtor(s) is not required for validity purposes but in order to render such assignment enforceable against the debtor(s).

A delegation of receivables is generally used to take security over receivables under insurance policies or vendor warranties. The parties to the delegation agreement are not only the delegating obligor (*délégant*) and the secured creditor (*délégataire*), but also the debtor (*délégué*) and therefore no notification of the latter is required. Under a delegation agreement, the debtor agrees to make direct payments to the secured creditor.

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

A pledge over the balance of a bank account is possible under French law. No particular formalities are required in connection therewith,

although the bank account holder is usually notified of the pledge so as to render such pledge enforceable against such person. A pledge may also be granted over cash (*gage-espèces*) by transferring the ownership of such cash to the secured creditor who may then freely dispose of it, subject to returning the same amount of cash to the pledgor upon discharge of all the secured liabilities.

3.6 Can collateral security be taken over shares in companies incorporated in France? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Collateral security can be taken over shares in companies incorporated in France either by way of a securities account pledge with respect to shares of a joint stock company (a *société anonyme*, a *société par actions simplifiée* or a *société européenne*) or by way of a share pledge with respect to other type of companies (such as a *société à responsabilité limitée*, a *société en nom collectif* or a *société civile*, etc.).

A securities account pledge is a pledge over a securities account in which shares (and/or other securities) are credited and over a cash proceeds account in which dividends or other cash proceeds relating to such shares (and/or other securities) are credited. The securities account is either held by the company whose shares are pledged or by a financial institution. Such security interest automatically extends to any additional shares and any additional cash proceeds which are credited to the pledged accounts during the life of the pledge. In order for such pledge agreement to be valid under French law, a mandatory form of statement of pledge (*déclaration de nantissement*) must be signed by the pledgor. It is also customary for the securities account holder and the cash proceeds account holder to sign confirmations of the pledge.

A share pledge actually pledges the shares (as opposed to the pledge of a securities account in which such shares are credited, as explained above with respect to securities account pledges) and therefore new additional shares are not included automatically in the scope of the pledge. It may also cover cash proceeds related to the pledged shares, but only if this is expressly specified in the pledge agreement. In addition to the registration of such pledge with the clerk of the relevant commercial court as mentioned below, other perfection formalities may be required depending on the type of company whose shares are pledged. For instance, a pledge over the shares of a *société civile* must be notified by bailiff (*signifiée par huissier*) to the company whose shares are pledged.

Shares of French companies are not in certificated form, but in dematerialised form. The pledge must be registered (i) with respect to shares of joint stock companies, in the share transfer registry (*registre des mouvements de titres*) and the shareholders' accounts (*comptes d'actionnaires*) of the company whose shares are pledged, and (ii) with respect to shares of other type of companies, in a special register held by the clerk of the relevant commercial court where the company whose shares are pledged is registered.

It is not recommended to have a securities account pledge or a share pledge governed by New York or English law because of difficulties, both practical and legal, which would arise with respect to the perfection and the enforcement of such security interests.

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

Yes, security can be taken over inventory. The pledged assets must be identified in the pledge agreement (type, quality, quantity and value). The pledge agreement must contain some mandatory provisions and must be registered (for validity purposes) with the clerk of the relevant commercial court where the pledgor is registered.

This type of pledge may only be granted by a borrower (and not by a guarantor or a third party security grantor), in favour of a French licensed credit institution (*établissement de credit*) (or a foreign credit institution which is licensed to carry out bank activities in France under the 2000/12 directive under a so-called "European passport") and may not be enforced through private foreclosure (*pacte commissoire*).

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, save for a lenders' lien (*privilège du prêteur de deniers*), a pledge over machinery and equipment, a pledge over inventory or a *Dailly* assignment of receivables by way of security (which may only be granted in order to secure the grantor's obligations as borrower) and subject to corporate benefit and financial assistance rules.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The most expensive fees are those relating to security interests over real estate properties. Registration costs and notary fees with respect to a mortgage are calculated as a percentage of the secured amounts and are therefore expensive (as at 31 December 2014, these costs include land registry tax fees (*taxe de publicité foncière*) of 0.715% of the secured amount, plus land registrar's fees (*contribution de sécurité immobilière*) of 0.05% of the secured amount, plus statutory notary fees of 0.45% of the secured amount, plus a fee of 125 euros for the registration of the mortgage with the French tax authorities). The costs relating to a lenders' lien (*privilège du prêteur de deniers*) are also based on the secured amount but are not as high as registration costs of a mortgage, as they do not include the 0.715% mandatory fees corresponding to the land tax (*taxe de publicité foncière*).

Registration fees with respect to a pledge over intellectual property rights are not expensive unless the pledge covers an important number of intellectual property rights and the accelerated registration procedure is chosen, as opposed to the ordinary registration procedure (the ordinary registration procedure may take up to two months while the accelerated registration procedure takes up to 5 days). The cost for the registration under the ordinary procedure is €26 per intellectual property right with a maximum amount of €260 and the cost for the registration under the accelerated procedure is an additional €50 per intellectual property right with no maximum amount.

The registration fees with respect to other types of security interests are not significant: e.g., registration costs with the commercial court of Paris of a pledge over business as a going concern, a pledge over inventory, a pledge over machinery and equipment or a pledge over shares (other than shares of a joint-stock company which do not require registration with a public register) amount to €150 for each pledge (for an amount of the secured obligations exceeding €41,600).

The commercial courts may require, prior to the registration of the above-mentioned security interests with the relevant commercial registry, a registration of such security interest agreements with the tax authorities – the cost of such registration is not significant (€125 for each security interest agreement).

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Generally no, save for (i) security over real estate properties with respect to which registration requirements involve a significant amount of expense (see above), and (ii) pledge over intellectual property rights which may take up to two months if the ordinary procedure is chosen or may be expensive if the accelerated procedure is chosen (please see question 3.9 above).

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

No, but it should be noted that the granting of a share pledge or a securities account pledge may require the prior consultation of the works council of the company whose shares are pledged (if such works council exists and if the pledge is over more than 50% of the shares of such company). The opinion of the works council is not binding, but its consultation is mandatory and may take from 15 days to several months depending on the complexity of the contemplated transaction.

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

No, there are not.

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

A security interest agreement over real estate property requires notarisation. If such agreement is signed under a power of attorney, such power of attorney agreement must also be notarised.

French law agreements may not be signed in counterparts.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

(a) Shares of the company

Yes, a French joint stock company (a *société anonyme*, a *société par actions simplifiée* or a *société euopéenne*) may not provide any financial assistance in the form of a loan, guarantee or security interest for the acquisition of its own shares. The violation of this prohibition may lead to the criminal liability of the managers/directors of such company and to the voidability of such loan, guarantee or security interest agreement.

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

The prohibition of financial assistance would also apply in case of the acquisition of shares in a company which directly or indirectly holds shares in the company.

(c) Shares in a sister subsidiary

There is no financial assistance prohibition as such, but this type of transaction remains subject to the corporate benefit rules described above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will France recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

France has not ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition. However, in a recent case law, the French Supreme Court has recognised the filing of claims in a bankruptcy proceeding by a New York law security trustee, but there is no case law yet with respect to the enforcement of the loan documentation and related collateral security by a trustee.

The role of an agent in a parallel debt mechanism, as well as the parallel debt mechanism itself, has also been recognised by the above-mentioned recent case law of the French Supreme Court and may therefore be an alternative to the trust mechanism in credit agreements.

The agent concept is very largely used in French syndicated loans and is based on a power of attorney granted by lenders. The security interests are generally granted in favour of each lender and not only in favour of the security agent, and each lender may act individually in enforcing its rights under the collateral security, save for the case where it is contractually prohibited from doing so by the finance documents. If enforcement of security interests is implemented through judicial proceedings, an agent may only act before a French court if it is granted a special power of attorney (*mandat ad litem*) by each lender.

5.2 If an agent or trustee is not recognised in France, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

See the answer to question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of France and guaranteed by a guarantor organised under the laws of France. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

A transfer is usually made in France by way of assignment rather than by way of novation.

A transfer made by way of assignment must be notified to all French borrowers by bailiff (*signification par huissier*) or each French borrower must sign the transfer agreement in a notarised form.

If the transfer is made by way of novation, the consent of the guarantor (as well as the consent of the security provider) is required in order for Lender B to be able to enforce its rights under the guarantee (or under the security interest). Such consent may be granted concomitantly with the transfer or prior to such transfer (such prior consent may also be provided in the guarantee/security interest agreement itself).

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

(a) Interest payable on loans made to domestic or foreign lenders

Interest paid to French tax resident individuals: As of 1 January 2013, such payments are subject to personal income tax in the hands of the individuals under the progressive tax schedule. However, when the paying establishment is located in France, it has an obligation to declare the gross amount of interest paid and withhold a compulsory tax advance at a rate of 24%, which is later offset against the definitive income tax charge due by the lender.

Interest paid to French tax resident companies: As a matter of principle, such payments are not subject to any withholding tax (***WHT***).

Interest paid to foreign lenders (individuals or companies): Such payments do not give rise to any French WHT.

Interest paid to a Non Cooperative State or Territory (***NCST***): As a general rule, a 75% WHT applies in cases where interest is paid to an account located in a NCST (notwithstanding the tax residency of the corporate/individual lender), unless the French debtor can demonstrate that the operations in respect of which the interest is paid have a main purpose and effect other than allowing their localisation in a NCST. However, please note that if the lender is tax resident of a country that has entered into a double tax treaty with France, the provisions of that treaty (if available) may permit the reduction of the rate (down to nil) of such WHT.

(b) Proceeds of a claim under a guarantee or the proceeds of enforcing security

As a matter of principle, proceeds deriving from a claim under a guarantee or as a result of enforcing security are not subject to WHT in France (irrespective of the tax residence of the beneficiary).

However, it should be noted that:

- Proceeds resulting from the enforcement of a security, in cases where the security grantor is not a French tax resident, may be subject to capital gains WHT (provided that a capital gain is realised upon the sale of the asset on which the security is taken) at rates that vary depending on the nature of the asset. However, if the security grantor is a tax resident of a country that has entered into a double tax treaty with France, the provisions of that treaty (if available) may permit the avoidance of (or at least, reduce the cost of) the WHT.
- When the proceeds deriving from enforcing a security are used to pay interest accrued under a loan agreement, the rules indicated in question 6.1 (a) above are applicable.
- Proceeds resulting from a claim under a guarantee are of a *sui generis* nature, but in the case where the purpose of the guarantee is to ensure (in part or in total) the payment of interest accrued under a loan agreement entered into between a French debtor and a foreign beneficiary, it cannot be totally excluded that such guarantee payments would be viewed (at least in part) as interest payments and accordingly be subject to French interest WHT (under the rules summarised in question 6.1 (a) above). There is, however, no firm position of the French tax authorities in this respect, nor relevant case law on the matter.

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

(a) Incentives attributed to foreign lenders

The absence of WHT on interest (subject to the NCST exception) is very attractive for foreign lenders.

In addition, it is worth mentioning that interest payments made to an account located in a NCST or to a beneficiary residing or located in a NCST as remuneration of a loan agreement entered into outside of France either (i) before 1 March 2010 provided that the expiry date has not since been extended, or (ii) as of 1 March 2010 if said agreement is assimilated to an agreement entered into before that date, are also exempt from WHT in France.

(b) Taxes applicable to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration

The same taxes apply to all lenders irrespective of whether they are French or foreign with respect to their loans, mortgages or other security documents for the purposes of effectiveness or registration – see the answer to question 3.9 above for details with respect to taxes in relation to registration with the tax authorities (if required).

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

No, it will not.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No other significant costs would be incurred by foreign lenders in the grant of such loan/guarantee/security (other than those mentioned above which apply to all lenders, irrespective of whether they are French or foreign). However, translation costs may be incurred with respect to security interests which require registration in a public register, if the security agreements are not already drafted in the French language.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No: thin capitalisation rules apply irrespective of the lender's place of residence.

7 Judicial Enforcement

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

Convention on the law applicable to contractual obligations of 19 June 1980 (the "**Rome Convention**") in relation to contracts entered into before 17 December 2009 and Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (the "**Rome I Regulation**") in relation to contracts entered into after 17 December 2009, are applicable in France.

(i) Contracts entered into before 17 December 2009

French courts will enforce the foreign law chosen by the parties to contracts entered into before 17 December 2009 in accordance with the Rome Convention, subject to:

- the overriding mandatory rules (*lois de police*) of the law of another country with which the situation has a close connection, if, and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract; and
- overriding mandatory provisions applicable in France irrespective of the law otherwise applicable to the contract.

In addition, notwithstanding any choice of law clause, in purely domestic contracts, i.e., where all the elements relevant to the situation (apart from the chosen law) are connected with one country only, the mandatory rules of said country shall be applicable.

(ii) Contracts entered into after 17 December 2009

French courts will enforce the foreign law chosen by the parties to contracts entered into after 17 December 2009 in accordance with the Rome I Regulation, subject to:

- French overriding mandatory provisions (*lois de police*); and
- the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.

In addition, notwithstanding any choice of law clause, in purely domestic contracts, i.e., where all the elements relevant to the situation (apart from the chosen law) are connected to one country only, the mandatory rules of said country shall be applicable.

7.2 Will the courts in France recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The criteria relating to the recognition and enforcement in France of judgments rendered by foreign courts vary depending on (i) the country where such judgments were rendered, and (ii) the time when they were rendered:

- judgments rendered within one of the Member States of the European Union **before 10 January 2015** 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 within one of the Member States of the European Union **after 10 January 2015** are enforced in France in accordance with the Council Regulation 1215/2012 of 12 December 2012 ("**EC Regulation 1215/2012**");
- 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

Judgments rendered <u>before</u> 10 January 2015

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.

Judgments rendered <u>after</u> 10 January 2015

Under EC Regulation 1215/2012, judgments rendered in civil and commercial matters by the courts of a given Member State are directly enforceable in France (Article 39 of Regulation 1215/2012), provided that two conditions are met, namely: (i) that a French bailiff is provided with a copy of the original decision and a certificate filed by the jurisdiction having rendered the decision (found under Appendix I to Regulation 1215/2012); and (ii) that this certificate is duly served upon the person against whom enforcement is sought, together with the decision (if not already served). This second criterion is not applicable to conservatory measures, except where the measure was ordered by a court without the defendant being summoned to appear.

An application for the refusal of enforcement may be lodged before the enforcement judge ("*juge de l'exécution*"). Please note that for the seizure of salaries, however, the competent court is the first instance court. At this stage, the appellant will be able to argue that the judgment should not be enforced based on one or more of the limited grounds set out under Articles 45 of EC Regulation 1215/2012 (relating to due process, public policy, and the incompatibility with earlier decisions).

(ii) Recognition and enforcement of a judgment given against a company in New York courts

In the absence of a treaty signed between France and the United States, the procedure for the enforcement of judgments rendered by New York courts requires a formal writ of summons. Foreign judgments may be enforced in France only once exequatur (also known as the *formule exécutoire*) is granted by the *Tribunal de grande instance* of the defendant's residence (or, if the debtor is not resident in France, the place where his assets are located).

The following tests must be met in order for a French court to grant an exequatur order with respect to a foreign judgment:

- the court rendering the judgment had jurisdiction over the defendant;
- the foreign court had not been used fraudulently to escape the jurisdiction of a court more closely related to the dispute (i.e., for forum shopping); and
- the foreign judgment was consistent with French international public policy, including due process.

If the French court is satisfied as to the above, the judgment given against a company in New York courts will be granted exequatur without any review of the facts or legal merits.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in France, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in France against the assets of the company?

If a company is in payment default, a lender may use the fast-track procedure known as *référé-provision* available for the recovery of debts which are not challengeable on serious grounds.

If the amounts are found to be indisputably due, the president of the Tribunal de Commerce orders the payment of the debt by an order (*ordonnance de référé*) which has the advantage of being immediately enforceable, notwithstanding an appeal that may be lodged. *Ordonnances de référé* may indeed be appealed within fifteen days. Such appeals are heard relatively rapidly by the *Cour d'appel*. There may be a further challenge by a *pourvoi* before the *Cour de cassation* and in such case the decision of the *Cour de cassation* may take up to one year.

Notwithstanding the above, lenders can always go through normal proceedings to obtain payments due under a loan agreement or a guarantee agreement, which may last between 12 to 18 months. The enforcement of non-European judgments may also be of the same duration.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

French law security interests may only be enforced upon the occurrence of a payment default (either resulting from a non-payment of interest, fees or principal or following an acceleration of the secured facilities) and not upon the occurrence of any event of default.

Enforcement of a pledge may be carried out under French law either through judicial foreclosure or public auction or by way of private foreclosure. Enforcement through judicial proceedings (i.e., judicial foreclosure or public auction) may take a significant amount of time (12-18 months with respect to a mortgage or up to 12 months for other type of security interests) whereas enforcement through private foreclosure may take up to 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*), a receivables delegation agreement (*delegation de créances*) or a fiducie agreement (but only in the case of a so-called possessory fiducie (*fiducie avec dépossession*) whereby the assets are effectively transferred to the *fiduciaire*).

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

French courts do not carry out a judicial review of the merits of arbitral awards. They only play a supervision function regarding the validity of arbitral awards for which recognition and enforcement are sought in France. According to the French Civil Procedure Code, a French court can set aside an arbitral award only if:

- the arbitral tribunal wrongly upheld or declined jurisdiction;
- the arbitral tribunal was not properly constituted (i.e. it was irregularly composed or the sole arbitrator was irregularly appointed);
- the arbitral tribunal ruled without complying with the mandate conferred upon it;
- due process (*principe du contradictoire*) was not respected; or
- recognition or enforcement of the award would be contrary to international public policy (*ordre public international*).

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

See the answer to question 7.6 above.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

If a security interest is granted by a French company during a so-called hardening period (*période suspecte*), such security interest may be declared null and void if (i) it has been granted in order to secure a previously incurred debt, or (ii) it has been granted in order to secure a current or future debt, but the beneficiary of the security had knowledge of the insolvency of the grantor. The hardening period is a period set by the bankruptcy court during which the guarantor/pledgor is deemed to be insolvent. According to the French law insolvency test (*cessation des paiements*), a company is insolvent if it is unable to pay its liabilities as they fall due with its immediately available assets (cash or other liquidity assets). A French bankruptcy court may set the insolvency date of a company as far as 18 months prior to the date on which the company has filed for insolvency.

French law provides for preferential creditor rights with respect to: employees' claims; legal expenses; new loans made available during a court-approved conciliation proceeding; security interests over real estate property; and security interests benefiting from a retention right (such as a share pledge, a securities account pledge or a bank account pledge).

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

Entities regulated by public law (*personnes morales de droit public*) (such as *collectivités territoriales* or *établissements publics*) are excluded from bankruptcy proceedings.

Entities which are not registered with the commercial register and do not have a legal personality (such as *sociétés en participation*, *sociétés de fait*, *sociétés en formation*) are also excluded from bankruptcy proceedings.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes, private foreclosure (*pacte commissoire*) is permitted under French law with respect to almost all types of security interests, save for certain exceptions such as a pledge over business as a going concern and a pledge over inventory.

However, enforcement by private foreclosure is prohibited during bankruptcy proceedings such as safeguard proceedings, accelerated financial safeguard proceedings, judicial administration proceedings and judicial liquidation proceedings.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of France?

French law allows considerable freedom to the parties to a contract in selecting a jurisdiction for their disputes, with the notable exception of disputes relating to real property, which must be resolved by the appropriate court at the place where the property is located.

The choice of a foreign jurisdiction is valid provided that:

- the dispute is international, it being specified that French courts do not require that the dispute has a material link to the foreign jurisdiction chosen by the parties;
- the jurisdiction choice clause does not preclude the mandatory exclusive jurisdiction of a French court in relation to certain aspects (e.g. in relation to employment contracts); and
- the clause is not a unilateral dispute resolution clause giving only one party the choice between several jurisdictions while the other party is bound to bring actions before one jurisdiction only (this principle has recently been confirmed by a decision rendered by the French Supreme Court on 26 September 2012).

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

Waivers of sovereign immunity from jurisdiction are legally binding and enforceable under the laws of France.

But a waiver of sovereign immunity from jurisdiction does not entail a waiver of immunity from execution, which:

- must be separately expressed in order for it to be equally binding and enforceable; and
- must specifically identify the assets or the category of assets over which the waiver is granted.

10 Other Matters

10.1 Are there any eligibility requirements in France for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in France need to be licensed or authorised in France or in their jurisdiction of incorporation?

Pursuant to French banking monopoly rules, an entity which carries out banking activities on a regular basis in France must either be (i) duly licensed as a credit institution (*établissement de crédit*) or as a financing company (*société de financement*) 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?

Even though the European sovereign debt crisis resurfaced in 2014, resulting in increased market uncertainties, lending markets in Germany continued to ease in 2014. The current outlook for the country's economic development and, consequently, for its lending markets, is generally viewed as positive. Unlike in the majority of European jurisdictions, there is currently no credit crunch in Germany. Apart from distressed situations, German borrowers operate in a market environment in which ample financing sources continue to be available. Germany has, besides the United Kingdom, one of the strongest leveraged buy-out markets in Europe. In particular, there has been a solid flow of high-volume deals since 2013. New lenders such as debt funds and insurance companies are increasingly active. At the same time, in spite of the health of the German bank lending market, borrowers increasingly make use of alternative financing means, such as bonds. Also, regulatory requirements continue to force banks to de-leverage, and many have done so in 2014.

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

As an example for the strong leveraged buy-out market, the acquisition of Springer Science & Business Media by BC Partners from EQT was the largest debt-financed private equity transaction in years, with a deal volume of approximately €3.3 billion. Another example was the debt-financed secondary buy-out of Ista, valued at €3.1 billion, by CVC Capital Partners from Charterhouse Capital Partners in an auction process. Additional auction deals in 2014 included Hellman and Friedman's acquisition of Scout24 from Deutsche Telekom with a roughly €2.0 billion company valuation (secondary), and EQT's acquisition of the Siemens hearing aid business for €2.2 billion (primary).

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 three most commonly used German corporate forms are those of (i) a limited liability company (*Gesellschaft mit beschränkter Haftung* – "**GmbH**"), (ii) a limited partnership (*Kommanditgesellschaft*) with a GmbH as the sole general partner ("**GmbH & Co. KG**"), and (iii) a stock corporation (*Aktiengesellschaft* – "**AG**").

GmbHs. Under the capital maintenance rules applicable to GmbHs pursuant to the German Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung* – "**GmbHG**"), assets that are required for the maintenance of a GmbH's registered share capital must not be distributed to its shareholders (or to any third party, if such a distribution would benefit the GmbH's shareholders). Any distribution to shareholders that results in the GmbH's net assets at book value falling below its registered share capital is prohibited. Downstream guarantees for loans of a GmbH's direct or indirect subsidiaries do not violate these rules. However, upstream and cross-stream guarantees granted by a GmbH may violate the capital maintenance rules, depending on the GmbH's balance sheet ratios at the relevant point in time. Certain exceptions to these rules apply. Distributions are permissible if they are made against "full value" and arm's length consideration (including a "full-value", *i.e.*, fully enforceable, counter-claim or re-transfer claim). The same applies if and to the extent that the borrower has passed on loan proceeds to the subsidiary GmbH. Furthermore, an exception applies where the GmbH's shareholder and the GmbH have entered into a statutory domination and control agreement (*Beherrschungsvertrag*) or profit and loss transfer agreement (*Gewinnabführungsvertrag*). However, some legal commentators have taken the view that the latter exception should apply only where the subsidiary GmbH's statutory claims against its shareholder under such intercompany agreement(s) have "full value".

As a legal matter, these statutory rules apply only as between a GmbH (and its management) and its shareholders. *See* question 2.2 below as regards the customary incorporation of these restrictions into contractual relationships with lenders and other third parties.

GmbH & Co. KGs. The capital maintenance rules for GmbHs are also applicable to the general partner GmbH of the limited partnership.

AGs. The German Stock Corporation Act (*Aktiengesetz* – "**AktG**") provides for stricter capital maintenance rules as compared to the rules applicable to GmbHs. Any payments or the extension of any other benefit by an AG to or for the benefit of its shareholders is prohibited, except in the form of a dividend distribution pursuant to a shareholders' resolution. These restrictions are subject to the same exceptions as described above for GmbHs (*i.e.,* situations in which the AG receives arms' length consideration, or has "full-value" statutory claims against its shareholders under a statutory domination and control or profit and loss transfer agreement, or has received loan amounts on-lent to it by the shareholder/borrower).

The above-described rules with regard to downstream, upstream or cross-stream guarantees apply correspondingly to the extension of downstream, upstream or cross-stream security.

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

GmbHs. Shareholders and managing directors of a GmbH may be personally liable to the GmbH for damages in case of a violation of the capital maintenance rules described in question 2.1 above. Furthermore, in case of payments made to a shareholder resulting in a cash flow insolvency (*Zahlungsunfähigkeit*) of a GmbH, managing directors may incur personal liability to the GmbH, unless such payments were made in line with the standard of care of a prudent businessman (*Sorgfalt eines ordentlichen Geschäftsmanns*).

It is standard market practice in Germany to include enforcement limitation language in the documentation of upstream or cross-stream guarantees or security extended by subsidiary GmbHs for the direct or indirect benefit of a shareholder, in order to shield the GmbH's managing directors from such personal liability risks. Under such limitation language, the secured borrower is generally limited in its enforcement of the guarantee or security to the amount of any free reserves of the GmbH. Accordingly, depending on the GmbH's balance sheet ratios from time to time, the limitation language may have a significant impact on the value of the guarantee or security. Exceptions are typically agreed in respect of loan amounts that were passed on by the borrower to the subsidiary GmbH. *See* question 2.4 below regarding the impact of shareholders' approvals on the liability of a GmbH's managing directors.

AGs. An AG's shareholders and management board members are subject to stricter rules and increased liability exposure *vis-à-vis* the AG as described in question 2.1 above, in case none of the above-described exceptions apply to payments or the extension of other benefits to or for the benefit of the AG's shareholders. In order to avoid personal liability, management board members should only allow such payments or extension of other benefits if the AG has entered into a statutory domination and control agreement with its shareholders.

In addition to the above-described enforcement limitations for GmbHs and AGs, and as a response to case law developed by the German Federal Court of Justice (*Bundesgerichtshof*), some legal commentators believe that the extension of upstream or cross-stream guarantees or security may also incur liability on the part of shareholders and management based on the legal doctrine of "destructive interference" (*existenzvernichtender Eingriff*), in cases where such extension impairs the company's continued existence. This doctrine applies to the intentional interference of damages on a company in violation of public policy (*vorsätzliche sittenwidrige Schädigung*), causing or further increasing the company's insolvency. On this basis, additional enforcement limitation language, by which any enforcement of the guarantee or security in question is subject to the company's continued ability to satisfy third-party debt, has been suggested and/or agreed to in some secured lending transactions in the past. However, due to the significant impact of any such additional enforcement limitation on the value of such guarantees or other collateral (whereby a secured creditor effectively subordinates itself to any unsecured third-party creditors), the inclusion of such language is considered unacceptable by many lenders.

2.3 Is lack of corporate power an issue?

With the exception of certain types of insurance companies, German companies are not subject to any *ultra vires* doctrine. Any limitations of management of a GmbH or an AG to represent the company with regard to certain transactions have generally no effect on the validity of agreements with third parties. Certain exceptions apply, in particular for scenarios in which it is obvious to the third party that management exceeds its corporate powers or in which management and the third party collude to the company's detriment.

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

The German Banking Act (*Kreditwesengesetz* – "**KWG**") provides that the granting of guarantees in a commercial manner, or to an extent that requires a commercially organised business, requires the authorisation by the German bank regulator (*Bundesanstalt für Finanzdienstleistungsaufsicht* – "**BaFin**"). An exception applies to entities that only engage in any such transactions with their subsidiaries, parent companies or other affiliates (*see* question 10.1 below with regard to additional exceptions to authorisation requirements).

Notwithstanding compliance with internal procedures as set out in the by-laws of the company or its management, it is standard market practice to also require shareholders' approval with regard to the extension of guarantees or security. For GmbHs, such approvals generally include an instruction to the managing directors to enter into the transaction agreements. Under German law, a GmbH's managing director acting on the basis a valid shareholders' approval (or instruction) can generally not incur liability to the GmbH, even if the execution of the instruction is detrimental to the GmbH.

The legal situation is different in the case of an AG, where management is not permitted to follow a shareholder instruction to take an act that is detrimental to the AG, except where a statutory domination and control agreement is in place.

Even in the case of a GmbH, shareholders' approvals are not valid where such approvals violate applicable law, *e.g.,* if an approval is in violation of statutory capital maintenance rules. Accordingly, in the case of upstream or cross-stream guarantees or security, a managing director may not rely on such a shareholders' approval and should review the validity of such an approval carefully. The corresponding uncertainties related to this, and the lack of case law on point, confirm the importance of the contractual enforcement limitation language, as described in question 2.2 above.

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

See questions 2.1 and 2.2 above regarding the limitations imposed by German capital maintenance rules and customary contractual enforcement limitations.

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

Under German law. there are no exchange controls that would pose an obstacle to enforcement of a guarantee or other collateral.

3 Collateral Security

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

For lending obligations, the most common types of available security used in Germany are the following:

Share collateral:

- share pledge; and
- security assignment of title.

Receivables collateral:

- security assignment; and
- pledge.

Cash account collateral:

- account pledge.

Movables and equipment collateral:

- security transfer of title; and
- pledge.

Intellectual property collateral:

- security assignment; and
- pledge.

Real estate collateral:

- mortgage (*Hypothek*); and
- land charge (*Grundschuld*).

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 German law, there is no concept of a floating charge over all assets of the chargor. Accordingly, assets have to be charged on an individual basis. Legally one could combine the creation of security over various types of assets in a single document, but standard market practice is to have one security agreement for each asset class, due to the differences in the creation and enforcement procedures applicable to the various types of collateral.

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

German law provides for two types of security over real property: (i) "accessory" mortgages, and (ii) "non-accessory" land charges. Land charges are the most common form of security over real estate in Germany, as they offer several advantages as compared to mortgages. Due to the "accessory" nature of a mortgage, the mortgage and the underlying secured receivable are inseparably linked. Accordingly, a mortgage can only secure a specific receivable, it can only be transferred where the underlying receivable is transferred and, by operation of law, if an underlying receivable is transferred, the mortgage is also deemed to be transferred. Land charges are not "accessory" and can therefore be created and transferred independently of the receivables they secure. The security over real estate created by mortgages and land charges extends generally also to the fixtures, accessories, related products and other components of the real estate.

Both mortgages and land charges are created by way of a security agreement. Generally, such agreement takes the form of a notarial deed, to enable the parties to effect a registration in the land register (*Grundbuch*), and to facilitate a possible enforcement. Both mortgages and land charges can be in the form of a certified security interest (*Briefhypothek* or *Briefgrundschuld*) or an uncertified security interest (*Buchhypothek* or *Buchgrundschuld*). Where a certificate was issued, such certificate has to be handed over to the secured party; where no certificate was issued, the exclusion of the certification must (in addition to the above-described general requirements) also be registered in the land register to perfect the security interest.

For equipment that does not constitute a fixture, *see* question 3.1 above in respect of the possible types of security. Typically this takes the form of a security transfer of title, given that the only alternative (a formal pledge) would require the surrender of actual possession in the equipment to become effective.

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 generally created by way of a security assignment of legal ownership. A security assignment may apply to a single, multiple, all existing and/or future receivables. From a legal perspective, a security assignment can be agreed in oral form, but it is standard market practice to assign receivables in writing. The receivables to be assigned must be sufficiently identifiable (*bestimmbar*). However, it is not required that each single receivable be specifically identified.

Where the underlying receivables contract contains a non-assignment clause, the general rule is that any assignment (including a security assignment) of such receivables that is purported to be made in violation of such clause does not result in an effective transfer of legal ownership of such receivables. However, as an exception, where both the assignor and the obligor are either (i) corporate entities, (ii) partnerships, or (iii) individual merchants, and (x) the underlying receivables contract constitutes a commercial transaction, or (y) the obligor of the receivable is a governmental agency, an assignment (including a security assignment) does in fact transfer legal ownership of the relevant receivables in spite of the non-assignment clause. This does not, however, apply to loan receivables of a bank.

To perfect the security, obligors are not required to be notified of a security assignment (and as a practical matter, absent an event of default, generally no notification is done), except where otherwise provided in the underlying receivables. Where the obligor was not notified (and is not otherwise aware of the assignment), it retains *vis-à-vis* the assignee certain set-off rights and other objections it might have against the assignor, *e.g.*, it may validly discharge its obligations under the receivables agreement by making payment to the assignor.

A security assignee can enforce the receivables directly against the obligor by presenting evidence of the assignment.

Security over receivables may also be created by way of a formal pledge. However, to perfect a pledge of a receivable, the obligor must be notified. As the assignors generally tend to avoid such notification, security assignments over receivables are far more customary than formal pledges.

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

The most common form of security over cash deposited in bank accounts is an account pledge. As cash in bank accounts constitutes, from a legal perspective, a receivable against the account bank, a security assignment could be used as an alternative to a pledge, but this is far less common. Although not legally required, pledge agreements are generally entered into in written form. In order for the pledge to be perfected, the account bank as obligor must be notified about the pledge. It should be noted that German banks, pursuant to their standard business terms, already have pledge over all accounts that are maintained with them. Such pledges are generally waived or subordinated by the account bank in case of a new contractual pledge with regard to the cash in bank accounts.

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?

GmbHs. Shares in a GmbH are not certificated and, from a legal perspective, do not constitute securities. The most common form of security over GmbH shares is a formal pledge. Such pledges must be notarised to be perfected. It is not necessary to notify the pledge to the GmbH. However, sometimes the by-laws of a GmbH require the prior consent of the GmbH or of the remaining shareholders for a share pledge to become effective. Furthermore, a notification to the GmbH may be advisable for purposes of an enforcement of certain rights of the pledgee *vis-à-vis* the GmbH. Under German conflict of laws rules, the perfection of a pledge over a GmbH is generally governed by German law, irrespective of any conflicting choice of law clauses in the corresponding security agreements. Pledges over shares generally do not extend to claims with regard to profits of the GmbH, unless otherwise stipulated by the parties. Unless the by-laws of the GmbH provide otherwise, certain rights associated with holdings in GmbH shares, such as profit claims (but not voting rights), may be pledged separately and without notarisation, but this requires a notification to the GmbH.

Security over GmbH shares can also be created by way of a security transfer of title. However, this form of security is not very common, as the transfer of title may raise potential lender liability issues for the secured party.

AGs. Shares in AGs are generally issued in bearer form and certificated in one global certificate, and such global certificate is deposited with a clearing system. Security over such shares is generally created by way of a formal pledge, requiring the transfer of direct or indirect possession (*Besitz*) of the securities. This is generally achieved by transferring the securities to a securities account maintained in the name of the secured party, or by blocking the securities account of the pledger in the books of the account bank. Under German conflict of laws rules, the perfection of a pledge over shares in an AG is generally governed by the laws of the jurisdiction in which the certificate is situated (*lex cartae sitae*). Accordingly, German law will apply where the certificate representing the AG shares is located in Germany.

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

Security over inventory and other movable property can be taken by way of a security transfer or a formal pledge. However, pledges over inventory are not common in Germany, as these require the surrender of direct possession of the assets to the pledgee.

Accordingly, security over inventory is generally created by way of security transfer of title. There is no specific form requirement for security transfer agreements, but as a practical matter these are generally entered into in writing. To perfect the security transfer, the assets to be transferred must be identified (including by reference to any and all assets that are located from time to time at a specified security location), and possession of such assets has to be transferred. Unlike in the case of a pledge, however, it is sufficient that the transferor agree to hold possession on behalf of the transferee, thereby extending indirect possession to the transferee.

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 the limitations described in questions 2.1 and 2.2 above, a company can extend security to secure both its own obligations as a borrower under a credit facility and as a guarantor of the obligations of other borrowers/guarantors under a credit facility.

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?

Germany does not provide for stamp duties and other taxes levied on documents. In particular, no German real estate transfer tax is triggered by the granting of security; however, such tax can be triggered in connection with the enforcement of real estate security. Notary fees are incurred for the creation of pledges in GmbH shares, mortgages and land charges. The amount of the notary fees depends upon the market value of the charged assets and is based on a statutory fee schedule, not any fixed percentages. The same applies with regard to the court fees incurred for the registration of mortgages and land charges in the land register. Notary fees can be significant and often prompted parties in the past to notarise pledges in GmbH shares in Switzerland, where the parties have more flexibility in agreeing on the amount of notary fees. However, law reforms in Germany and Switzerland have raised legal uncertainties for notarisations in Switzerland with regard to the perfection of pledges of GmbH shares. A ruling of the German Federal Court of Justice at the end of 2013 addressed some, but failed to clarify all issues with regard to notarisations in Switzerland.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

See question 3.9 above with regard to expenses. Depending on the court handling the registration of land charges and/or mortgages, the registration might take several weeks or even longer. However, this does generally not result in any delay of the closing of a secured lending transaction, as it is standard market practice for the facility agreement to provide that the mere filing for registration of land charges or mortgages satisfies the corresponding closing condition.

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

Pursuant to German law, generally no such consents are 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?

There are generally no special priority or other concerns with regard to a revolving credit facility. Security can even be created

with regard to future receivables, provided that such receivables are identifiable (*see* question 3.4 above).

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

See questions 3.3 and 3.6 above regarding notarisations. Where a security agreement is executed on the basis of a power of attorney, the parties typically require the authorisation pursuant to the power of attorney to be evidenced on the basis of a complete chain of corresponding powers certified by notaries or corresponding entries in commercial registers (*Handelsregister*). In case of powers of attorney executed by foreign companies, foreign notaries may certify the identity of signatories and the content of the respective foreign register (if any). For some foreign countries, the certifications by the foreign notaries must be accompanied by an apostille.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

AGs. The financial assistance rules for German stock corporation provide for an explicit ban on the extension of loans to third parties and the extension of collateral to secure loans of third parties in order for such third parties to acquire shares in the AG. Any agreements entered into in violation of such rules are invalid. Exceptions to these rules apply (i) where a statutory domination and control or profit and loss transfer agreement exists, (ii) where financial assistance is granted in the course of the regular business of banks or financial services institutions, and (iii) in connection with an equity participation of employees.

GmbHs. GmbHs are not subject to comparable financial assistance rules. However, the capital maintenance rules and the legal doctrine on "destructive interference" described in questions 2.1 and 2.2 above applicable to GmbHs result in comparable limitations. In particular, in a standard leveraged buy-out scenario with a GmbH as the target, financial assistance requested by the purchaser from the GmbH may be considered "destructive interference". The capital maintenance rules apply not only to payments or the extension of other benefits by a GmbH to its shareholders, but also to future shareholders, if the extension of payments or other benefits to those are closely related to the acquisition of shares in the GmbH.

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

In this context, no clear guidance is available from German case law and legal scholars.

AGs. It seems fair to assume that the financial assistance rules described above should apply where such a company can exercise controlling influence over an AG that extended security.

GmbHs. It seems fair to assume that payments or the extension of other benefits by a GmbH to such a company which can exercise influence over the GmbH should be, subject to the limitations described in questions 2.1 and 2.2 above, prohibited pursuant to the capital maintenance rules as applicable to GmbHs. As German courts tend to apply such rules rather broadly, it also seems fair to assume that it does not matter whether such a company is already part of the GmbH's group when the payment or other benefit is extended. Also, the legal doctrine on "destructive interference" raises additional limitations for the extension of a payment or other benefit in such a scenario.

(c) Shares in a sister subsidiary

As in the scenario under (b) above, there is no clear guidance by German case law and legal scholars. Financial assistance rules applicable to AGs as described in (a) above would not apply. However, the capital maintenance rules and the legal doctrine on "destructive interference" applicable to GmbHs as described in questions 2.1 and 2.2 above apply and might impose limitations that are comparable to financial assistance rules. Furthermore, depending on the facts at hand, such rules may also be applicable in case payments or benefits are extended to an affiliate of the shareholder, if such shareholder can exercise controlling influence over the provider of the payments or benefits and such affiliate. It also seems fair to assume that such limitations should apply whether or not such affiliate is already part of the group when the payment or other benefit is extended.

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?

This is generally recognised by German law, with an exception for "accessory" security interests (*see* question 3.3 above) such as pledges and mortgages (*see* question 5.2 below regarding the parallel debt concept).

5.2 If an agent or trustee is not recognised in Germany, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

As described above in question 5.1, this only arises with regard to "accessory" security interests. Due to the fact that the secured claim and an "accessory" security interest for such claim are legally inseparable, a security agent or trustee can only hold such security where it is also a creditor of the secured claim. As an alternative mechanism to achieve the effect referred to in question 5.1, and to avoid requiring all lenders to become parties to the security agreement, parallel debt structures are frequently used in Germany. In such structures, the parties create an additional obligation of the borrower to the security agent or trustee which is in the same amount as the aggregate outstanding claims under the finance documents. This allows the creation of both "accessory" and "non-accessory" security for the benefit of the security agent or trustee for the full amount of what is outstanding from time to time. Such security can then be enforced by the security agent or trustee, and the enforcement proceeds can be applied to the claims of all lenders. However, although the general view is that these should be recognised under German law, the validity of parallel debt structures has not yet been tested in German courts.

5.3 Assume a loan is made to a company organised under the laws of Germany and guaranteed by a guarantor organised under the laws of Germany. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

German law distinguishes between a guarantee (*Garantie*) and a surety (*Bürgschaft*).

Guarantees. German law considers a guarantee to create a separate, "non-accessory" claim against the guarantor. Consequently, the guarantee must be assigned to Lender B. (However, except where expressly permitted by the terms of the guarantee agreement, the assignability of "first demand" guarantees is unclear.) The guarantor retains *vis-à-vis* Lender B any objections resulting from the guarantee agreement upon a transfer of the loan and assignment of the guarantee. However, it may generally not raise any objections resulting from the contractual relationship between the obligor and Lender B under the loan agreement.

In any event, it is general market practice that guarantees are extended for the benefit of all parties to the facility agreement, and that the security agent will hold such guarantees for the benefit of those parties. In these cases, the guarantee need not be transferred to a new lender.

Sureties. German law considers a surety (which must be in writing) to create an "accessory" claim. Consequently, it is automatically transferred upon an assignment of the loan. In contrast to a guarantor, the grantor of a surety is not only entitled to raise objections resulting from the surety upon a transfer of the loan, but also objections resulting from the relationship between the obligor and creditor under the loan agreement.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Generally, there is no requirement under German tax law to deduct or withhold tax from (i) interest payable on loans made to domestic or foreign lenders, (ii) the proceeds of a claim under a guarantee, or (iii) the proceeds of an enforcement of security. However, the German tax authorities are entitled to assess on an obligor an obligation to withhold tax at a rate of 26.375 per cent (or 15.825 per cent in case of a corporate taxpayer) on interest payments to a foreign lender, if such interest payments are subject to tax in Germany and such withholding appears to be required for safeguarding Germany's taxation right (and is not excluded under any applicable tax treaty). Interest payments may be considered German source income if a particular link to German sources exists. According to German local tax provisions, this link exists, *e.g.*, in the case of interest payments made on loans that are secured by German *situs* real estate. Where an applicable tax treaty also permits Germany to tax such income from interest payments, tax withheld might be credited or refunded upon tax assessment on the foreign lender, which requires a tax filing of the lender as well.

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 German tax other incentives are provided preferentially to foreign lenders. No taxes (such as stamp, issue, registration or similar taxes or duties) apply with respect to loans, mortgages or other security documents for the purpose of effectiveness or registration.

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

Income of a foreign lender will not become taxable in Germany solely because of a loan to or guarantee and/or, generally, the grant of security from a company in Germany.

Notwithstanding the foregoing, income of a foreign lender may become taxable in Germany where a loan is secured by German *situs* real estate or comparable rights or ships registered in Germany. This, however, generally does not apply in case of the existence of tax treaties between Germany and the country of residence of the foreign lender (*see* question 6.1 above). However, income of a foreign lender may become taxable in Germany (i) in case such income is attributable to the business property of a permanent establishment of such lender, including a permanent representative, or a fixed base maintained in Germany by the foreign lender, or (ii) such income is otherwise considered as German-source income (*e.g.*, rental income from German real estate).

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

See question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

German law does generally not provide for any such consequences.

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?

Regulation (EC) 593/2008 on the Law applicable to Contractual Obligations (Rome I) is applicable in Germany. Accordingly, subject to the requirements set out below, courts in Germany will generally recognise the contractual choice of a foreign law, and enforce such contract, to the extent that they have jurisdiction for claims under such contract. Choice of law clauses in contracts are

recognised where there is an actual conflict of laws and the contract relates to civil or commercial matters. Choice of law clauses can also be added or modified after the relevant contract was executed. However, where there is no actual conflict of laws and the contract is exclusively connected to EU Member State(s), the parties cannot choose the law of a non-EU Member State. If they were to do so, German courts would not recognise such a choice of law and would apply the law of the EU Member State that the contract is connected to. In addition, German courts may apply mandatory provisions of the jurisdictions where the contractual obligations have to be fulfilled. A contractual choice of law will not be recognised, however, where it violates the German *ordre public*.

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?

In this respect, one has to distinguish between judgments rendered in another EU Member State and judgments rendered elsewhere.

EU Member State Judgments. The enforcement of judgments rendered in another EU Member State is governed by Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "**Brussels I Regulation**"). Pursuant to Article 33 of the Brussels I Regulation, any such judgments will be recognised and enforced without any special procedure being required or any re-examination of the merits of the case. Certain exceptions apply (*e.g.*, in respect of judgments that are manifestly contrary to the German *ordre public*). Such judgments will be declared enforceable upon application to a presiding judge of a chamber of a German regional court (*Landgericht*).

Non-EU Member State Judgments. Judgments rendered outside the EU will generally be recognised, unless the recognition is explicitly excluded under the German Code of Civil Procedure (*Zivilprozessordnung*). Certain exceptions apply (*e.g.*, in respect of judgments that are contrary to the German *ordre public*, or where the foreign court did not have jurisdiction according to German law). To become enforceable in Germany, such judgments have to be declared enforceable by a German court pursuant to the German Code of Civil Procedure. However, in any such proceeding the German court does not review the merits of the case.

It is standard market practice in Germany for a party that wants to rely on a foreign judgment to obtain a declaratory judgment which recognises 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 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?

There are different factors that impact the timing for obtaining a decision of a German court or enforcing a foreign judgment, including, *inter alia*, the complexity of the case and the workload of the court. In a best case scenario, with regard to (a) above, a first-instance court judgment might be obtained within one year. With regard to (b) above, in a best case scenario, the enforcement of a judgment from an EU Member State should general be recognised and enforceable within a few days, while this might take a couple of months in the case of a judgment from a non-EU Member State. However, in both cases this might also take significantly more time, and the time required for the actual enforcement will vary from case to case. Additional time may be added by appeals (most of the first-instance judgments can be appealed, but preliminary enforcement is generally available upon extending collateral).

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?

Land charges/mortgages. Land charges and mortgages have to be enforced in formal enforcement proceedings, frequently by way of a public auction conducted by the enforcement court (*Vollstreckungsgericht*). The timing of such enforcement is generally impacted by the workload of such court. In addition, the obligor may apply for a suspension of enforcement for a period of six months. This requires, however, that there is a certain likelihood that the suspension will render the auction unnecessary and that the suspension is justified on equitable grounds.

Movables/inventory. Security over movables/inventory that is in the form of a pledge is generally enforced outside of formal enforcement proceedings (*Zwangsvollstreckungsverfahren*) by way of a public auction. Alternatively, where there is an exchange price for the relevant asset, a discretionary sale may be undertaken. Public auctions have a significant impact on timing and require a notification to the security provider with a mandatory waiting period of one month before the auction can be performed.

German law does not provide for any regulatory consents for the enforcement of security. However, the Legal Services Act (*Rechtsdienstleistungsgesetz*) requires express permission for rendering debt collection services (*Inkassodienstleistungen*) (subject to certain exceptions, *e.g.*, for attorneys). Debt collection services are permitted under the Legal Services Act if the debt collection agency is registered in the legal services register and commands over certain legal expertise (in particular civil law, commercial law and insolvency law).

In addition, any factoring services conducted in a commercial manner, and any factorings services requiring a commercially organised business, are subject to licensing rules under the KWG. *See* question 2.4 above and question 10.1 below with regard to exceptions to such licensing requirement.

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

The only additional restriction for foreign lenders is that these may be required to post collateral for court costs before any proceedings will begin. However, this is not applicable where such requirement is waived by a corresponding treaty between Germany and the jurisdiction in which such lender has its domicile or residence. Lenders from EU Member States or states that are party to the Hague Convention on Civil Procedure of 1 March 1954 are generally not required to post collateral for court costs.

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?

Preliminary insolvency proceedings. Initially, upon an insolvency filing, the insolvency court will generally appoint a so-called

"preliminary insolvency administrator" and open "preliminary insolvency proceedings". Such proceedings usually take up to three months, during which it is determined whether (i) an insolvency ground exists, and (ii) the company's assets are sufficient to cover the expected costs of the proceedings. The insolvency court may (and often does) impose a prohibition on claims and security enforcement measures against the debtor during this period by way of a court order. This does not apply to the enforcement of security over real estate; however, the "preliminary insolvency administrator" may apply for suspension of the enforcement of such security by way of public auction where he or she can demonstrate a certain likelihood that the suspension is necessary to avoid an adverse impact on the debtor's financial situation. Furthermore, German insolvency courts may issue an order entitling a "preliminary insolvency administrator" to collect receivables over which security was granted by way of a security assignment.

Insolvency Proceedings. The opening of (actual) insolvency proceedings creates a moratorium on all individual claims enforcement measures against the insolvent debtor. See question 8.1 below on creditors with a right to preferential treatment. As regards the impact of insolvency proceedings on the enforcement of security, see question 8.1 below.

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

German law provides only for very limited review of arbitral awards. The recognition and enforcement of arbitral awards is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Accordingly, a court will generally not re-examine the merits of the case. Certain exceptions apply (*e.g.*, invalidity of the arbitration agreement and corresponding lack of jurisdiction of the arbitral tribunal).

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In insolvency proceedings, secured lenders generally have a right to preferential treatment (*Absonderung*) in the form of a preferred distribution from the proceeds of the enforced security, whereas unsecured creditors only participate in the remainder of the proceeds (if any) from the bankruptcy proceedings on a *pro rata* basis. The latter also applies to secured creditors in respect of any deficiency claims they may have after the enforcement of their security.

Certain forms of security can be enforced only by the insolvency administrator. This applies generally to security over (i) inventory/movables in the insolvency administrator's possession, and (ii) receivables, even where the receivables obligor has been notified of the security assignment. The secured party itself may enforce security over receivables or movables only in those rare cases where such security was created by way of a pledge. With regard to land charges and mortgages, both the insolvency administrator and the secured party are entitled to enforce the security by way of public auction or sequestration. In addition, the insolvency administrator may enforce land charges and mortgages by way of a discretionary sale. Even where a secured party is entitled to enforce the security itself, this is subject to possible legal actions by the insolvency administrator, *e.g.,* the insolvency administrator is entitled to file for the suspension of an enforcement by way of public auction, especially where the auction would have a significant adverse impact on the amount to be realised for the insolvency estate.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The insolvency administrator may challenge (clawback) legal actions by the insolvent party that impaired third-party creditors during applicable preference periods if certain additional statutory requirements are satisfied. Applicable preference periods run from one month to ten years prior to the insolvency filing. Any clawback under these rules is governed by statutory rules and (unlike in many other jurisdictions) not in the discretion of the insolvency court.

One of the most commonly used challenges applied by insolvency administrators relates to the grant of security or satisfaction of a claim by the (now insolvent) debtor, provided that such action was performed (i) during the last three months prior to the insolvency filing, where at such time the debtor was unable to pay its debts as they came due (illiquid) and the creditor knew of such inability, or (ii) after the insolvency filing, provided that at such time the creditor was aware of the debtor's inability to pay its debts or of the filing.

In addition, the insolvency administrator may challenge actions of the debtor that extended security to a creditor or satisfaction of a claim to which such creditor was not entitled (or was not entitled to in such a way or at such time), if such action was taken (i) during the last month prior to the insolvency filing or after such filing, (ii) during the second or third last month prior to such filing, if the debtor was unable to pay its debts at such time, or (iii) during the second or third last month prior to such filing, if the creditor was aware at the time when such action was taken that it was detrimental to the debtor's third-party creditors.

Furthermore, transactions (*Rechtsgeschäfte*) entered into by the debtor may be challenged by the insolvency administrator if they directly impaired the debtor's third-party creditors and the transaction was done (i) during the last three months prior to the insolvency filing, if at such time the debtor was unable to pay its debts and the creditor was aware of that, or (ii) after the insolvency filing, if at such time the creditor was aware of the debtor's inability to pay its debts or of the filing.

Any action performed without any consideration may also be challenged by the insolvency administrator, unless it was performed more than four years prior to the insolvency filing.

In addition, an insolvency administrator is entitled to challenge actions that were taken with the intent to impair the debtor's third-party creditors, provided that the creditor was aware of such intent and the action was taken within ten years prior to the insolvency filing or after such filing.

In respect of shareholder loans and similar transactions, the insolvency administrator may challenge:

(i) an action taken without any consideration, except where this occurred more than four years prior to the insolvency filing;

(ii) an action by which security was provided for a shareholder loan or similar shareholder's claim, if this occurred within ten years prior to the insolvency filing or after such filing;

(iii) an action by which a shareholder loan or similar shareholder's claim was satisfied, if this occurred within one year prior to the insolvency filing or after such filing; and

(iv) an action by which a third party's claim for the repayment of a loan or payment of a similar claim was satisfied, if such claim was secured by security granted by the debtor's shareholder and the action was taken within one year prior to the insolvency filing or after such filing.

An insolvency administrator's clawback rights are more restricted in the case of actions taken by the debtor for which there was immediate and equivalent consideration (*e.g.*, with regard to the extension of security, if such security constituted equivalent (*gleichwertig*) security and there was a direct nexus (*unmittelbarer Zusammenhang*) of the extension of security with the extension of a credit). Any such action is considered a "cash transaction" (*Bargeschäft*) and may be challenged by the insolvency administrator only where the debtor had the intent to impair its third-party creditors. "Equivalence" may also exist if there is a certain level of over-collaterisation. A "direct nexus" requires that there be no significant time difference between the extension of the credit and the extension of security. However, no "cash transaction" exists where the debtor extended security with regard to a pre-existing claim without any explicit contractual obligation to do so; this also applies to the extension of a new credit where the parties agree that that the security granted for the new credit will also secure a pre-existing debt for which previously no security was granted.

In addition, German law provides certain rebuttable presumptions that facilitate the challenge by an insolvency administrator of transactions between the debtor and its related parties (affiliates). *Inter alia*, the insolvency administrator is entitled to challenge any such transaction if it was (i) entered into for consideration during the last two years preceding the insolvency filing, (ii) directly detrimental to the debtor's third-party creditors, or (iii) performed by the debtor with the intent to impair its third-party creditors, unless the related party can prove that it was not aware of such intent.

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

Certain entities governed by public law are, due to public policy considerations, excluded from bankruptcy proceedings pursuant to German insolvency laws.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Creditors principally use court proceedings to seize the assets of a company in enforcement. Private remedies such as "self-help" are typically only permissible as a last resort, *i.e.*, where there is a present danger to suffer irreparable harm.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Germany?

In cross-border scenarios, the submission of a party to a foreign jurisdiction is generally governed by Article 23 of the Brussels I Regulation, which provides that a contractual choice of forum is generally permissible and legally binding. Certain form requirements may apply. If expressly agreed, a clause giving only one party the right to choose the forum is permissible. However, if other courts have exclusive jurisdiction pursuant to Article 22 of the Brussels I Regulation, no choice of forum is permissible. This relates in particular to proceedings regarding *in rem* rights in immovable properties or tenancies of immovable properties.

However, there is currently no clear guidance as to where the Brussels I Regulation will apply, unless a cross-border scenario exists where both parties have their domicile in different EU Member States. Where only one party has its domicile in an EU Member State and the other party has its domicile in the same EU Member State or in a non-EU Member State, it cannot be excluded that a court may find that the Brussels I Regulation would not be applicable, so that the choice of jurisdiction clause would be governed by domestic (*e.g.*, German) law. However, it should be noted that German domestic rules correspond largely to the Brussels I Regulation.

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

A waiver of sovereign immunity is generally legally binding, unless (i) it conflicts with public international law or (ii) covers areas that are specifically protected by international law, *e.g.*, diplomatic immunity. The enforcement into assets protected by diplomatic immunity, *e.g.*, embassy buildings, is permissible only with a corresponding express waiver of diplomatic immunity.

10 Other Matters

10.1 Are there any eligibility requirements in Germany for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Germany need to be licensed or authorised in Germany or in their jurisdiction of incorporation?

The KWG provides that the extension of cash loans in a commercial manner, or to an extent that requires a commercially organised business, requires a banking licence. Various exceptions to this rule apply (*e.g.*, for insurance companies; *see* also question 2.4 above regarding a further exception applicable to banking business with certain affiliates).

In addition, according to guidance by BaFin, the licensing requirement does not apply to pre-existing client relationships or to the extension of loans at the borrower's own solicitation. According to BaFin, the latter exception typically applies in the case of large corporate clients and institutional investors.

Furthermore, BaFin may exempt lenders from the licensing requirement where the lender does not require supervision based on the nature of its business. With regard to foreign lenders, such exemption typically applies where these are effectively supervised in their home countries by competent authorities in accordance with internationally recognised standards and the competent home country authorities cooperate with BaFin in a satisfactory manner.

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

A material consideration to be taken into account relates to the legal concept of lender liability resulting from the so-called "tortuous grant of a restructuring loan" (*Sanierungskredit*). This legal concept is based on German case law that is not fully clear and consistent. The initial test is whether a lender has extended a loan to a distressed company that is not economically viable, and the loan would actually not result in a restructuring of the company but only delay its insolvency in order for the lender to obtain certain benefits, *e.g.*, the expiration of preference periods. Where such a lender acted with a certain degree of intent and/or recklessness, German courts may consider such extension of credit to be an unfair impairment of other creditors of the distressed borrower, and hold such lender liable to

such other creditors for any losses such creditors suffered from the delay of insolvency caused by such lender. Such liability can be significant and especially relates to future creditors of the distressed borrower that are not or not fully secured. This liability can also be incurred *vis-à-vis* existing creditors of the borrower, amounting to the difference by which the insolvency ratio applicable to their claims against the distressed borrower is reduced as a consequence of the delay of insolvency to the ratio that they would have received if the insolvency filing would have been made earlier. Furthermore, subject to certain requirements, security extended by the distressed borrower to such a lender can be void or challengeable by the insolvency administrator (*see* question 8.2 above). However, German courts acknowledge that restructuring efforts generally involve the extension of new loans and, necessarily, a certain degree of risk that the distressed borrower may eventually become insolvent in spite of the restructuring efforts. Accordingly, it seems fair to assume that lenders should not incur lender liability if they act in good faith when participating in the restructuring of a distressed borrower. In these situations lenders generally obtain restructuring opinions (*Sanierungsgutachten*) from, *e.g.*, auditing firms, confirming on the basis of a thorough due diligence review that, upon the grant of the new loan, the borrower will be viable going forward. Such opinions can be used as a defence if the borrower subsequently falls into insolvency and litigation is initiated against the new lender.

Another material consideration to be taken into account relates to persons who represent lenders in the context of restructuring loans. Such a person can potentially qualify as a *de facto* managing director (*faktischer Geschäftsführer*) of the borrower. This legal concept applies where a person acts *vis-à-vis* third parties as if he or she were appointed as a managing director of the borrower, and effectively manages the borrower in a way a validly appointed managing director would (including by influencing the activities of the actual managing director), but without an actual, legally valid appointment. *De facto* managing directors can incur liability to third parties for any delay of an insolvency filing. There is no clear guidance as to where a person representing lenders may have to be considered a *de facto* managing director of the borrower. All facts at hand have to be taken into account, including in particular the duration and the kind of influence taken by such person on the actual management of the borrower.

A further material consideration relates to the subordination of shareholder loans. In insolvency proceedings, shareholder loans are subordinated to claims of other creditors of the insolvent party. Such subordination applies as a matter of statutory law, not in the discretion of the court. Exceptions apply where a shareholder either (i) has acquired its shares in an attempt to effect a restructuring (restructuring exemption), which is again typically evidenced by way of a third-party restructuring opinion, or (ii) holds 10% or less of the borrower's registered share capital (small shareholder exemption). In addition to the subordination, an insolvency administrator may be entitled to challenge certain acts of the insolvent party, as described in question 8.2 above.

The subordination of shareholder loans can pose an additional risk for lenders where these qualify as *de facto* shareholders. This legal concept is based on case law of the German Federal Court of Justice. It generally requires that the lender received a pledge over a company's shares and qualifies as a so-called "irregular pledgee" (*irregulärer Pfandgläubiger*), meaning a pledge that has been put in a position to be able to exert influence over the borrower's management, including by way of overly restrictive covenants and consent requirements in the underlying loan documentation.

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Greece

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1 Overview

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

Further to the recent parliamentary elections and the subsequent four (4)-month extension of the country's financial rescue resolved by the Euro zone finance ministers, Greek systemic banks, which have successfully concluded the 2014 ECB stress test assessment, have to face new major challenges, mainly due to the uncertainties created by the on-going discussions of the country with its creditors as to its unsustainable debt. Within such a framework, Greek banks have little room to provide the necessary funding to the real economy.

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

In 2014, Greek banks have continued refinancing existing loans on a syndicated basis. Within such a framework, the most significant lending transaction of 2014 was the €2.2bn PPC refinancing.

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

- "lenders" means credit institutions and "borrowers" or "obligors" means companies; whereas
- "companies" means Greek corporations which are regulated by codifying Law 2190/1920 on societé anonyms, as amended by Law 3604/2007 and in force (the "**Greek Company Law**").

2 Guarantees

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

Article 23a of Greek Company Law provides that a company is prohibited from guaranteeing the borrowings of associated legal entities, unless the following (quite strict) conditions are cumulatively met: (i) the guarantee serves the company's interests; (ii) the company has a right of recourse against the principal debtor (i.e. the associated enterprise in favour of which the guarantee is provided); (iii) the general meeting of shareholders (the "**GM**") approves the transaction by an increased special quorum and majority; and (iv) the claims of the lender, in favour of which the guarantee is provided, are subordinated to the claims of the company's existing creditors. Greek financial institutions are not subject to the above regime and may freely guarantee borrowings of members of their groups. In addition, a company may guarantee borrowings of one or more other legal entities, whose financial statements are subject to consolidation pursuant to articles 90-109 of Greek Company Law, again provided that the GM approves the transaction by an increased special majority.

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

In principle, the provision of guarantee shall serve the guarantor company's interests, an issue which is a factual and multidimensional one and therefore has to be examined on a case-by-case basis. If such a condition is not met, then the guarantee is considered null and void and directors' liability (including penal) may arise.

2.3 Is lack of corporate power an issue?

Lack of corporate power (i.e. total absence of the relevant scope in the company's Articles of Association) is an issue only to the extent that a guarantee is considered as not serving the attainment of the company's business scope, in which case it is null and void, as per our response under question 2.2. On such a basis, lenders usually require the provision of guarantee to be included in the business scope of borrower companies.

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

In principle, no. As aforementioned under question 2.1, an approval by the GM, to which shareholders representing 1/10 of the paid-up share capital (1/20 in the case of listed companies) shall not oppose, is required. The Board of Directors (the "**BoD**") shall submit to the GM a report confirming satisfaction of the conditions for the lawful granting of the guarantee, whereas the GM resolution shall be registered with the Companies' Registrar and meet the statutory publication requirements. In case of companies, whose financial statements are subject to consolidation, pursuant to articles 90-109 of Greek Company Law, the GM approval shall be resolved by a 2/3 majority (increased to 19/20, if provided on a post-transaction basis).

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

In general, no (except for guarantees raising financial assistance issues, in respect of which refer to section 4).

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

No, there are not.

3 Collateral Security

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

There are two (2) basic categories of security rights under Greek law: collateral *in personam*; and collateral *in rem*. The main personal security rights are guarantees, whereas the main real security rights are (prenotation of) mortgages (over immovable assets) and pledges (over movable assets and rights). Non-attachable assets and/or claims are not available to secure lending obligations.

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

Given that specific establishment, publication and registration requirements may apply depending on the type of either the security or the asset, on which such security is granted, an agreement in relation to each type of asset is commonly used. The procedure depends on whether a court decision, notarial deed or private agreement is statutorily required for the establishment of the security, as well as whether such decision, agreement or deed has to be registered with a specific authority and meet any publication requirement. See below for more details.

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

Collateral, in the form of either a mortgage or a prenotation of mortgage, may be taken over real property (land) and plant, as well as all component parts and accessories of the immovable (i.e. machinery and equipment), which are owned by the security provider and are fixed (or exist) thereto.

Pursuant to the provisions of the Greek Civil Code (the "**GCC**"), a mortgage is the right *in rem* established in favour of a creditor over a person's full ownership (or usufruct) rights on immovable property (land and buildings) to secure an obligation by means of the creditor's preferential satisfaction. A prenotation is a type of temporary mortgage, which may be rendered final provided that: (a) a final court decision orders payment of the due and payable claim, which is secured by the prenotation; and (b) the prenotation is converted to a mortgage within a period of 90 days from the issuance of such a court decision. Given their equal treatment as to enforceability and ranking, prenotation is usually preferred due to the lower costs involved.

As to the procedure, a mortgage may be established bilaterally, by virtue of a notarial deed, or unilaterally, by virtue of a court decision; a prenotation of mortgage is always established by virtue of a court decision (either on a bilateral or a unilateral basis). For the perfection of both types of securities, the court decision or the notarial deed shall be registered with the competent Land Registry or Cadastre.

Under both types of security, possession of the real property is not conveyed to the creditor. Pursuant to special statutory provisions applicable to (prenotations of) mortgages securing claims of credit institutions: said securities are protected from clawback in case of bankruptcy of the collateral provider; such securities extend to any machinery and equipment that enters the mortgaged plant even after the establishment of the security; the collateral provider is prohibited from removing and/or transferring the machinery and equipment, without the prior consent of the creditor; and enforcement procedures are facilitated.

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

Receivables (present or future) may be pledged under the provisions of the GCC on the basis of a written agreement, which shall take the form of a notarial deed or a private agreement bearing a certain date (the latter is preferred due to its minimal costs). The agreement is executed between the creditor and the collateral provider and must be notified to the debtors of the pledged receivables in order to be perfected. Pledge of current or future business receivables may also be established under the provisions of articles 11-15 of law 2844/2000; in addition, collateral security over business receivables may take the form of a floating charge under the provisions of articles 16-18 of law 2844/2000, which is established on a group of claims/rights. Such claims/rights are freely collected/disposed by the security provider, who is, however, obliged to substitute them with similar claims/rights. Finally, claims may be pledged in favour of credit institutions licensed in Greece pursuant to the beneficial provisions of legislative decree ("**l.d.**") 17.7.1923.

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

A pledge over cash deposited in bank accounts is commonly realised in favour of credit institutions under the provisions of either l.d. 17.7.1923 and/or law 3301/2004, transposing into Greek law the EU Directive on financial collateral arrangements (the "**collateral law**"). The procedure involves in this case, too, a pledge agreement in the form of a notarial deed or a private agreement bearing a certain date, which is notified to the bank maintaining the accounts.

3.6 Can collateral security be taken over shares in companies incorporated in Greece? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares in companies incorporated in Greece may be pledged as security of claims arising from lending transactions. The pledge is extended to dividends and other monetary or personal rights deriving from the shares, unless otherwise agreed.

A pledge of either bearer or registered shares is realised in accordance with the aforementioned (under question 3.4) GCC procedure, with the additional requirement of delivery of the share certificates to the pledgee, whose details shall be noted on the share certificates, as well as into the shareholders' book, in the case of

registered shares. In the case of dematerialised listed shares, the pledge needs to be registered with the Dematerialized Securities System. Finally, a pledge of listed shares may also be effectuated pursuant to the provisions of the collateral law.

In principle, security over shares in companies incorporated in Greece may validly be granted under a New York or English law governed document; rights *in rem* however over the shares will be governed by the *lex rei sitae*, i.e. the law of the place where either the respective account or registry is maintained, in the case of dematerialised shares, or the person – normally the security holder – holding the shares is located, in the case of securities in paper form. Finally, such choice of law will be subject to Greek public order and overriding mandatory provisions, to the extent applicable.

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

Given its purpose (i.e. to be sold), inventory (products) is commonly pledged, under the provisions of articles 16-18 of law 2844/2000, in the form of a floating charge over a group of assets (the inventory), which remain in the possession of the security provider, the latter being entitled to dispose, with the concurrent obligation, however, to substitute them with similar assets. A floating charge is perfected by virtue of its registration in the public books kept with the competent pledge registry.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company may grant a security interest in order to secure its obligations under a credit facility both as a borrower and as a guarantor of the obligations of other borrowers and/or guarantors of obligations.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Costs vary depending on the type of security:

In the case of mortgage, notarial fees amount to 1.2% of the security value, whereas legal fees are also payable if lawyers are involved. In the case of prenotation of mortgage, court fees do not exceed €500. Registration fees for both securities amount to 0.83% of the security value in case of land registries, or 0.93% in case of Cadastres.

Registration of the notional pledge or floating charge to the Pledge Registry is burdened with fees equal to 0.7% of the security value.

The above security charges are significantly reduced in case of bond loans issued by Greek companies under the provisions of law 3156/2003 (the "**bond loans law**").

Registration of the pledge of dematerialised listed shares to the Dematerialized Securities System costs €120 (per issuer and type of share). The fees of court bailiffs for the notification of a security document amounts to €40-70 per service.

Finally, loans granted by Greek or foreign banks to Greek companies, as well as securities granted in their context, are exempted from Greek stamp duties.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

In principle, notification or registration of securities does not involve a significant amount of time. Limited Land Registries are slow in processing registrations of deeds or court decisions to their public books. In terms of expenses, please refer to our answer to question 3.9.

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

In principle, no consents are required. The only related requirements are provided by the provisions of:

a. law 1892/1990, pursuant to which consents shall be obtained as to agreements involving the acquisition by non-EU individuals or legal entities of rights *in rem* on real property within Greek border areas (as well as shares in companies with such real rights); and

b. law 3310/2005, pursuant to which any agreement (including a security document) in respect of rights in shares representing at least 1% of the share capital of a media company or a company taking part to a public tender is null and void unless such agreement is executed before a notary public and notified to the Greek National Council for Radio and Television.

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

No. Any type of collateral secures the obligations arising from the balance of the respective accounts, after closing thereof.

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

See our answers 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 prohibited from providing guarantees and/or giving security to support borrowings incurred to finance the direct or indirect acquisition of shares of the same by any third party (other than the company's employees) unless:

(i) the GM provides its prior consent to the guarantee and/or security by an increased quorum and majority on the basis of a BoD report on the reasons and the company's interest for the transaction to be approved, as well as an auditor's report; and

(ii) the secured amount, which shall appear in a non-distributable reserve as long as the security is outstanding, does not cause the company's own funds to fall below the aggregate amount of share capital and non-distributable reserves.

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

As long as the company, whose shares are being acquired, is considered to be the parent company of the company which is providing the guarantee or other security, then the restrictions referred to under question 4.1(a) apply.

(c) Shares in a sister subsidiary

This case is not covered by the provisions of the Greek Company Law.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Greece recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

In principle, no. Such a notion may only be found in the bond loans law, which provides for the role of a bondholders' representative, acting also as a security agent in the framework of bond loans issued by Greek companies, as well as securitisation transactions. Under such provisions, securities *in rem* are granted in favour of the security (bondholder) agent, which shall be either a credit institution or an investment firm, licensed to operate in Greece. Such security agent is appointed by the issuer of the bonds (i.e. borrower) and is acting in the name and on behalf of all the secured creditors (bondholders).

5.2 If an agent or trustee is not recognised in Greece, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Other than the security agent provided by the bond loans law as above, there is no alternative mechanism (including the parallel debt clause) to achieve the intended effect without any legal risk.

5.3 Assume a loan is made to a company organised under the laws of Greece and guaranteed by a guarantor organised under the laws of Greece. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The transfer of a lender's rights and obligations arising from a loan (and a guarantee) agreement is allowed, unless otherwise provided by the respective contractual provisions. In order to be perfected, the transfer shall be notified to the debtors (borrower and guarantor).

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest payable on credit facilities is not subject to withholding tax; it has been clarified that, under the provisions of the new Greek Income Tax Code (the "**ITC**"), applicable as of 01.01.2014, such exemption also applies to foreign lenders (see our answer to question 6.2 for applicable DTT rates). A 15% withholding tax is levied on interest from bond loans issued by resident companies (see our answer to question 6.2 for foreign investors). The above tax treatment should not alter due to the fact that interest has been paid in the form of proceeds from a guarantee claim or from enforcement of security.

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

In cases where, under ITC provisions, interest payable to foreign lenders is subject to withholding tax, the lower rate among the following shall apply:

(a) 15%, as provided by ITC;

(b) the rate provided by the tax treaty (if any), signed by Greece, with the State of which the foreign lender is a tax resident; and

(c) the zero rate provided by the EU Interest and Royalties Directive, if the relevant statutory conditions are met.

Under the ITC provisions, the exemption of non-resident companies without a permanent establishment in Greece from any withholding tax on interest from bond loans issued by resident companies no longer applies (it applied until 31.12.2013).

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

Foreign banks do not acquire a permanent establishment in Greece solely because of the granting of a loan to a Greek company or a guarantee and/or grant of security therefrom.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

An annual contribution at the rate of 0.6% is imposed on the average outstanding monthly balance of each loan granted by a Greek or foreign bank to a Greek resident. Loans between banks, loans to the Greek State, loans funded by the EIB, as well as bond loans are exempt from such contribution. As to guarantees, no additional cost arises. For costs and fees in respect of securities, kindly refer to our answer to question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

There are, in principle, no adverse legal consequences to a borrower due to the fact that some or all of the lenders are organised under the laws of a jurisdiction other than Greece. Thin capitalisation rules exist in Greece, but their application is not affected by the residence of the lenders. Deductibility of interest may be disallowed under special tax anti-avoidance provisions.

7 Judicial Enforcement

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

Greek courts do recognise and enforce contracts that have a foreign governing law on the basis of the provisions of the Rome Convention on the law applicable to contractual obligations and Regulation EC 593/2008, whichever is applicable, subject to: rights *in rem*, which are governed by the law applicable as per the conflict of law rules; Greek public order; and overriding mandatory provisions.

7.2 Will the courts in Greece recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes, Greek courts will recognise and enforce a foreign judgment without re-examination of the case, pursuant to the applicable provisions of: EU Regulations, in case of judgments from other EU Member States (e.g. Regulations EC 44/2001 and/or 805/2004 and/or 1215/2012); bilateral International Conventions; and the respective provisions of the Greek Code of Civil Procedure (the "**GCCP**").

However, Greek courts may deny recognition in case: the foreign judgment is not an enforceable title or a *res judicata* in the foreign country; it is issued by a foreign court not having jurisdiction as per Greek law; it violates the Greek public order; the defendant was deprived of its rights to a fair trial; or the foreign judgment is contrary to a Greek judgment, which is *res judicata* for the same issue and parties.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Greece, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Greece against the assets of the company?

The period required for a foreign lender to obtain a judgment (of first degree, i.e. appealable) over a Greek law governed contract starts from six months, in case of a payment order, and goes as far as two to four years, in case of a law suit. In the case of a foreign governing law, such periods are expected to be significantly extended. The period required for the recognition of a foreign judgment may also prove considerable.

In any case, enforcement of a Greek or foreign judgment and actual satisfaction of a lender is usually lengthy, especially when auctions are involved (see below, question 7.4), given that legal defences (other than to claim payment) are available to the obligor(s) during the enforcement procedure as a consequence of the typically excessive requirements of the latter. The length of the process is also heavily dependent on if there are claims of other creditors participating in the enforcement and auction proceedings with general and/or special privileges, as per the GCCP provisions.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Under the GCCP's general rules of enforcement of security, the mortgagee/pledgee of mortgaged/ pledged immovable/movable assets may seek satisfaction through the issuance of an enforceable title (in principle, either non-appealable court decisions, including payment orders, or notarial deeds), which is followed by seizure of the property for auction. The GCCP includes specific rules as to the actions and periods within which enforcement proceedings shall be effectuated.

As to the allocation of proceeds from the auction of a specific asset, in case of multiple creditors participating in the respective proceedings with claims which are higher than the auction proceeds, the following order of priority applies. First, limited enforcement expenses are covered. Then, State claims from VAT due (including surcharges), dismissal compensations, employment claims of the last two (2) years prior to the auction and social security claims due until the day of the auction are fully covered. Finally a maximum of 1/3 of the balance goes to creditors with general privileges (mainly State claims from taxes other than VAT), and 2/3 thereof satisfies the claims of special privileges (i.e. those having a security over the auctioned asset).

The above mandatory auction is avoided in case of: a pledge of claims under the provisions of l.d. 17.7.1923, where the credit institution arguably acquires full ownership thereof and is entitled to liquidate the claim, with the obligation to refund to the borrower any amount exceeding its secured claim; and financial collateral arrangements under the provisions of the collateral law, which provide for the satisfaction of the creditor through sale, set off or application of the financial instruments and/or cash in discharge of the relevant obligations.

No regulatory consents are required.

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

No restrictions apply. However, it has been argued that foreign lenders do not enjoy the benefits of l.d. 17.7.1923.

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

Bankruptcy or reorganisation (reconciliation) proceedings involve suspension of enforcement proceedings, which, however, apply for a limited period of time (usually not more than one year). In the case of reconciliation, collateral security rights may be amended, as provided by the reconciliation agreement reached between the debtor and its creditors.

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

Yes. An arbitral award will be recognised by Greek courts under the provisions of the New York Convention for its contracting states and under the provisions of the GCCP for any other case.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

As already mentioned, in case of bankruptcy the court usually imposes a temporary moratorium on individual prosecutions (i.e. prohibiting the lender from commencing or continuing enforcement procedures against the debtor who has been declared bankrupt). In addition, a security agreement is subject to the clawback provisions of the Greek bankruptcy code (security agreements are in principle protected from clawback if established by virtue of the provisions of the collateral law or law 4112/1929, as well as if carried out in the framework of a reconciliation plan). Finally, the Greek bankruptcy code provides that creditors with a real security on an asset of the bankruptcy estate are satisfied solely by the liquidation of such asset, with an option however to waive their security and be satisfied by the whole bankruptcy estate, in which case their claims are subordinated as per the Greek bankruptcy code provisions. Securities under the collateral law are in principle not affected by the bankruptcy proceeding.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

According to the Greek bankruptcy code, transactions (i.e. donations or other transactions with disproportionately small consideration, payments of non-outstanding debts, establishment of *in rem* securities) held during the suspect period are subject to clawback, upon request of the bankruptcy administrator or a creditor. The suspect (preference) period is determined by the bankruptcy court and may not start earlier than two years from the date of issuance of the court decision declaring bankruptcy. Furthermore, transactions carried out within a period of five years preceding the declaration of bankruptcy are conditionally subject to clawback.

During bankruptcy proceedings, the following priority of payments applies: first, specific costs incurred in the bankruptcy proceedings are covered; then, State claims from VAT due (including surcharges), dismissal compensations, employment claims of the two (2) years prior to the declaration of bankruptcy and social security claims due until the day of the declaration of bankruptcy are fully satisfied; then, general privileges up to 1/3 of the remaining amount (mainly claims from financing of the insolvent company during implementation of any reconciliation agreement and State claims from taxes, other than VAT) are paid, whereas the other 2/3 satisfy special privileges (i.e. secured claims). Finally, unsecured claims are covered.

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

The Greek bankruptcy code is applicable to all types of companies, except for the following legal entities which are subject to special liquidation provisions: credit institutions as provided by article 68 of law 3601/2007; insurance undertakings as provided by articles 10 and 12a of Greek l.d. 400/1970; and investment firms, as provided by article 22 of law 3606/2007.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

As aforementioned, the only enforcement processes that do not involve court proceedings are those provided by (a) l.d. 17.7.1923, and (b) the collateral law.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Greece?

Yes, it is legally binding and enforceable.

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

An obligor's waiver of sovereign immunity is legally binding and enforceable under the laws of Greece, subject to any overriding mandatory provision establishing an immunity right in favour of that obligor.

10 Other Matters

10.1 Are there any eligibility requirements in Greece for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Greece need to be licensed or authorised in Greece or in their jurisdiction of incorporation?

In principle, loans to a Greek company may be granted either by: credit institutions (an authorisation by the Bank of Greece is required in case of a non-EU bank); other entities licensed by the Bank of Greece to carry out lending business; or members of the same corporate group. In addition, as aforementioned, the security agent under the bond loans law shall be a credit institution or an investment firm licensed to operate in Greece.

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

Lenders and equity investors need to obtain special legal and tax advice when participating in financings in Greece.

Note

This chapter is up-to-date as at February 28, 2015.

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

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Hong Kong

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1 Overview

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

It has been reported that Hong Kong syndicated lending activity increased in 2014 by approximately 15% in terms of aggregate year-on-year lending volume. Despite an economic slowdown in China and certain efforts of the Hong Kong Monetary Authority to impose tighter controls over the lending activities of Hong Kong banks, this increase is said to be the result of a continuing trend of Chinese companies seeking to raise cheaper finance offshore. The position in Hong Kong is consistent with the Asia Pacific region (ex-Japan) more generally, which is reported to have experienced a record aggregate lending volume in excess of US$500 billion in 2014.

It remains to be seen to what extent this trend will be sustained during the course of 2015. However, many market participants predict that Chinese companies will continue to create significant offshore borrowing demand, particularly in connection with acquisition financing opportunities (possibly with a focus on the energy sector given the recent shift in global oil prices).

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

Significant syndicated lending deals in 2014 included the US$6.9 billion financing of MMG Ltd's acquisition of the Las Bambas copper mine in Peru from Glencore Xstrata Plc; the US$3.2 billion financing of COFCO Group's acquisition of certain agribusinesses; and the HK$37 billion financing of Power Assets Holdings' spin-off of The Hongkong Electric Company, Ltd. Notable transactions in 2013 included the US$8 billion syndicated loan to Alibaba Group Holding Ltd, and the US$6 billion syndicated term loan to CNOOC Canada Holding Ltd., in connection with the acquisition by China National Offshore Oil Corporation of Canada's Nexen Inc.

2 Guarantees

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

Subject to the prohibition on giving financial assistance (addressed in section 4 below), there is, in principle, nothing to restrict a company guaranteeing the borrowings of other members of its corporate group, provided that it is in the guarantor's best interests to do so (see question 2.2).

It should be noted that section 500 Companies Ordinance (Cap. 622) ("**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 or shareholder of the guarantor may be able to apply to court to set aside the guarantee and recover any benefits conferred on the creditor, such as payments made under the guarantee.

2.3 Is lack of corporate power an issue?

A Hong Kong company formed on or after 31 August 1984 has the power to give guarantees, subject to any limitation or restriction in its articles of association. It should be noted that by virtue of section 98 CO, Hong Kong companies no longer have a memorandum of association, although the provisions of any pre-existing memorandum are deemed to be incorporated into the articles of association.

Subject to certain exceptions, the power of the directors to bind the company is regarded as free of any such limitation or restriction under the articles in favour of a person dealing with the company in good faith. However, it is still best practice to check the guarantor's constitutional documents to ensure that there are no relevant restrictions or limitations on the company's power.

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

As a general rule, no, although the directors of a company giving a guarantee may wish to seek shareholder approval in circumstances in which they have corporate benefit concerns (see question 2.2 above). A valid and enforceable guarantee will also need to adhere to the principles of contract law.

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

There are no such limitations, although the greater the potential value of the guarantee, the more important it will be for the directors of the guarantor to be able to demonstrate corporate benefit to the guarantor (see question 2.2).

In addition, if the guarantor was or becomes (within the requisite statutory clawback periods) insolvent after entering into the guarantee, the guarantee may be vulnerable to being set aside if it can be shown to constitute, for example, a transaction defrauding creditors (see further question 8.2).

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

No, although controls do exist in Mainland China, which may be relevant if the guarantor is a Chinese company.

3 Collateral Security

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

A large variety of different types of assets and interests, whether tangible or otherwise, are available to secure lending obligations under Hong Kong law. The following types of assets are most commonly used as collateral in Hong Kong:

- Real estate, which includes land, any right, interest or easement in or over land, the whole or part of an undivided share in land and any fixtures that are permanently fastened to land such as buildings (see the Conveyancing and Property Ordinance (Cap. 219) ("**CPO**")).
- Receivables and claims, which are rights under contracts and include book debts and receivables in the form of loans, notes and other types of financial receivables. Examples of financial receivables include trade receivables and future toll road receivables.
- Financial instruments such as listed and unlisted shares, bonds, exchange-traded funds and other forms of securities, whether they are directly held by the owner or held indirectly through a clearing system (e.g. the Central Clearing and Settlement System ("**CCASS**") operated by the Hong Kong Securities Clearing Company Limited ("**HKSCC**")).
- Cash deposits in bank accounts.
- Tangible movable assets such as ships, aircraft, inventory and machinery.

Other common collateral asset classes include insurance and intellectual property.

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

It is possible to grant security over different types of assets by means of a general security agreement. In practice, however, a separate security agreement is typically used for each type of asset as the perfection requirements are likely to vary depending on the asset concerned. Perfection may involve complying with certain registration formalities, such as a security interest created over land in Hong Kong (registration with the Land Registry); a ship registered under the flag of Hong Kong (registration with the Marine Department); or a trade mark registered in Hong Kong (registration with the Intellectual Property Department). Failure to comply with applicable registration formalities may result in a loss of priority over claims from subsequent secured creditors with security over the relevant asset.

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

Land and Plant

Security can be taken over land (which, as defined in the CPO, includes any permanent fixtures attaching to the land such as a plant in the form of a building) and is most commonly created by way of a statutory legal charge (typically referred to as a mortgage in Hong Kong) or an equitable mortgage. A statutory legal charge over land should be in writing, executed as a deed, and expressed to be a legal charge under the CPO. The mortgagee under a legal charge has the powers, rights and protections given to it under the CPO which include, among other things, the power to sell, and the right to possess, the property in the event of a default by the mortgagor. An equitable mortgage is an informal, but enforceable, security arrangement that may arise where the title deeds of a property are deposited with the lender. If the equitable mortgage is executed as a deed, the lender will benefit from most of the powers and protections of a mortgagee under a legal charge, except in relation to the power to sell the property.

Any instrument that gives effect to the creation or transfer of a security interest in land in Hong Kong should be registered with the Land Registry within one month of the execution of the instrument in order to preserve the priority of the security interest over any subsequent interests (see section 5 of the Land Registration Ordinance (Cap. 128) ("**LRO**")). An unregistered instrument will be void against any subsequent purchaser in good faith or mortgagee for valuable consideration (see section 3 LRO).

If the mortgagor is a Hong Kong incorporated company or, in the case of a mortgage over property situated in Hong Kong, a non-Hong Kong company that maintains a registered place of business in Hong Kong (registered with the Companies Registry under Part XVI CO), particulars of the security interest (including a certified copy of the security instrument) must also be registered with the Companies Registry within one calendar month of the date of its creation (see sections 335 and 336 CO) in order to perfect the security interest.

Machinery and Equipment

Security can be taken over machinery and equipment, which generally constitute movable property not permanently attached to land and, therefore, not considered to be land within the meaning

of the CPO. The most common methods of granting security over machinery and equipment in Hong Kong are by way of a fixed or floating charge for the benefit of a secured party. Security can also be created over machinery and equipment by way of a mortgage (legal or equitable), pledge or lien.

A charge provides the secured party (or chargee) with the right to appropriate the charged property, i.e. the machinery and equipment, in order to discharge the debt in the event of a default by the chargor (the collateral provider). It creates an encumbrance over the machinery and equipment but does not transfer ownership or possession of it to the chargee (although a document creating a charge will usually grant the chargee a power of attorney to compel a transfer of ownership in the event of a default by the chargor).

A charge may be fixed or floating. In the case of a fixed charge, the encumbrance attaches to specifically identified property – in this case, machinery and equipment – immediately upon the creation of the fixed charge (or, in the case of a fixed charge over future machinery and equipment, immediately upon the relevant machinery or equipment coming into existence as the chargor's assets). The fixed charge deprives the chargor with the right freely to deal with, or maintain control over, the charged assets without the consent of the chargee. In contrast, a floating charge is a charge over unascertained assets within a defined category, which crystallises into a fixed charge upon the occurrence of a specified event, at which point the charge attaches to the specific assets then constituting the property in existence within the defined category. Applied here, the chargor, as owner, retains control over the charged machinery and equipment and has the right to deal with, use and dispose of the machinery and equipment in the ordinary course of business. New and replacement machinery and equipment would automatically become subject to the floating charge. The parties' characterisation of a charge is not decisive; whether a court would regard it as floating or fixed will depend upon, among other things, the extent to which the chargor can in fact deal with, and exert control over, the charged property.

While a chargor is likely to prefer a floating charge over its assets to preserve its ability to deal freely with the secured property, a secured party will typically prefer a fixed charge to ensure, among other things, that if the chargor becomes insolvent, the secured party's claim ranks ahead of certain statutorily preferred claims, such as claims for liquidation expenses and certain employment-related claims. A floating charge, on the other hand, will give rise to a claim that will rank below such statutorily preferred claims.

In addition, a person who acquires an interest in property subject to an uncrystallised floating charge will generally acquire the interest free of the charge. On the other hand, the rights of a chargee under a fixed charge will only be defeated by a third-party purchaser of the charged property who acquires it in good faith without notice of the fixed charge. If the fixed charge has been duly registered, a purchaser will in any event be deemed to have knowledge of the charge.

In the event of a liquidation of the chargor, section 267 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("**CWMPO**") provides that a floating charge created within the 12 months preceding the commencement of the winding-up may be void unless the debtor was solvent immediately after the creation of the charge.

Alternatively, security over machinery and equipment can be taken by way of a legal or equitable mortgage. Under a legal mortgage, legal title to the collateral is held by the lender (the mortgagee), subject to a condition requiring the lender to transfer title back to the borrower (the mortgagor) upon full performance or redemption of the secured obligations (e.g. on discharge of the debt in full). An equitable mortgage may exist where the parties intended to create a legal mortgage but there was no transfer to the lender of legal title to the secured property.

Finally, it is also possible to create security over machinery and equipment by way of a pledge, which requires a constructive or actual transfer of possession of the property, or by way of a lien, which involves the retention of possession by the lien holder in order to secure a debt in the form of, for example, unpaid servicing fees on the relevant machinery or equipment. A lien may arise by express agreement or by operation of law.

Where the security is given by a Hong Kong incorporated company or, in the case of security over property situated in Hong Kong, a non-Hong Kong company that maintains a registered place of business in Hong Kong (registered with the Companies Registry under Part XVI of the CO), registration requirements under sections 335 and 336 CO are applicable (see above).

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

Security can be taken over receivables. Where the receivables in question are governed by Hong Kong law, perfection requirements and rules relating to priority will be governed by Hong Kong law, regardless of the governing law of the contract creating the security interest. The most common methods of granting security over receivables in Hong Kong are by way of an assignment or by way of a charge.

An assignment of receivables by way of security to a secured party will typically provide for reassignment of the receivables once the secured obligations have been performed or redeemed (e.g. when the debt has been fully discharged).

An assignment may be a legal assignment or an equitable assignment. A legal assignment is an assignment that complies with the requirements under section 9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) ("**LARCO**"). An assignment will be an effective legal assignment if:

- it is an absolute assignment whereby the assignor's entire legal interest in the receivables is transferred to the assignee;
- the assignment is in writing signed by the assignor, or by an agent authorised by it;
- the subject matter of the assignment is legal debts; and
- express written notice of the assignment is given to the obligor.

An assignment which does not meet one or more of the above criteria will be an equitable assignment. Equitable assignments, which are enforceable in the name of the assignor, are common as assignors often prefer to avoid providing written notice to obligors, especially where it is commercially impractical to do so (e.g., where large volumes of receivables involving multiple obligors are continuously created and assigned).

An assignment is perfected once the requirements specified under section 9 LARCO have been satisfied (see above). Where competing claims to the same receivables exist among multiple assignees, the order in which notices of assignment were given to the relevant obligor(s) will determine priority. A perfected assignment where notice of the assignment has been given to any relevant obligor will take priority over an earlier assignment with respect to which notice either was not given to the obligor or was given, but subsequent to the perfection of the later assignment (unless the assignee of the later assignment had knowledge at the time of the assignment of the existence of the earlier assignment).

The purchaser may alternatively create a charge over receivables for the benefit of a secured party (see question 3.3 above for a summary of the key features of a charge).

Security created over receivables of a Hong Kong incorporated company or, in the case of receivables situated in Hong Kong, a non-Hong Kong company that maintains a registered place of business in Hong Kong (registered with the Companies Registry under Part XVI of the CO) is registrable under sections 335 and 336 CO (see above).

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

Security may be taken over a bank account (including the cash deposited in the account) situated in Hong Kong by way of a fixed or floating charge (see question 3.3 above for a summary of the key features of a charge).

While the Hong Kong court generally will recognise security governed by a foreign law over a Hong Kong bank account, Hong Kong law perfection requirements are still applicable. Charges over bank accounts are not strictly registrable under the CO, although historically it has been common practice to register security interests granted by a Hong Kong incorporated company or a non-Hong Kong company that maintains a registered place of business in Hong Kong (registered with the Companies registry under Part XVI CO) as if such security interests were required to be registered under sections 335 or 336 CO.

3.6 Can collateral security be taken over shares in companies incorporated in Hong Kong? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Security can be taken over shares in a Hong Kong incorporated company by way of a mortgage or charge. Shares in a Hong Kong company may be in certificated form or in scripless form held indirectly through a clearing system such as the CCASS operated by the HKSCC.

Security over shares in certificated form may be created by way of a legal mortgage, where the shares are transferred to the mortgagee (or its nominee) who becomes the registered holder, with an agreement by the mortgagee to transfer the shares back to the mortgagor on repayment of the debt by the mortgagor. Alternatively, the mortgagor may create a security interest over the shares by way of a charge or equitable mortgage whereby the mortgagor remains the legal owner of the shares, but the share certificates are physically deposited with the secured party together with other relevant supporting documents (such as a signed blank share transfer form and contract notes) so that a transfer of ownership of the shares to the secured party may be effected if the security becomes enforceable. If a charge or equitable mortgage is created over a company's shares, the company is usually notified of the security interest.

If shares are held in scripless form with CCASS, then security is usually created by way of a charge over certain rights of the chargor relating to the shares, such as rights against CCASS and the relevant participant of CCASS. Notice of the security interest must be given to the participant.

It is common practice for a security interest over shares to be registered with the Companies Registry if the collateral provider is a Hong Kong incorporated company or a non-Hong Kong company that maintains a registered place of business in Hong Kong (under sections 335 and 336 CO – see above). Although a security interest over shares is not specified as a registrable charge under the CO, declared dividends relating to the shares may be considered as book debts, which fall within one of the categories of registrable charges under the CO.

Security over shares can be granted under a New York or English law governed security document (as Hong Kong courts generally will give effect to the contracting parties' choice of foreign law provided certain conditions are satisfied – see question 7.1 below). However, irrespective of the choice of law, perfection requirements under Hong Kong law would apply where the *lex situs* of the shares is Hong Kong.

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

Security can be taken over inventory, usually in the form of a floating charge. A floating charge is usually more appropriate than a fixed charge or a legal mortgage as a form of security over inventory given the need for the chargor to deal with the charged assets in the ordinary course of business and the turnover of inventory (see the response to question 3.3 above for a detailed discussion about charges and mortgages). New inventory may automatically become the subject of a floating charge and, upon the occurrence of an enforcement event, the floating charge would crystallise into a fixed charge which attaches to the specific inventory items then constituting the charged property. A floating charge must be perfected by registration at the Companies Registry under sections 335 and 336 CO, where applicable (see above).

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A Hong Kong company may grant a security interest to secure its obligations as a borrower under a credit facility. The secured obligations may include not only payment obligations but also other types of obligations (e.g. an obligation to comply with covenants and undertakings). In general, a company may grant a security interest in order to secure its obligations as a guarantor of the obligations of other borrowers or guarantors of obligations under a credit facility. However, there are restrictions in certain circumstances, as discussed in the 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) ("**SDO**") 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 (in general, HK$210 to HK$450 depending on, among other things, the nature of the instrument being registered and the value involved), the Trade Marks Registry (HK$800), the Patents Registry (HK$325) and the Designs Registry (HK$590).

Notarisation Fees

Security documents are not required to be notarised in Hong Kong.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

No. Registrations and filings at various registries in Hong Kong generally take several weeks. See question 3.9 regarding registration fees.

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

No regulatory or similar consents are required in order to create a security interest in Hong Kong, except in certain circumstances involving the transfer of shares (in a legal mortgage) in, or an assignment of, assets of a telecommunications company that holds a carrier licence (such as a 3G licence), in which case an approval from the Office of Telecommunications Authority ("**OFTA**") is required. It is common practice to seek a comfort letter from the OFTA even if the creation of a security interest does not involve a transfer of shares or assets (such as where a charge or equitable mortgage is created). The comfort letter ideally should state that the creation of the security interest does not violate any laws or regulations and the terms of the relevant licence.

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

No. In Hong Kong, priority depends on various factors relating to the creation and perfection of the security interest (such as the form of security created and the timing of perfection or registration of a security interest) and not on the nature of the obligations which are being secured.

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

With respect to land, as discussed in question 3.3 above, a statutory legal charge or an equitable mortgage (executed as a deed) must be created under the CPO in order for a mortgagee to be entitled to take advantage of the protections and rights under the Ordinance. A statutory legal charge over land must be in writing, executed as a deed and expressed to be a legal charge under the CPO.

A mortgage over a ship registered under the flag of Hong Kong is required to be in a prescribed form and registered with the Hong Kong Marine Department. The prescribed form requires only basic information about the relevant transaction and details of the parties involved. Supplemental agreements between the parties may be filed using the prescribed form.

Where an instrument contains the grant of a power of attorney, it is required under the Powers of Attorney Ordinance (Cap. 31) to be executed as a deed. A Hong Kong law governed charge typically includes the grant of a power of attorney by the chargor to the chargee and is therefore typically executed as a deed. Furthermore, where it is unclear whether valuable consideration is given, a security agreement should be executed as a deed as it is generally binding and enforceable despite the lack of consideration. To be validly executed as a deed, a document must comply with certain formalities applicable to deeds, including a clear marking on the face of the document that it is intended to be a deed.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Yes. Under Hong Kong law, where a person has acquired shares in a company and any liability has been incurred (by that or any other person), for the purpose of that acquisition, it is (subject to certain limited exceptions) not lawful for the company or any of its subsidiaries to give financial assistance directly or indirectly for the purpose of reducing or discharging the liability so incurred (section 275 CO). The term "financial assistance" is a broadly defined term that includes a guarantee, security, indemnity and loan, among other things. A company that guarantees or grants security to support a loan incurred by the borrower to acquire shares of the company would fall within the general prohibition of the law. However, financial assistance may be given in certain circumstances (broadly, if the financial assistance does not exceed 5% of the paid up share capital and reserves of the company or is pre-approved by shareholders) if the detailed requirements of certain statutory authorisation procedures in sections 283 to 285 CO are met. Such requirements include the need for the directors of the company giving the assistance to make a solvency statement in respect of the company.

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

Yes. The general prohibition discussed in (a) above and the relevant exceptions may also apply where a direct or indirect subsidiary of a holding company (other than a holding company incorporated outside Hong Kong) provides financial assistance to support a loan incurred by the borrower to acquire shares of the holding company.

(c) Shares in a sister subsidiary

Although the prohibition does not expressly prohibit a company from providing financial assistance for the purpose of acquiring shares in a sister subsidiary of the company, it is important for the directors of the company to ensure that, by providing such financial assistance, they are not acting in breach of their fiduciary duty to act in good faith in the best interests of the company and that the transaction is for the commercial benefit of the company. Whether commercial benefit exists is a matter of fact and should be determined in light of all the surrounding circumstances. Directors may seek shareholders' approval to support their position.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Hong Kong recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The concepts of agency and trust are well recognised in Hong Kong. In syndicated lending in Hong Kong, it is common for the agent bank to act as security trustee and, thus, hold security as trustee for the secured lenders. A security trustee can enforce its rights in a Hong Kong court.

5.2 If an agent or trustee is not recognised in Hong Kong, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable, as the agent and trustee concepts are recognised in Hong Kong.

5.3 Assume a loan is made to a company organised under the laws of Hong Kong and guaranteed by a guarantor organised under the laws of Hong Kong. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The loan and guarantee can be transferred in one of two key ways: by assignment, or by novation.

Assignment:

Provided that the loan agreement does not contain any restrictions on assignment, Lender A can assign the benefit of the loan to Lender B without the need for the consent of the borrower although only the benefit, and not the burden, of an agreement can be assigned. To ensure that the loan can be enforced by Lender B in its own name, a legal assignment will be required. The assignment will only be a legal assignment if: (i) it is in writing signed by the assignor; (ii) it is absolute (and not conditional or revocable); (iii) notice is given to the assignee (who is usually a party to the assignment contract); and (iv) written notice of assignment is given to the borrower. If the loan agreement prohibits assignments, the consent of the borrower will be required.

To ensure that Lender B can enforce the guarantee in its own name, it will also be necessary for the guarantee to be legally assigned to Lender B. To avoid any argument that the guarantee is discharged as a result of the assignment of the loan, the guarantor's consent to the assignment should be obtained.

Novation:

Alternatively, Lender A could novate the contract to Lender B. In a novation, both the benefit and burden of the contract are transferred to the transferee. The consent of each of the borrower, Lender A and Lender B would be required. A novation would have the effect of extinguishing the original contact between the borrower and Lender A and replacing it with a new contract between the borrower and Lender B. This would have the effect of releasing the guarantee given in respect of that contract. It will therefore also be necessary for the guarantee to be transferred to Lender B with the guarantor's consent or alternatively for Lender B to enter into a new guarantee agreement with the guarantor.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Hong Kong does not levy withholding tax on either interest payable on loans, proceeds of a claim under a guarantee or proceeds of enforcing security.

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

Tax advantages for foreign investors and creditors

There are no specific 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, 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

The residency status of a purchaser of land situated in Hong Kong may impact the amount of tax payable on the chargeable instrument for sale or conveyance of the land under the SDO. In certain circumstances, a sale to an individual who is a Hong Kong permanent resident may be exempt from the higher rates of Ad Valorem Stamp Duty, which have been in force since February 2013. In addition, since October 2012, Hong Kong has applied a special Buyer's Stamp Duty of 15% (of the stated consideration paid or market value, whichever is higher) on real estate acquisitions for purchasers who are companies and foreign individuals who are not permanent residents of Hong Kong. The Buyer's Stamp Duty is imposed on top of the other required forms of stamp duty payable on all real estate transactions.

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

Hong Kong operates on a territorial, source-based taxation basis. In general, a company carrying on a business in Hong Kong is subject to tax on profits derived from and arising in Hong Kong.

Interest income of banks will therefore normally be taxable if the income is derived from a source in Hong Kong. The general rule for determining whether interest income of a financial institution is taxable in Hong Kong is that if the interest income received by or accrued to a financial institution arises through the carrying on by the financial institution of its business in Hong Kong, the income will be taxable in Hong Kong. This is the case even if the loan that is being made is available only outside of Hong Kong.

As regards the granting of security from a company, whether the grant gives rise to tax implications depends on the collateral involved and the form of the grant. A grant of shares as security may give rise to stamp duty at the time of the grant if it involves a transfer of title such as in a legal mortgage of shares, except where the shares are transferred pursuant to a stock lending and stock borrowing transaction. See question 3.9 above.

The existence of a guarantee ordinarily would not give rise to any tax implications. However, if the guarantee is provided by the borrower by way of a deposit or another loan, then the interest payable to the lender by the borrower may not be deductible for the borrower unless the interest on the other loan or deposit is also taxable in Hong Kong.

Hong Kong has entered into double tax agreements with a number of jurisdictions. Where a double tax agreement applies, taxes payable outside of Hong Kong may be credited against Hong Kong profits taxes on the same profit.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

See question 3.9 relating to various costs involved.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

There are no adverse consequences to the borrower in such a scenario. There are no thin capitalisation rules that apply in Hong Kong, although anti-tax avoidance rules may apply under certain circumstances to disallow the deduction of interest expenses by the borrower (see, for example, question 6.3 relating to guarantees).

7 Judicial Enforcement

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

Subject to limited exceptions, the Hong Kong court will recognise, and give effect to, the contracting parties' choice of foreign law, where that choice is made in good faith and is legal and sufficiently certain. The court may refuse to apply a foreign law if doing so would be contrary to Hong Kong public policy and/or if the foreign law was chosen with the intention of evading the laws of the jurisdiction which has the most real and substantial connection with the subject matter of the contract.

Hong Kong mandatory rules and legal principles will apply in some circumstances, such as those relating to a transfer of an interest in land in Hong Kong.

7.2 Will the courts in Hong Kong recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Judgments given by the courts in New York and England and Wales are capable of being recognised and enforced in Hong Kong at common law, subject to compliance with certain requirements. The requirements include, among others, that the judgment is final and conclusive and was rendered by a court which had competent jurisdiction. The limited grounds on which enforcement of a foreign judgment may be challenged do not allow a re-examination of the merits of the judgment.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Hong Kong, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Hong Kong against the assets of the company?

Obtaining a judgment from the Hong Kong court

Timing will largely depend on whether or not the defendant attempts to defend the claim, or takes other steps that would slow the progress of the proceedings, such as contesting the jurisdiction of the Hong Kong court to hear the claim.

If the defendant does not seek to defend the claim, it may be possible to obtain default judgment (which is administrative in nature and does not involve a consideration of the merits of the case) within around one month of the proceedings being served on the defendant.

If the defendant does file a defence which has no legal merits, it may be possible to obtain summary judgment (i.e. a judgment on the merits but without a full trial) in around 3 to 6 months. A plaintiff may also consider seeking the early determination of its case on a point of law or a strike-out of the defence.

Enforcing a judgment of the Hong Kong court against the assets of the company

There are several methods of enforcing a judgment against assets located in Hong Kong; the method(s) used will depend upon, among other things, the type(s) of asset in question. It would ordinarily take approximately 2 months or more to complete one of the available enforcement procedures.

Enforcing a foreign judgment

The entire process from registering, or commencing an action on, the foreign judgment (as applicable) to enforcing it over the assets of the judgment debtor by one of the available enforcement procedures would ordinarily take around 4 to 6 months (but could take materially longer if the judgment debtor seeks to resist enforcement).

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There are no significant restrictions, although the exact steps that will need to be taken and the consequent timing of the process (and need for any regulatory consents) will depend upon the nature of the security interest and property in question, as well as the proprietary remedies pursued by the secured creditor.

If court intervention is necessary, the enforcement process may take longer and be more expensive. In addition, a creditor exercising a power of sale will ordinarily owe the debtor (and surety) certain duties, which may require reasonable precautions to be taken to obtain the full market value of the property. While this may dictate in favour of a public auction, there is no general requirement that a sale of the secured assets should be conducted in this way.

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

In general, there are no such restrictions specifically applicable to foreign lenders.

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

Compulsory winding-up

Once a winding-up order has been made or following the appointment of a provisional liquidator, no action or proceeding may, except with the leave of the court, be proceeded or commenced against the company. This does not, however, prevent a secured creditor from appointing a receiver pursuant to the terms of its security agreement, although if the receiver needs to take possession of assets of the company he or she will need leave of the court to do so. Such leave is ordinarily granted as a matter of course.

Voluntary winding-up

Unlike a compulsory winding-up, there is no statutory moratorium, although the court has 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. The Hong Kong Arbitration Ordinance (Cap. 609) ("**AO**") is largely based on the UNCITRAL Model Law.

The AO stipulates that both Hong Kong and foreign awards will be enforceable in the same manner as a Hong Kong court order. Enforcement may only be refused if the respondent proves that one or more of the limited grounds set out in the AO applies. These relate to matters such as procedural fairness and the status of the award, but not to questions of fact or law (although, if the award was made in a non-New York Convention country, the Hong Kong court has 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 CWMPO, if an insolvent company does something or suffers something to be done that puts a creditor in a better position in the event of an insolvent liquidation than they would otherwise have been and the company was influenced by a desire to prefer that creditor, an unfair preference occurs. A liquidator may apply to set aside such a transaction if it occurred within six months prior to commencement of the liquidation or, in the case of a transaction with an associate, two years prior to such commencement.

Floating charge:

Pursuant to section 267 CWMPO, a floating charge granted by a company within 12 months prior to the commencement of the company's liquidation is invalid if the company was insolvent at the time of granting the charge or became insolvent as a consequence, except to the extent of any new money advanced to the company at the same time as or after the charge was created.

Extortionate credit transactions:

Pursuant to section 264B CWMPO, any credit transaction entered into within three years prior to the commencement of the liquidation may, on the application of a liquidator, be set aside or varied by the court if it involves grossly exorbitant payments or otherwise grossly contravenes ordinary principles of fair dealing. There is a presumption that the transaction is extortionate unless the presumption can be rebutted.

Fraud – transactions to defraud creditors and fraudulent trading:

A transaction may be set aside pursuant to section 60 of the CPO if it can be proven that it was entered into with the intent to defraud creditors. There is no time limit or insolvency requirement for such a claim.

In addition, if in the course of the winding up it appears that any business of the company has been carried out with intent to defraud creditors or for any fraudulent purpose, the court may, on the application of a liquidator, Official Receiver, creditor or contributory, declare pursuant to section 275 CWMPO that any persons who were knowingly parties to the carrying on of the business in that way are personally liable for all or any of the company's debts (as the court may direct).

Similarly, if an officer of the company is guilty of misfeasance or breach of duty, pursuant to section 276 CWMPO, the court may,

on the application of a liquidator, Official Receiver, creditor or contributory, compel the officer to repay or restore the money or property of the company.

Preferential creditors:

Secured creditors are generally entitled to recover out of the proceeds of their security in priority to all other claimants. However, if the security is by way of a floating charge, the claims of preferential creditors will rank ahead of the claims of the floating charge holder. Preferential creditors in Hong Kong are primarily: (i) employees with certain claims in respect of, for example, unpaid wages, severance, long service and other relevant leave entitlements; and (ii) the Hong Kong Government in respect of unpaid taxes falling due in the 12 months immediately prior to the commencement of the liquidation. In a winding up of a bank or insurance company, certain other categories of claim are also given preferential status.

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

Voluntary liquidation is not available to unregistered companies or banks in Hong Kong. Such entities can only be wound up by order of the court. Unregistered companies include any company, partnership or association which has more than eight members and is not registered under the relevant Companies Ordinances or the Limited Partnerships Ordinance. Foreign companies registered under Part XVI of the CO are also considered "unregistered" for the purposes of winding-up.

The winding-up provisions of the CWMPO are also varied in some respects in the case of a winding-up of a bank or insurance company, by virtue of the provisions of the Banking Ordinance (Cap.155) ("**BO**") and Insurance Companies Ordinance respectively.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

A secured creditor may in certain circumstances be in a position to exercise a power of sale over secured property which is already in its possession, or take other out-of-court steps such as to appoint a receiver or exercise rights of set-off. However, a creditor, or an office holder in the context of insolvency proceedings, that is not in possession of the assets of the company, would require the assistance of the court to forcefully take possession of such assets, if the party in possession of the assets refuses to surrender them.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Hong Kong?

If the parties have agreed that a foreign court is to have exclusive jurisdiction in relation to any disputes between them, the Hong Kong court will ordinarily respect that agreement and should grant a stay of any proceedings commenced before it. If, on the other hand, the parties have agreed that the foreign court is to have non-exclusive jurisdiction, that is likely to be one of a number of factors the Hong Kong court will take into account on an application by one of the parties for a stay of the Hong Kong proceedings on the basis of *forum non conveniens*.

The fact that parallel proceedings may already be on foot in a foreign jurisdiction will not in itself cause the Hong Kong court to stay proceedings but will be a relevant consideration on a stay application.

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

The Hong Kong Court of Final Appeal (in *Democratic Republic of the Congo & Ors. v. FG Hemisphere Associates LLC* [2011] 5 HKC) held that the doctrine of absolute sovereign immunity applies in Hong Kong. This means that an entity entitled to immunity will be able to assert immunity in relation to all transactions and in respect of all assets, regardless of their commercial or sovereign nature.

Whilst it is possible for a state to waive immunity, such a waiver must be express, unequivocal and made at the time when the court is being asked to exercise jurisdiction against the state in question. This means that pre-dispute contractual waivers of sovereign immunity will not be enforced by the Hong Kong court.

The absolute doctrine of state immunity should not impact the ability of an arbitral tribunal with its seat in Hong Kong to assume jurisdiction over a foreign state because arbitration is a consensual process. It is widely considered that an arbitration agreement will also operate as an effective waiver of immunity from the supervisory oversight of the Hong Kong court in relation to an arbitration seated in Hong Kong.

Finally, it would appear that the doctrine of sovereign immunity has no application to a claim before the Hong Kong court against the People's Republic of China (the "**PRC**") on the basis that, since 1997, the Hong Kong Special Administrative Region has been a part of the PRC. Instead, the PRC could seek to claim immunity under the related doctrine of 'crown' immunity.

10 Other Matters

10.1 Are there any eligibility requirements in Hong Kong for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Hong Kong need to be licensed or authorised in Hong Kong or in their jurisdiction of incorporation?

Any individual or company that carries on the business of making loans is required to be licensed as a money lender under the Money Lenders Ordinance (Cap. 163) ("**MLO**"). The Licensing Court is responsible for the determination of applications for and granting of money lenders' licences, and will therefore consider whether an applicant is a suitable person to be granted a licence. There are exemptions available under the MLO that exempt certain persons from being required to hold a money lenders' licence. Exempted persons include any authorised banking institution that holds a Hong Kong banking licence under the BO and any bank incorporated or established outside of Hong Kong that is regulated by an overseas banking supervisory authority and that carries on banking business in the place where that banking supervisory authority is located. Certain types of loans are also exempt from the licensing requirement of the MLO. Exempted loans include any loan made by a holding company to its subsidiary or by a subsidiary to its holding company, any loan made to a company that has a paid up share capital of not less than HK$1,000,000 or an equivalent amount in any other

approved currency and any loan made to a company secured by a mortgage, charge, lien or other encumbrance registered, or to be registered, under the CO.

There are no eligibility requirements for any person to be an agent or a security agent, although if the agent engages in any regulated activities in Hong Kong under the Securities and Futures Ordinance (Cap. 571), it may be required to obtain the relevant licence or licences depending on the nature and scope of the activities involved.

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

Excessive Interest

There are regulations in Hong Kong aimed primarily at protecting consumers from being subject to excessive rates of interest. Any person (other than an authorised banking institution regulated by the Hong Kong Monetary Authority) who lends or offers to lend at a rate of interest exceeding 60% per annum commits a criminal offence under section 24 MLO, and could be subject to a substantial fine and imprisonment. Any such agreement and any security provided by the borrower will not be enforceable. In addition, any agreement for the repayment of a loan or for the payment of interest on a loan in respect of which the effective rate of interest exceeds 48% per annum will, having regard to that fact alone, be presumed to be a transaction which is extortionate, as provided under section 25 MLO. A Hong Kong court may give directions to alter the terms of an extortionate agreement. However, the presumption could be rebutted if the court is satisfied that the rate of interest is not unreasonable or unfair given the surrounding circumstances. The factors the court would consider include, without limitation, the debtor's age, experience, business capacity, market rates for similar transactions and the degree of risk faced by the lender. The regulations discussed above do not apply to loans made to a company with a paid up share capital of HK$1,000,000 or more.

As a general rule, a party is not permitted to impose a penalty on another party, including a penalty for late payment. However, an exception to the rule is that contracting parties are free to agree on a default interest rate for late payment so long as it reflects a genuine estimate of the loss that would be suffered by the non-defaulting party.

Consumer Protection

Where a party to a contract deals as a consumer under the Unconscionable Contracts Ordinance (Cap. 458) (the "**UCO**"), the contract, or the part of the contract that is held by a court to be unconscionable, will not be enforceable. A consumer is one who neither makes the contract in the course of a business nor holds himself out as doing so (see section 3 UCO). It should be noted that in determining whether a contract or a part of a contract is "unconscionable", the Hong Kong court would consider the circumstances relating to the contract at the time the contract was made. For example, it has previously been decided by the Hong Kong court that the costs provisions in a credit card agreement were unconscionable because of the relative strengths of the bargaining positions of the credit card company or bank.

Where a lender is an authorised banking institution regulated by the Hong Kong Monetary Authority, the lender will be subject to the Code of Banking Practice issued by The Hong Kong Association of Banks, which governs, among other things, the proper conduct of authorised banking institutions in dealing with individual customers.

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1 Overview

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

Prudential Principles for Non-Banks

Recently, Bank Indonesia ("**BI**") has enacted BI Regulation No. 16/21/PBI/2014 dated 28 October 2014 concerning Implementation of Prudential Principles for the Management of Offshore Loans of Non-Bank Corporations ("**NBC**") ("**Regulation 16**"), which replaces BI Regulation No. 16/20/PBI/2014 with the same subject. Regulation 16, which comes into force as of 1 January 2015, aims to mitigate various risks inherent to private external debt, specifically at non-bank corporations. In principle, Regulation 16 requires NBC with offshore loan (except for trade credit) to implement prudential principles, by satisfying certain obligations to meet prescribed hedging ratios, liquidity ratios, and credit ratings, as follows:

- Hedging Requirement. Each NBC must effectuate a minimum hedging ratio of 25% of the combined negative spread between its Foreign Exchange Assets and its Foreign Exchange Liabilities which will be due (i) within three months after the end of the relevant quarter, and (ii) between the fourth and the sixth month after the end of the relevant quarter. The hedging ratio must be realised by hedging the foreign exchange against the Rupiah by taking out derivative coverage in the form of a forward, a swap and/or an option. During the first year after effectiveness (until 31 December 2016), a reduced minimum hedging ratio of 20% would apply.
- Liquidity Ratio. The NBC must meet a minimum liquidity ratio of 70%, calculated by dividing the total value of Foreign Exchange Assets that is available up to three months after the end of the last quarter by the amount of Foreign Exchange Liabilities that are due up to three months after the end of the most recent quarter. Receivables derived from forwards, swaps, and/or options which will be closed up to three months after the end of the most recent quarter may be included in the calculation. During the first year after effectiveness (until 31 December 2015), a reduced minimum liquidity ratio of 50% would apply.
- Credit Rating. The NBC must have a credit rating (either an issuer credit rating or a debt credit rating) of at least BB- (or equivalent) issued by an authorised Rating Agency (including, amongst others Fitch Ratings, Moody's Investor Service and Standard and Poor's). The rating may not be older than two years. The rating must be a long-term debt rating if the NBC wishes to issue long-term bonds. The credit rating requirement is not applicable to offshore debt in foreign exchange ("**FX Offshore Loan**") obtained (i) for the purposes of refinancing (i.e. without increase of principal), or (ii) from international institutional credit providers (bilateral or multilateral) in relation to infrastructure projects (including infrastructure in the fields of transportation, roads, irrigation, drinking water, sanitation, telecommunication and informatics, electricity, and oil and gas). Institutions that are specifically mentioned in Regulation 16 are International Finance Corporation (IFC), Japan Bank for International Cooperation (JBIC), Japan International Cooperation Agency (JICA), Asian Development Bank (ADB) and Islamic Development Bank (IDB). The Credit Rating requirement would be applicable on the FX Offshore Loan that is signed or issued as of 1 January 2016.

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

As the largest issuer of bonds, the Government of Indonesia regularly taps the local market to finance the state budget. The Indonesian government bond forms vary from conventional and retail government bonds to government sukuk in several tenors. Municipal bonds are issued by the province or district government for financing public utilities projects.

Although both government and corporate bonds are listed on the Indonesia Stock Exchange (IDX), they are mostly traded Over-the-Counter (OTC). Bank Indonesia (BI) also issues short-term bank certificates known as Certificates of the Central Bank.

The last issuance of Indonesian government bonds were issued in 2013, amounting to USD 1,500,000,000, with a coupon rate of 6.125%. The maturity date of these bonds is in 2019. There continued to be a trend of high demand for the offering among investors for the short-term international market.

2 Guarantees

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

Yes, a company guarantee is commonly acceptable in financing practice.

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

Under Indonesian law, the validity of a legal act performed by an Indonesian company may be contested for want of a corporate benefit. Furthermore, under Indonesian law, there is uncertainty as to whether the issuance of a guarantee or a third party security or a stipulation in an agreement for the benefit of third parties by a company in order to secure the fulfilment of obligations of a third party is or can be regarded to be in the furtherance of the objects of that company (the "*Ultra Vires* Doctrine"), and consequently, whether such guarantee or third party security may be voidable or unenforceable under the laws of the Republic of Indonesia. In determining whether the issuance of a guarantee and third party security is in furtherance of the objects of a company, it is important to take into account the provisions of the articles of association of that company and whether that company derives certain commercial benefit from the transaction in respect of which the guarantee and third party security is issued.

Based on the *Ultra Vires* Doctrine, validity or enforceability can in principle only be challenged by that company itself, i.e. arguably through (a) the shareholders of that company, (b) the board of directors of that company, (c) the board of commissioners of that company, or (d) by a receiver in the event of bankruptcy. By obtaining the written consent of all of the shareholders, board of directors and board of commissioners of the relevant company authorising that company to enter into a guarantee and third party security for the benefit of the company for whose benefit it creates such guarantee or third party security and confirming that such transaction is in the interests of that company, those parties should not be able to successfully challenge the validity or enforceability of that guarantee on the basis of the *Ultra Vires* Doctrine.

2.3 Is lack of corporate power an issue?

Yes, the Indonesian Company Law and the articles of association of an Indonesian company normally stipulate certain requirements to obtain a corporate power (approval) from the organs of the company i.e. board of commissioners' approval and/or shareholders' approval. Lack of corporate approval would legally affect the validity of the corporate guarantee and cause the board of directors to be held liable against any loss in relation to such provision of corporate guarantee/security.

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

Please refer to our explanation in question 2.3 above.

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

On the amount of guarantee, it is not specifically stipulated in the regulations. Please note, however, that Indonesian Company Law stipulates that the board of directors must request shareholders' approval to encumber the assets of the company having a value that exceeds 50% of the net assets in 1 (one) transaction or more, whether or not related to each other. Thus, it could somehow be interpreted that a guarantee needs to also consider the assets of the company.

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

There are no exchange control obstacles for the enforcement of a guarantee. The enforcement of a guarantee will be done through a court order. Please note, however, that the Indonesian court system recognises three levels of courts, namely the district court, court of appeal and Supreme Court. This means that if a borrower still challenges a decision from the judges of a district court and files an appeal to the court of appeal, the guarantee cannot be enforced by the lender pending the decision of the judges of court of appeal. This process would continue up to the Supreme Court, which can certainly take years for enforcement.

3 Collateral Security

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

To secure the lending obligations, we can classify the common types of security as follows:

- Immovable assets – i.e. land, buildings, fixtures and vessels with gross weight of 20 cubic metres or more and aircraft – form of security granted: **mortgage**.
- Movable assets – i.e. machinery, inventory, raw material and vehicles – form of security: **fiduciary transfer**.
- Intangible assets – i.e. shares, intellectual property rights, etc. – form of security: **pledge**.

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

A special agreement is required to create security over each type of assets. The procedure for each type of security is as follows:

- Mortgage:

  A mortgage deed must be signed before the Land Officer with jurisdiction over the land to be mortgaged. This deed must be in Bahasa Indonesia (the official language of Indonesia) and in the prescribed official form. The signed mortgage deed must be then registered at the relevant land offices. The mortgage is established at the moment it is entered in the land book located at the relevant land offices.
- Fiduciary security:

  A fiduciary security deed must be signed before the notary. This deed must be in Bahasa Indonesia (the official language of Indonesia) and in the prescribed official form. Based on this deed, the transferor (borrower) transfers its legal title to the transferred assets to the transferee (lender) for the period during which the debt remains outstanding. The fiduciary security is effective when the fiduciary security office issues a fiduciary certificate.
- Pledge:

  A pledge agreement can be executed in a notarial deed or executed privately, setting out the pledge's particulars. The pledge is effective when the pledge is recorded in the shareholders' register of the relevant company.

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

Please refer to question 3.1 and 3.2.

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

Yes, the proper form of security over receivables is fiduciary transfer. Please refer to question 3.2 above.

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

Yes, the most common form of security over a cash deposit is a pledge over the bank account. However, the fiduciary registration office has expressed the view that a bank account cannot be the subject of an Indonesian security interest and the enforceability of a pledge over a bank account is yet to be tested in court. Although its enforceability is doubtful, it is common practice to secure cash deposits with a pledge over a bank account.

3.6 Can collateral security be taken over shares in companies incorporated in Indonesia? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, collateral security over shares in companies incorporated in Indonesia can be taken. A pledge of Indonesian shares can be enforced provided the governing law is Indonesian law. See the procedure discussed above.

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

Security over the movable property can be taken by way of fiduciary transfer.

The Fiduciary Security must be made by a notarial deed and in the Indonesian language. The debt so secured can be in the form of:

- existing debts;
- future debts already agreed upon in a certain amount; or
- debts the amount of which can be determined at the time of execution based on the principal agreement.

The goods encumbered by a Fiduciary Security must be registered, including goods located outside Indonesian territory.

The fiduciary transferee shall apply for the registration of the Fiduciary Security and attach to the application a registration statement with the stipulated data. Upon registration on the date of receipt of the registration application, the applicant will obtain a Fiduciary Security Certificate stating the date of the application. The Fiduciary Security is created on the date of registration it in the Fiduciary Register Book (*Buku Daftar Fidusia*). The fiduciary security certificate has force of execution equal to a final court verdict.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, it can.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Registration fees for mortgages are normally based on the value of the secured amount under the mortgage (the lender has a choice whether to use the actual value of the assets or the principal amount of the loan), and can be costly. There is also a registration fee for fiduciary transfers. However, the amount is nominal. Notary fees concerning fiduciary transfers and pledges of shares vary and are at the notary's discretion. Stamp duty of IDR 6,000 (less than US$ 0.50) is payable on any agreement signed by the parties.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Please refer to question 3.9 above, particularly on the registration fee for mortgages. With regard to the estimated time for filing and registering a mortgage or Fiduciary Security, it would approximately take one month, while for the shares pledge it can be done once the pledge agreement has been executed.

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

Normally, creditor consent is required (unless the relevant security provider does not have any debt). AA shareholder approval is also required in the situation as we have described in our response to question 2.5.

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

If it is a revolving credit facility and the initial loan has been repaid, the security needs to be re-created every time the facility is given. However, we understand, in practice, some creditors have different views. They are of the view that no re-creation of security is required since the initial security covers the entire facility.

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

Yes, please refer to question 3.9 above.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Financial assistance is not an issue: there are no such prohibitions or restrictions other than those that may be set out in the Articles of Association of the company concerned. In addition, a company guaranteeing and/or giving security to support borrowings incurred to finance or refinance the direct or indirect acquisition of such

shares may be deemed *ultra vires* unless there is direct commercial benefit. See also question 2.5 above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Indonesia recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Indonesia indeed recognises the role of an agent for the above purpose. They are known as a "security agent". The security agent is appointed by the lenders in a separate agreement. This agreement, among others, stipulates the period of appointment, rights and obligations of the security agent, termination, etc.

5.2 If an agent or trustee is not recognised in Indonesia, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

5.3 Assume a loan is made to a company organised under the laws of Indonesia and guaranteed by a guarantor organised under the laws of Indonesia. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Yes, Lender A may use a "cessie mechanism", commonly known as an "assignment of claim receivables", and assign its rights to Lender B by executing the "Cessie Deed". Regarding the guarantee, all related guarantee deeds must be re-executed in favour of Lender B.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Yes, there are requirements to deduct or withhold tax from interest payable on loans made to domestic or foreign lenders, as stipulated in Income Tax Law. For cross-border loans, the withholding tax rate can usually be reduced if the lender resides in a jurisdiction which has a tax treaty with Indonesia.

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

No tax incentives would be given to a foreign creditor. However, foreign creditors may enjoy a certain tax rate to the extent its country has a treaty with Indonesia.

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

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, but recurring administrative requirements relating to the reporting of payment of interest and principal apply, and foreign loans received by certain categories of Indonesian borrowers require prior governmental approval.

7 Judicial Enforcement

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

Indonesian law recognises a choice of foreign law as the governing law of a loan agreement except to the extent that: (i) a loan term or a provision of that law is clearly incompatible with Indonesian public policy; and (ii) the Indonesian court must give effect to mandatory rules of the law of another jurisdiction with which the situation has a close connection.

Theoretically, courts in Indonesia can enforce a contract that has a foreign governing law. In practice, however, there have been cases where Indonesian courts have refused to give effect to choice of foreign law clauses for other specified or unspecified reasons. A foreign choice of law is not permitted for security agreements or guarantees, and these agreements must be governed by Indonesian law.

7.2 Will the courts in Indonesia recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Indonesian courts will not recognise judgments of foreign courts and accordingly it will be necessary for any matter in which a judgment has been obtained in a foreign court to be re-litigated in the Indonesian courts in order to enforce in Indonesia the cause of action giving rise to the foreign judgment and such Indonesian courts may attribute such importance to the foreign judgment as they may deem appropriate.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Indonesia, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Indonesia against the assets of the company?

(a) It would take approximately 6 (six) months to obtain a judgment in the district court. However, if the counter party (defendant) appeals to the higher courts (court of appeal and supreme courts), it may take years.

(b) Foreign court judgments cannot be enforced in Indonesia.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

On default, a security interest can be enforced through a public auction or private sale.

Public sale or auction

In theory, a public auction can be conducted without a court judgment or order if the owner of the assets is co-operative. In practice, however, a court order is required.

In the case of listed shares, however, the Indonesian Civil Code clearly specifies that an auction held by two brokers can be conducted in the market. In this case, no court order is required so long as a power of attorney to dispose of the shares has been given (usually at the time the pledge is created).

Private sale

A private sale is permitted if this means that a higher sale price can be achieved for the parties. Private sale requires consent from the owner of the assets, which is normally included in the relevant security documents.

For mortgage and fiduciary transfer, private sale can only be conducted:

- After the expiry of one month from written notification of the intended sale to interested parties and publication of this notice in at least two daily newspapers with circulation in the area where the asset is located.
- Where no third party has voiced an objection against the private sale. The law is unclear as to who these third parties may be, although it is safe to assume that they include, at least, the borrower's other creditors.

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

The above enforcement method as explained in question 7.4 also applies to foreign lenders.

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

Yes, it is known as Suspension of Payments (moratorium). The procedure is started by the debtor or its creditor petitioning the Commercial Court for a suspension of payments. The Commercial Court must then grant a provisional moratorium, and appoint a supervisory judge and an administrator or receiver to assist the debtor in managing its estate. The debtor will be entitled to manage and dispose of its assets jointly with the administrator. During this suspension period, the debtor does not have to make payments to its unsecured creditors and secured creditors cannot enforce their security without the court's consent. The purpose of a suspension of payments is to enable the debtor to propose a composition plan.

For creditors holding a mortgage, a pledge, a fiduciary security or any other *in rem* security right may enforce its right against the secured assets as if there were no bankruptcy. However the aforesaid right is limited by the so-called "stay period". A stay is a restriction on the right of secured creditors and third parties to exercise their right. This stay applies for a time period of at most 90 (ninety) days as of the date of the bankruptcy judgment. The stay does not apply to claims of creditors whose rights are secured by cash deposits and the rights of creditors to set-off debts. By law, the 90-day stay will expire on an earlier date in case of an early termination of the bankruptcy or upon the commencement of the state of insolvency.

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

A foreign or international arbitral award can be recognised and enforced in Indonesia as Indonesia has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards through Presidential Decision No. 34 of 1981. The procedures for recognition and enforcement of foreign arbitral awards are further regulated by Law No. 30 of 1999 on Arbitration and Alternative Dispute. However, before the enforcement, the award needs to be registered to the District Court of Central Jakarta. Please note, however, that the Chairman of the District Court of Central Jakarta may refuse to issue the writ of execution if it views that the award violates public order. The decision rejecting the enforcement can be appealed at the Supreme Court and must be decided by the Supreme Court within 90 (ninety) days as of the registration of the appeal. A decision approving the enforcement of the award cannot be appealed.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The mortgage, the pledge and the fiduciary transfer are "*in rem rights*" which are "*absolute*" and "*exclusive*" and create preferential rights to the holder of the security even in bankruptcy. Bankruptcy

of the mortgagor, the pledgor and the fiduciary transferor does not, in principle, affect the security right of the mortgagee, pledgee and transferee in that the assets in question are not regarded as being part of the bankruptcy assets. However, the creditors should note the "stay" period as we have elaborated in response to question 7.6, which restricts the ability of the creditors to enforce its rights.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes, there are.

On the preference period with respect to the security, we believe that there should be no preference period, except that: once the bankruptcy estate is declared in the state of insolvency, the secured creditors must exercise their privileged right over the collateral within 2 (two) months as of the point the bankruptcy estate is declared to be in the state of insolvency. Otherwise, the appointed receiver is required to request the delivery of the collateral to be sold by the receiver. If the receiver has enforced the collateral, the proceeds that will be distributed to the secured creditors need first to be deducted by not only the amount of the mandatory preferred claims (which will also apply if the secured creditors enforced the collateral by themselves), but also the bankruptcy costs.

On the clawback rights, under Articles 41 and 42 of the Indonesian Bankruptcy Law, for the interest of the bankruptcy assets, only the receiver could request the nullification of a preferential transfer transaction conducted by the debtor before its bankruptcy, if such transaction was considered detrimental to the creditors ("Bankruptcy Preferential Transfer"). To nullify a Bankruptcy Preferential Transfer the receiver must prove the following requirements:

(i) the preferential transfer was performed by the debtor before it was declared bankrupt;

(ii) the debtor was not obligated by contract (existing obligation) or by law to perform the preferential transfer;

(iii) the preferential transfer was prejudiced the creditors' interests; and

(iv) the debtor and such third party had or should have had knowledge that the preferential transfer would prejudice the creditors' interests.

If the preferential transfer transaction was conducted within a period of 1 (one) year before the company's bankruptcy, provided that the transaction was not mandatory for the debtor and unless it could be proven otherwise, both the debtor and the third party with whom the said act was performed were deemed to know that such transaction was detrimental to the creditors when such transaction belongs to one of the following three categories:

(i) a transaction in which the consideration that the debtor received was substantially less than the estimated value of the consideration given;

(ii) a payment or granting of security for debts which are not yet due; or

(iii) a transaction entered into by the debtor with a certain relative or related parties.

There is no provision under the Bankruptcy Law which stipulates a specific period when the Bankruptcy Preferential Transfer claim can be made. However, request for the nullification of a Bankruptcy Preferential Transfer shall be made by the receiver. The claim can be made only if the debtor has a receiver.

If the underlying security documents are nullified due to the Bankruptcy Preferential Transfer, then the security will also become invalid.

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

A. Specific expenses stipulated by the Tax Law:
- legal expenses arising solely from a court order to auction movable and or immovable goods;
- expenses incurred for securing the goods; and
- legal expenses, arising solely from the auction and settlement of inheritance.

B. Preferred creditors ranked above the secured creditors.

Tax claims and court charges which specifically result from the disposal of a movable or immovable asset (these must be paid from the proceeds of the sale of the assets over all other priority debts, and even over a pledge or mortgage), the legal charges, exclusively caused by sale and saving of the estate (these will have priority over pledges and mortgages).

C. The receiver's fee.

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

No, there are no entities which are excluded from bankruptcy proceedings.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No, there are no processes other than the court proceedings which are available to a creditor to seize the assets of the company in enforcement.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Indonesia?

Yes, a submission to a foreign jurisdiction should be binding and enforceable.

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

Sovereign immunity has not been explicitly legislated in Indonesia. The Republic of Indonesia has subscribed to the doctrine of restrictive sovereign immunity by its entry into the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965. However, if a party is a state-owned company and enters into a commercial contract, it can be argued that such state-owned company has waived its entitlement (if any) to sovereign immunity).

In practice, the Government of Indonesia ("**GOI**") does not use sovereign immunity as the basis of defence in a dispute which relates to its obligation under a commercial agreement.

Nevertheless, the GOI specifically does not waive any immunity in respect of:

- actions brought against the Republic arising out of or based upon U.S. federal or state securities laws;
- attachments under Indonesian law;
- present or future "premises of the mission" as defined in the Vienna Convention on Diplomatic Relations signed in 1961;
- "consular premises" as defined in the Vienna Convention on Consular Relations signed in 1963;
- any other property or assets used solely or mainly for government or public purposes in the Republic or elsewhere; and
- military property or military assets or property or assets of the Republic related thereto.

The GOI is subject to suit in competent courts in Indonesia. However, Law No. 1 of 2004 on State Treasury prohibits the seizure or attachment of property or assets owned by the GOI.

10 Other Matters

10.1 Are there any eligibility requirements in Indonesia for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Indonesia need to be licensed or authorised in Indonesia or in their jurisdiction of incorporation?

There are not necessarily any eligibility requirements for a lender to be a bank. Lenders to a company in Indonesia do not need to be licensed in Indonesia. However, we normally assume that the lenders have proper licences under its jurisdiction.

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

Other than the above, we believe there are no matters that need to be considered when participating in financings.

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Ali Budiardjo, Nugroho, Reksodiputro, usually abbreviated to ABNR, was established in Jakarta in 1967 as a partnership of legal consultants in Indonesian business law. The firm is one of Indonesia's largest independent full-service law firms. The commitment we make to clients is to provide broad-based, personalised service from top quality teams of lawyers with international experience that includes groundbreaking deals and projects. ABNR's reputation has been recognised around the world by independent industry surveys and law firm guides. ABNR was selected, based on its high level of integrity and professionalism, to be the sole Indonesian member of the world's largest law firm association Lex Mundi and of the prestigious Pacific Rim Advisory Council (PRAC).

Italy

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1 Overview

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

As a reaction to the credit crunch and the overall economic crisis, the Italian Government has introduced a number of different measures to boost the domestic economy, increase competitiveness of the Italian corporate and financial system and facilitate access by Italian companies to alternative sources of funding. This process started in 2012, when the Italian Government passed a new law to allow access to bond financings by non-listed companies by extending the application of certain favourable provisions originally applicable to listed companies only. Subsequent legislation passed in the following years lifted additional obstacles to the access to the capital market for Italian companies, including by way of private placement transactions. As a result, high-yield bonds have become a viable source of financing for non-listed companies and, during the last couple of years, we have seen in the Italian market a sharp increase of bond-debt deals *in lieu* of, or coupled with, bank-debt transactions.

The Italian Government has recently introduced a number of changes to the Italian regulatory and tax framework, with the aim of making new financing options (alternative to the traditional bank-financing model) available to Italian companies. In particular, a new law enacted in June 2014 has implemented in Italy the Alternative Investment Fund Manager Directive (AIFMD) and Bank of Italy (i.e., the Italian regulatory authority) is now working on the relevant implementing regulation, which is expected to come into force reasonably soon. The new regulatory framework will establish an EEA passporting regime for alternative investment fund managers and allow, subject to certain requirements, direct lending to Italian companies through the establishment of credit funds. In addition, a recent package of measures enacted in August 2014 (the so-called "Competitiveness Decree" (*Decreto Competitività*)) in order to boost the domestic economy and further expand the alternative funding options, has made it possible for insurance companies and Italian securitisation vehicles (i.e., companies established pursuant to the Italian securitisation law) to engage in direct lending to Italian borrowers. The ability to do so is however subject to the issuance of regulations by the respective regulatory authority (i.e., IVASS and Bank of Italy), which will define the relevant requirements. On the tax side, favourable tax regimes and exemptions from withholding tax on interest payments have now been made available to long-term financings granted by banks and other entities established in an EEA state.

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

- GTECH's offering of $5.2 billion (equivalent) multi-tranche senior secured notes to fund the acquisition of International Game Technology;
- GTECH's $2.4 billion (equivalent) multi-currency revolving credit facility and €800 million term loan facility;
- ENEL's renegotiation of its revolving credit facility amounting to approximately €9.4 billion; and
- Wind Telecomunicazioni's refinancing including a new €4 billion issuance of three tranches of senior secured bonds.

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, Italian companies can generally guarantee borrowings of other members of their corporate group. However, the availability of guarantees must in practice be permitted by the articles of association of the relevant company and is restricted by corporate benefit (see question 2.2) and financial assistance rules (see question 4.1).

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, any transaction to be entered into by an Italian company (including the granting of security and guarantees) must (i) not be *ultra vires* (i.e., outside the corporate power of the company), and (ii) be instrumental in achieving the concrete business purpose of the company itself (i.e., there must be some direct or indirect benefit to that company). The existence of some actual benefit is ultimately a matter of fact to be addressed and evaluated by the directors on a case-by-case basis. The directors of an Italian company are therefore under a duty to carefully analyse a transaction in order to determine the overall benefit to the company (if any), if it is adequate to the obligations and risk assumed by the company thereunder (for that purpose a monetary cap to the guarantee can be introduced) and whether the transaction is sustainable and there might be an actual or potential prejudice to the company or its creditors by entering into such transaction.

Directors of Italian companies are under the duty to promote the success of the company itself, as opposed to the group's success. This is why corporate benefit is to be assessed at the level of the relevant company on a standalone basis. Thus, it is generally more difficult to establish that a company obtains a corporate benefit from providing an upstream or cross-stream guarantee or security. However, in certain circumstances and subject to specific rules, the interest of the corporate group to which such company belongs may also be taken into consideration.

Generally, resolutions passed by the board of directors in violation of the applicable law and the articles of association of the company, as in the case of transactions *ultra vires*, in the absence of a real and adequate corporate benefit or affected by conflict of interest, may be subject to challenge and annulment. Civil liabilities may be imposed on the directors of the company in those circumstances or in case of failure by the directors to comply with the fiduciary duties they owe to the company or if they did not act in its best interest. In addition, any shareholder found to be exercising undue influence may also be held liable *vis-à-vis* the company, its creditors and the other shareholders if the undue influence results in a prejudice for any of them. However, any challenge is without prejudice to rights acquired by *bona fide* third parties.

2.3 Is lack of corporate power an issue?

Yes, please see question 2.2.

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

The granting of financings or other forms of financial support (including guarantees) on a professional basis and *vis-à-vis* the general public is a restricted activity reserved to banks and financial intermediaries duly authorised by and registered with the Italian regulator (i.e., Bank of Italy). However, granting guarantees in support of indebtedness of other members of the same corporate group is generally not considered a restricted activity, and as such it is generally not subject to authorisations or consents by any governmental, judicial or regulatory body or authority nor subject to filings. Guarantees, which must be permissible under the articles of association of the relevant company, are usually approved by the board of directors of the guarantor and shareholders' approval is generally not required. Guarantees must be documented in writing and are usually included directly in the loan agreements. Guarantees documented by a document signed by the parties in the Italian Republic are subject to registration with the competent registration office and thus, unless exempt, subject to a registration tax equal to 0.50% of the amount guaranteed.

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

As mentioned in question 2.2, any guarantee granted by an Italian company must be sustainable, adequate and proportionate to the overall direct or indirect benefit that company receives as a whole by entering into the relevant transaction. To that effect a monetary cap quantifying the actual benefit deemed to be received is generally introduced. In addition, with reference to *omnibus* guarantees, i.e., guarantees granted in relation to future or potential obligations, the indication of the maximum guaranteed amount under the relevant guarantee is mandatorily required for the validity of the guarantee.

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

No Italian exchange control regulations restrict enforcement of guarantees. However, the underlying payment obligations might not be enforceable if contrary to exchange control restrictions imposed by the United Nations or the European Union from time to time.

3 Collateral Security

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

The most common forms of security are mortgages, pledges (which are governed by different rules depending on the type of assets subject to security), assignments by way of security and special privileges (*privilegi speciali*) pursuant to article 46 of Legislative Decree No. 385 of 1 September 1993 (the "**Consolidated Banking Act**"). With limited exceptions, security under Italian law generally covers existing and well-identified assets only. Security over future assets is generally not recognised and is re-characterised as an undertaking to grant security.

As a general rule, security over real estate assets and movable assets registered with public registries (such as motor vehicles, aircraft, ships, etc.) is usually granted by way of a mortgage, while security over all other movable assets (including personal property, IP rights, shares, bank accounts, receivables and claims) is usually taken by way of a pledge. Security over claims and contractual rights can also be created by an assignment by way of security. As a general rule, pledges require a written agreement, an "undisputed date" (*data certa*) of the agreement and the delivery of the pledged assets to the pledgee (or a custodian) for security purposes. In order to obtain an undisputed date the document is usually executed before a notary public, but other methods are available. The delivery of the pledged assets has the double function of further strengthening the creditor's right against the pledgor and ensuring the publicity of the security *vis-à-vis* third parties. Depending on the nature of the assets subject to the pledge, delivery can be achieved in different ways.

Each form of security has its set of rules as to creation, perfection, registration and enforcement and sometimes the same form of security (e.g., the pledge) is governed by different rules depending on the type of assets subject to security.

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

Floating charges and all-asset security are not available under Italian law. Separate instruments are required over different types of assets, each subject to a separate set of statutory provisions governing the creation, perfection, registration and enforcement of the relevant security. The closest instrument to a floating charge that Italian law recognises is the special privilege (*privilegio speciale*) (see question 3.7).

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

Security over land and buildings (as well as registered movable assets) is granted by way of a mortgage, while security over all other

movable assets (including machinery and equipment) can be taken by way of a pledge.

Mortgages are to be signed before a notary public and registration of security with the competent Land Registry (or the asset-specific registers for vehicles, ships, aircraft, etc.) is required not only for establishing ranking of security but as an essential requirement for the validity of the security.

See question 3.1 for the general requirements for pledges. However, because of (i) the delivery requirement, i.e., possession of the relevant assets has to pass onto the secured creditor(s), (ii) the need for a (partial) release of security every time an asset subject to security is to be disposed of, and (iii) re-characterisation as an undertaking to grant security of any security over future assets, security over machinery or equipment is rarely taken, unless the special privilege is available (see question 3.7).

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

Security over receivables can be taken by way of a pledge, and delivery/perfection is achieved by notification of the pledge to (or acceptance of it by) the relevant debtor. In both cases an undisputed date of the notice/acceptance is required for enforceability against third parties (including the receiver/liquidator of the pledgor). An undisputed date of the notice is generally achieved by service of the notice by a court bailiff, while an undisputed date of the acceptance is generally achieved by execution of the acceptance before a notary public but alternative routes for both instruments are available (including certified electronic mail).

Alternatively, security over receivables can be obtained in the form of an assignment by way of security of the relevant receivables. On the one hand, similarly to pledge over receivables, the assignment by way of security also requires (i) a written agreement bearing an undisputed date, and (ii) that the security document clearly identifies the receivables subject to security. On the other hand, the notification to the assigned debtor (or its acceptance) is only a requirement for the enforceability of the assignment *vis-à-vis* third parties, as opposed to a perfection requirement of the security (as is the case for the pledge). In other words, an assignment by way of security of receivables is a valid security between the parties as of the date of the agreement, irrespective of the notification to/acceptance by the debtor. This difference makes the assignment a more flexible security and, as a result, it is more commonly used in the Italian market, as opposed to the pledge. In fact, for a number of commercial and practical reasons, in many circumstances the assignor/pledgor may not be willing to notify its debtors of the security and, with the assignment by way of security, the notice can be postponed to a later moment (e.g., event of default) so as to minimise the impact of the security on the company's day-to-day operations, without impacting on the validity of the security interest. However, it has to be stressed that the enforceability against third parties (including any receiver or liquidator of the company) requires notice of the assignment. The notice can be served at any time before the insolvency of the pledgor, without jeopardising the security, since the relevant hardening period starts running from the date of the agreement, whereas, in the case of the pledge, the relevant hardening period only runs from the date of the notice.

In case the assigned debtor is a governmental entity or the assigned/pledged claims are public sector claims, specific rules apply and additional requirements, including the consent of the assigned debtor and/or the compliance with specific formalities for the execution of the relevant security document, may be required.

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

Security over bank accounts is taken by way of a pledge over the bank accounts, although technically this is a pledge over the claims *vis-à-vis* the account bank for the payment of any positive balance.

See questions 3.1 and 3.4 for the requirements for a pledge over receivables.

Unless otherwise expressly agreed in the agreement, the right to operate the bank account passes upon execution of the relevant security document from the pledgor to the pledgee by operation of law. However, in order not to impair the ability of the pledgor to conduct its operations in the ordinary course of business, it is market practice to leave the right to operate the operating account with the pledgor until a freezing notice is delivered by the pledgee to the account bank (usually, once an event of default has occurred).

Due to the floating nature of the assets subject to this security interest (i.e., the balance of the accounts), a periodic confirmation of security (with the need for a new notice to be delivered to the account bank (i.e., the assigned debtor)) is strongly advisable in order to preserve the security.

Due to the nature of the asset subject to this specific security which qualifies as financial collateral, security over bank accounts can be governed pursuant to the Financial Collateral Directive (Directive 2002/47/EC), as implemented by Italian Legislative Decree No. 170 of 21 May 2004, which greatly simplifies the enforcement process, making it faster and not subject to any stay in the event of insolvency of the relevant grantor once an enforcement event has occurred under the security document.

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?

Italian limited liability companies mainly belong to two categories: *società per azioni* (S.p.A.); or *società a responsabilità limitata* (S.r.l.). While the equity in S.p.A.s is divided up into shares of equal par value, represented by registered share certificates (unless in dematerialised form), equity in S.r.l.s is not divided into shares and each equity holder is the owner of a percentage (quota) of the entire equity of the company.

Due to the need for perfection of the relevant Italian law perfection requirements and the characteristics of the relevant assets, security over both shares and quotas should be taken pursuant to Italian law-governed pledge agreements.

The general rules applicable to pledges described in question 3.1 apply. Delivery of the pledged asset (and therefore perfection of security) is achieved through the transfer by way of security of the certificates representing the shares in an S.p.A. (or by registering the pledge in the securities account where the shares are held, in case of dematerialised shares in an S.p.A.) or by registering the pledge in the competent Companies Registry in case of quotas in an S.r.l. In each case, the pledge must be recorded in the shareholders' book of the company (if any) in order for it to be enforceable against the company. Due to the requirement for registration with the competent Companies Registry, a pledge over quotas in an S.r.l. has to be signed before a notary public and registered with the competent registration office in Italy. This is not, however, a requirement for a valid pledge over the shares in an S.p.A.

In the case of shares over public companies, which are always in dematerialised form and qualify as financial collateral, security

can be governed by the Financial Collateral Directive (Directive 2002/47/EC), as implemented by Italian Legislative Decree No. 170 of 21 May 2004, which greatly simplifies the enforcement process, making it faster and not subject to any stay in the event of insolvency of the relevant grantor once an enforcement event has occurred under the security document.

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

Movable assets not registered with public registries and reserved for the running of a business (including: (i) existing and future equipment, plant, machinery, concessions and instrumental assets; (ii) raw materials, work-in-progress, finished goods, livestock and merchandise; (iii) goods otherwise purchased with the proceeds of the relevant financing; and (iv) existing and future receivables arising from the sale of the assets and goods listed above) can be subject to the special privilege. The special privilege is the closest instrument to a floating charge that Italian law recognises as it covers classes of assets owned from time to time by the borrower, as opposed to specific assets owned by the grantor at the time the security is granted. However, the special privilege is only available in the limited circumstances where: (i) the grantor is the borrower (i.e., not available for guarantors) under a loan agreement (or the issuer of notes); (ii) the lender(s) is/are a bank(s) or financial institution(s) duly authorised to carry out lending activity pursuant to the Consolidated Banking Act (or the noteholders are qualified investors); and (iii) the financing has a maturity longer than 18 months.

Special privileges must be signed before a notary public. A list of all equipment, plant, machinery, raw materials, work-in-progress, finished goods, livestock, merchandise and any other goods and claims subject to security must be included in the security document which also must specify the maximum amount secured thereunder. The security document must then be lodged with the specific registry held at the competent court.

Due to the floating nature of this security interest and the assets subject to it (i.e., the inventory), a periodic confirmation of security (with the need for a new filing of the list of assets subject to security with the competent court) is strongly advisable in order to preserve security.

As an alternative to the special privilege, security over a class or classes of movable assets can be taken by way of a "revolving pledge". Although very rarely used in practice because of its burdensome procedure and as it is not a well-tested instrument, the revolving pledge can theoretically cover well identified movable assets not subject to a specific regime (mainly the same which can be subject to special privilege) subject to the following requirements: (A) the assets subject to security are to be (i) included in a list, (ii) physically "marked" as subject to security, and (iii) deposited in a well confined area outside the control of the pledgor; (B) the security is to be granted for a maximum agreed amount; and (C) each substitution of the assets must be made with an asset of the same type and of a similar value as the one disposed of.

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. However note the considerations in section 2 above and in this section 3.

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 notarisation is required (see question 3.13), relevant costs depend on value of the agreement and activity requested.

Unless exempt, security documents executed in Italy or registered in Italy at the time of execution (e.g., as a perfection requirement) or at any time thereafter (e.g., for enforcement purposes) are subject to registration tax. Security interests are generally subject to a registration tax equal to (i) Euro 200 when securing the security provider's obligations as a borrower only, or (ii) 0.5% of the amount secured when securing third parties' obligations. Mortgages are also subject to an additional mortgage tax equal to 2% of the amount secured.

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?

Notification requirements are generally not time consuming or expensive, but this depends on the number of notifications (e.g., number of debtors to be notified) or the frequency of the notifications (e.g., monthly notifications to the account banks). Filings and registrations can generally be carried out in a swift fashion but the circumstances may involve numerous filings/registrations (e.g., registration of mortgages in several different land registries). As to registration costs, see question 3.9.

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

No regulatory, judicial or similar consents are required for the creation of security by companies generally. Specific assets may be subject to consent either by operation of law (e.g., public sector claims are subject to consent by the relevant governmental entity) or by contract (e.g., security over receivables might be subject to consent by the relevant debtor).

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

There is no special priority nor concern in case of security for a revolving credit facility.

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

Notarisation is a requirement for some security only (e.g., mortgages and pledge over quotas in an S.r.l.), while for other security it may be advisable in order to ensure an undisputable date, but other methods are available to achieve this effect.

Powers of attorney ("**PoAs**") are required every time a document is not signed directly by any director of the company duly authorised by the relevant corporate authorisations. A notarised PoA (or a notarised abstract of the board resolutions authorising the relevant director(s)) is required every time a security document is to be signed before a notary public. An apostille, pursuant to the Hague Convention Abolishing the Requirement for Legalisation for Foreign

Public Documents, or similar authentications might be required in case of notarisations coming from a notary licensed in a country other than the one notarising the relevant security document.

Italian law documents cannot be executed as deeds or in counterparts. An Italian law security document can generally be executed by the parties at a physical meeting where all parties sign the same piece of paper or by exchange of commercial mail, where a party signs a proposal of the agreement and posts it to the other side and the other party signs a separate document for acceptance and posts it to the proposing party.

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 Italian civil code prohibits an Italian company from, either directly or indirectly, granting loans, guarantees or security for the purchase or the subscription of its own shares. The rule is widely interpreted to cover the acquisition of any company directly or indirectly controlling the relevant Italian company and any subsequent refinancing of the acquisition debt. With the exception of circumstances where the assistance granted is for an amount not exceeding the profits payable and the reserves available for distribution and subject to certain other requirements, there is no exemption available. Any agreement in direct or indirect violation of the provision is invalid and unenforceable.

The issue is usually addressed by way of a debt push-down via the merger of the acquisition vehicle (the "**SPV**") with the target. In that scenario, the acquisition facilities are advanced to the SPV under a bridge loan, while the refinancing or new revolving lines (if any) can be advanced directly to the target under a medium term loan, in relation to which security and guarantees by the target can be taken on day one. Before the maturity of the bridge loan (generally, within 12 to 18 months from closing of the acquisition) the SPV and the target merge and the acquisition facilities are refinanced under a new medium term loan, or the one used for the refinancing or new revolving lines (if any). The security package will now extend to the new refinanced acquisition facilities. The described structure cannot however be used where the acquisition is entirely funded through a bond issuance, as bonds usually have a medium to long-term maturity profile. As a result, this limitation makes, to a certain extent, bonds a less suitable instrument to fund acquisitions of Italian targets, requiring a specific analysis and creative solutions to properly address potential financial assistance issues and structure the push-down of the debt.

For this structure to work, the statutory merger must comply with the following requirements: (i) the merger plan must identify the financial resources to be used by the company resulting from the merger to meet its debt obligations; (ii) the report of the board of directors must explain, *inter alia*, the economic reason for the merger, the objectives it intends to achieve and the financial resources it intends to use; (iii) the independent experts (appointed by the court in case of *società per azioni*) must certify the reasonableness of the assumptions and conclusions drawn in the merger plan; and (iv) the independent auditors must provide a report on the merger plan.

It is generally accepted that a guarantee or security granted by an Italian company in order to guarantee/secure any part of the debt which is not used, either directly or indirectly, to acquire the target's shares is permitted. However, due to the punitive nature and wide interpretation of the relevant provisions, it is advisable to rule out all up-stream guarantees and security and that the non-acquisition debt to be guaranteed/secured is clearly distinguished and separated from the acquisition debt (e.g., separate loan agreements or at least separate and independent facilities under the same loan agreement), so as to avoid any argument that any such guarantee or security is in fact indirect financial assistance.

See also question 2 as to general limits to guarantees and security.

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

Yes. See (a) above.

(c) *Shares in a sister subsidiary*

Arguably this is not subject to the financial assistance restrictions. However, as mentioned in question (a) above, due to the punitive nature and wide interpretation of the relevant provisions, it is advisable that the debt for the acquisition of the sister subsidiary be clearly distinguished and separated from the debt for the acquisition of the company's shares or any of its direct or indirect holding companies.

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?

Italian law-governed security interests are commonly granted to lenders individually. Although trusts governed by foreign law should be recognised by Italian courts, there are no trusts available under Italian law. As a result, security is not granted to one person only for the benefit of others but instead each creditor must be the beneficiary of the security interest (and registered as such, if registration is a perfection requirement to that security). In other words, only the persons specifically identified in the security documents as beneficiaries of the security (and if this is the case, registered or notified to the relevant debtor as such) generally have the rights purported to be created under the security (including enforcement rights). This results in the need for a confirmation of security (and new registrations are required, if the security is subject to registration) upon any assignment or transfer of interests by any lender of record.

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?

Generally, the trustee's role and functions are replicated by appointing the collateral agent/trustee as agent acting in the name and on behalf (*mandatario con rappresentanza*) of the other secured parties pursuant Italian law. Such appointment is normally included in the loan agreement or the intercreditor agreement and allows the collateral agent to sign the security documents (including the security confirmations upon a change of lender) on behalf of the

other secured creditors, exercise their rights thereunder and enforce security. This however does not avoid the requirement that the security be granted, registered (if required) and enforced in favour of each lender individually. The validity and enforceability of alternative solutions to this issue (e.g., parallel debt structure) are untested and highly debated in Italy.

Sub-participation structures, where only one bank (e.g., the agent) is the lender of record and all other lenders are sub-participants, are sometimes implemented in order to structure around this requirement (the so-called "IBLOR" structure). However, sub-participants are not recognised as secured creditors and have no rights under the security. They only rely on the sharing and turnover provisions included in the intercreditor agreements, or subrogation rights in case of defaults, and bear the risk of the insolvency of the lender of record.

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?

If the loan is transferred, for the new lender to have a valid claim against the borrower, enforceable against all third parties (including a possible borrower's bankruptcy receiver), as a matter of Italian law, the transfer must be notified to, or accepted by, the relevant borrower and the notification or acceptance must bear an undisputable date.

Guarantees are vulnerable to challenge when the guaranteed debt is amended, rescheduled, extended or otherwise transferred without the consent of the guarantor. Provisions are usually inserted into guarantees to provide advance consent to such amendments, but the effect of such provisions is limited and a prudent approach is to obtain guarantee confirmations whenever material amendments are made to the guaranteed debt.

As to security, please refer to question 5.2.

However, please note that if the loan, the guarantee or the security are governed by a law other than Italian law, different requirements may apply according to Rome I Regulation ((EC) 593/2008).

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?

Prima facie, payments of interest by an Italian borrower (or by a non-Italian borrower where the payments are of Italian source interest) are subject to withholding tax at the rate of 26% or the lower rate provided for by any applicable double taxation treaty. However, this general rule is subject to various exemptions. For example, withholding does not apply in respect of: (a) interest paid on an advance from (i) an Italian bank (i.e., a bank or a financial institution duly authorised to carry out lending activity pursuant to the Consolidated Banking Act), or (ii) a non-Italian bank or financial institution which is lending through a facility office in the Italian Republic which qualifies as an Italian permanent establishment (*stabile organizzazione*); or (b) interest arising from medium/long-term loans granted by (i) a bank, financial institution or insurance company organised and authorised in the European Union, (ii) institutional investors (including credit funds) established in a white-listed jurisdiction and subject to regulatory supervision, (iii) Italian securitisation special purpose vehicles (subject to implementing regulation by the Bank of Italy not yet in force), or (iv) certain EU credit institutions. The borrower is responsible for accounting to the Italian tax authorities for any applicable Italian withholding tax.

According to one interpretation of the relevant Italian tax provisions, the proceeds of a claim under a guarantee by an Italian guarantor or the proceeds of enforcing security granted by an Italian entity could also be subject to withholding tax as outlined above.

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 Italian law, there are no tax incentives provided preferentially to foreign lenders and there are no taxes applicable to foreign lenders for the effectiveness or registration of loans, mortgages or security documents other than those highlighted above, which apply to all lenders, irrespective as to whether they are Italian or foreign. On the contrary, Italian lenders might take advantage of tax incentives reserved for them such as the withholding tax exemption reserved for the entities listed in question 6.1 or the substitutive tax (*imposta sostitutiva*) regime, which Italian and EU banks, insurance companies, credit funds or Italian securitisation special purpose vehicles (subject to implementing regulation by Bank of Italy not yet in force) may opt for. Pursuant to the substitutive tax regime, all indirect taxation applicable to a transaction (including registration costs for security) is replaced by an umbrella tax equal to 0.25% of the amount of the loan if the loan has a maturity longer than 18 months.

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?

No, a foreign lender will not become taxable in Italy solely because of a loan to, or grant of guarantee or security from, a company in Italy. However, please see question 6.1 as to 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.?

Foreign lenders would be subject to the same costs and notarial fees (if any) as Italian lenders. Costs and notarial fees depend on a number of variables (e.g., whether documents are executed outside Italy, registered in Italy, the type of security, etc.). For further details, refer to the questions above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

If a lender is resident, domiciled or located for tax purposes or acting through a lending office or a permanent establishment (*stabile organizzazione*) in a country or territory listed as having a privileged tax regime or not allowing an adequate exchange of information with the Italian tax authorities, the Italian-resident borrower might

be subject to certain deductibility restrictions on the interest paid under the loan.

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?

Subject to exceptions, whether the countries involved are EU Member States or not, the Italian courts will apply Rome I Regulation ((EC) 593/2008) on the law applicable to contractual obligations to determine the governing law of a contract made on or after 17 December 2009. The general rule under Rome I is that the contract is governed by the law chosen by the parties. Exceptions include, in particular, circumstances where the choice of law is fraudulent or the application is manifestly incompatible with the public policy of the forum or in the case of overriding mandatory provisions of the law of the forum. Subject to certain exceptions, an Italian court would also uphold an agreement made in advance to submit non-contractual obligations (e.g., a claim in respect of a misrepresentation made in the course of contractual negotiations) to the law of a particular country, in accordance with the terms of the Rome II Regulation ((EC) 864/2007).

If an Italian court has and accepts jurisdiction, the foreign governing law will be applied according to its principles in terms of interpretation and application. The law governing the proceeding of an Italian court will however be Italian procedural law. Notwithstanding the above, Italian courts may refuse to apply the foreign law provisions governing the documents or to grant some of the remedies sought (e.g., punitive damages) if their application violates Italian public policy or is contrary to overriding provisions of Italian law. In addition, obligations governed by foreign laws may not be enforceable under Italian law if and to the extent that the same would be illegal, unenforceable or contrary to public policy under the laws of that jurisdiction. An Italian court may also take into account the law of the place of performance in relation to the manner in which performance of the obligation sought to be enforced should have taken place and the steps to be taken in the event of defective performance.

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?

Enforceability in Italy of final judgments obtained in a foreign court is governed by either the Brussels Regulation (EU) 1215/2012) (in the case of judgments from the courts of other EU Member States) or Titolo IV (*Efficacia di sentenze e atti stranieri*) of the Law 218/1995 (*Riforma del sistema italiano di diritto internazionale privato*) if no bilateral treaty applies. Generally, a final and conclusive judgment for a definite sum of money entered by a foreign court in any proceeding should be enforced by the Italian courts without re-examination or re-litigation of the matters adjudicated upon provided that the following conditions are met:

(i) the foreign courts which rendered the final judgment had jurisdiction according to Italian law principles of jurisdiction;

(ii) the relevant summons and complaint was appropriately served on the defendants in accordance with the law of the forum and during the proceeding the essential rights of the defendants have not been violated;

(iii) the parties to the proceeding appeared before the court in accordance with the law of the forum or, in the event of default by the defendants, the foreign court declared such default in accordance with the law of the forum;

(iv) the foreign judgment is final and not subject to any further appeal in accordance with the law of the forum;

(v) the foreign judgment is not in conflict with any final judgment previously rendered by an Italian court;

(vi) there is no action pending in the Italian Republic among the same parties and arising from the same facts and circumstances which commenced prior to the action in the country of the forum; and

(vii) the provisions of such judgment would not violate Italian public policy.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in 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?

It is very difficult to give an estimate on proceedings brought in Italy as timing would depend on a number of different factors, including the venue of the proceedings. Looking at some unofficial statistics, from filing of a suit to final adjudication of a matter and enforcement, up to seven years may lapse. Enforcement of a foreign judgment is a much more straightforward exercise, which, assuming no re-litigation of the matters adjudicated upon, takes approximately up to 18-24 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?

As a general rule, under Italian law foreclosure is effected through a court-supervised procedure culminating in a public auction. As a result, enforcing against collateral can be quite expensive and time-consuming. Although recent changes in the law to speed up enforcement of real estate assets have made available the use of auction directly managed by the notary public or of computerised auctions, this is the only avenue available for mortgages and special privileges. However, enforcement of a pledge can also be carried out, depending on the type of assets subject to security, through an out-of-court procedure, provided that this ensures a transparent sale process and fair sale price. In this case, the secured creditors have the right, after five days from the service on the debtor of the injunction to pay, to have the secured assets sold, in whole or in part, in one or more instalments, by auction or by private sale through the security agent, a court bailiff or other authorised persons. The secured creditors also have the right to request payment by way of assignment, in whole or in part, of the assets subject to security. The request is to be made to the court and, if granted, the assignment will be made pursuant to a valuation of the asset by way of expert report.

To the extent that the relevant assets qualify as "financial collateral" (i.e., financial instruments (including shares in public companies), credit claims (including claims for repayment of money to and loans made by credit institutions) and cash), security over these assets can be governed by the Financial Collateral Directive (Directive

2002/47/EC), as implemented by Italian Legislative Decree No. 170 of 21 May 2004, which greatly simplifies the enforcement process, making it faster and not subject to any stay in the event of insolvency of the relevant grantor once an enforcement event has occurred under the security document.

See also question 7.6 as to the effect of the opening of a bankruptcy or similar proceedings on an enforcement process.

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?

There are no special restrictions applicable to foreign lenders in either case.

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?

An automatic moratorium begins on the date the Italian company is declared bankrupt or any other insolvency proceeding (*procedura concorsuale*), including a pre-bankruptcy composition with creditors (*concordato preventivo*), is commenced by or against the company. Once the moratorium has commenced, secured creditors cannot enforce security (other than certain financial collateral arrangements) and no action or proceeding can be started or continued against the company by any creditor (whether secured or unsecured).

In the context of a *concordato preventivo*, if certain conditions are met, a debtor may bring forward the automatic stay of all individual enforcement and protective actions by filing (and registering in the Companies Registry) a "blank petition" (*concordato in bianco*). The filing of the relevant reorganisation plan and of the other documents is then deferred to a term set by the Bankruptcy Court between 60 and 120 days (which, subject to certain requirements, may eventually be extended for a further 60 days) after the date of the filing of the relevant petition.

No automatic stay applies in an out-of-court restructuring implemented outside a formal procedure by way of a certified recovery plan (*piano attestato di risanamento*). In the case of a restructuring implemented by way of debt restructuring arrangements (*accordi di ristrutturazione*) an interim moratorium begins on the date of publication of the agreement in the competent Companies Registry for a period of 60 days, during which creditors may not commence or continue legal actions in relation to claims which arose before the publication. However, both the certified recovery plans and the debt restructuring arrangements may provide for a moratorium or postponement of the claims in agreement with creditors.

No moratorium applies in case of voluntary liquidation of an Italian company.

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

An arbitral award made by an arbitral tribunal with its seat in Italy is recognised and may be enforced in Italy in the same manner as a judgment or order of an Italian court and without re-examination on the merits, subject only to the filing of the award with the competent court, together with the agreement under which the parties submitted to arbitration.

Recognition and enforceability in Italy of arbitral awards made by an arbitral tribunal with its seat in a country other than Italy is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, irrespective as to whether the country where the arbitral tribunal has its seat is a party to the Convention or not.

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?

Pursuant to Royal Decree No. 267 of 16 March 1942 (the "**Bankruptcy Law**"), upon the declaration of bankruptcy of a company (or in certain circumstances during an extraordinary administration procedure (*amministrazione straordinaria*)) certain transactions are considered without effect *vis-à-vis* its creditors while others are subject to claw-back. In particular:

1. the following transactions are without effect *vis-à-vis* the creditors:
   - transactions entered into for no consideration, during the two years before the commencement of the insolvency proceeding (the "**Relevant Date**"); and
   - repayments of debt during the two years before the Relevant Date in relation to which the scheduled due date was on or after the Relevant Date;
2. the following transactions are subject to claw-back unless the relevant third party proves that it had no knowledge of the insolvency status of the debtor (i.e., a high standard of proof being required to rebut this presumption):
   - undervalue transactions during the twelve months preceding the Relevant Date, in relation to which the value of the services, goods or undertakings provided by the debtor (now insolvent) was at least 25% higher than the consideration actually received (or to be received) by it;
   - payments in relation to monetary obligations due and payable not made in cash or through any other customary means of payment during the twelve months before the Relevant Date;
   - security interests granted during the twelve months preceding the Relevant Date for pre-existing unexpired debts; and
   - security interests granted during the six months before the Relevant Date for pre-existing expired debts; and
3. the following transactions, if entered during the six months before the Relevant Date, might also be challenged, but the bankruptcy receiver has to prove that the relevant third party had knowledge of the insolvency status of the debtor:
   - payments of debt due and payable;
   - transactions for adequate consideration; and
   - security interests or other preferences granted simultaneously with the incurrence of the debt secured.

In connection with an extraordinary administration procedure (*amministrazione straordinaria*), claw-back periods can be extended to up to five years.

Lastly, transactions may also be challenged by the bankruptcy receiver under the ordinary rules of the Italian civil code if entered into in prejudice of the creditors. However, due to the higher standard of proof required for the successful conclusion of such action, this action is rarely brought.

The Bankruptcy Law also provides for a number of transactions which are expressly excluded from claw-back, most notably payments for goods and services in the normal course of business on arm's-length terms, payments of salary/compensation to employees of the debtor and payments and other transactions made/entered into in connection with certified recovery plans (*piani attestati di risanamento*), debt restructuring arrangements (*accordi di ristrutturazione*) or pre-bankruptcy compositions with creditors (*concordati preventivi*).

Following the Financial Collateral Directive, certain insolvency challenge risks and the moratorium on enforcement of security in insolvency do not apply to security over "financial collateral" (see question 7.4).

The proceeds of the realisation of the assets in a bankruptcy procedure are applied as follows:

(i) first, towards costs and expenses for the administration of the insolvency procedure (including fees of the receiver/liquidator), the temporary running of the business (when authorised) and the liquidation of the assets, together with any other claims qualified by operation of law as pre-deductible (*pre-deducibili*);

(ii) second, towards secured claims and other privileged claims, in the order of priority provided by law; and

(iii) then, towards unsecured claims *pro rata*, together with secured claims to the extent not satisfied through the proceeds of the secured assets.

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

Individuals who are not commercial entrepreneurs (*imprenditori*) pursuant to and for the purposes of articles 2082 to 2093 of the Italian civil code are not subject to insolvency (*insolvenza*) or bankruptcy (*fallimento*) as well as any winding-up, administration, insolvency or other similar proceedings (*procedure fallimentari*) affecting companies.

The Bankruptcy Law is applicable, and as a result bankruptcy can be declared, only if a company meets one of the following requirements: (i) net assets (*attivo patrimoniale*) exceeding €300,000 at the end of each of the three most recent financial years; (ii) total gross revenue (*ricavi lordi*) exceeding €200,000 for each of the three most recent financial years; or (iii) total indebtedness in excess of €500,000.

In addition, public interest entities such as state-controlled companies, banks, financial institutions, authorised financial intermediaries, open-ended investment vehicles, management companies and insurance companies are not subject to ordinary bankruptcy proceedings. Instead, these entities are subject to extraordinary administration (*amministrazione straordinaria*) and compulsory administrative winding-up (*liquidazione coatta amministrativa*), in relation to which specific procedures and rules apply.

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 7.4 as to the enforcement options. In addition, although not an enforcement proceeding *per se*, creditors may apply for precautionary measures (*misure cautelari*) *vis-à-vis* a debtor for the purpose of preserving the debtor's estate (*mezzi di conservazione della garanzia patrimoniale*) in the event of material adverse change in the debtor's financial conditions.

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?

On the assumption that the express submission to the foreign courts constitutes a valid and binding submission under the law governing the relevant documents, the express submission to the jurisdiction of the foreign courts would normally be binding under Italian law. Exceptions to the validity of the submission to a court other than an Italian court are limited and generally do not relate to commercial relationships. However, the express submission to a court other than an Italian court is ineffective if the elected foreign court does not accept jurisdiction or is otherwise incompetent to determine the matter commenced before it.

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

A waiver of sovereign immunity is generally legally binding and enforceable under Italian law. However certain assets are not subject to enforcement due to their nature (e.g., forests, mines, assets of historic or artistic interest, real property used for public office and military stations, arms, aircraft, and ships).

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?

Lending, 'including…financing of commercial transactions (including forfeiting)', is an ancillary banking activity under the Capital Requirements Directive 2013/36/EU (CRD). EU Member States have discretion as to whether various types of lending may be carried out by entities that are not regulated as banks (credit institutions) or otherwise. Under the Consolidated Banking Act the performance of certain financial activities (including lending) *vis-à-vis* the public is a regulated activity in the Italian Republic and is reserved to banks and financial intermediaries duly authorised by and registered with Bank of Italy. The EEA passporting regime set out in the CRD permits a bank regulated in one Member State to carry out all banking activities recognised under the CRD in other EEA Member States. However, the EEA passporting regime does not offer passporting rights for unregulated lenders, nor for investment firms wishing to engage in lending activities on a cross-border basis. Generally, no licence or registration is required for intra-group lending or financings offered occasionally and non-professionally. However, see also question 1.1 as to recent developments.

Agent/security agent services can be performed by non-regulated entities to the extent the agreed role (taking into account all actions which could conceivably be required during the life of the transaction) does not include activities which are regulated in the Italian Republic, in which case prior regulatory authorisation will be required. Relevant regulated activities include accepting deposits (for which a banking licence is required), arranging deals in investments, advising on investments, dealing in investments as a

principal or agent, safeguarding and administering investments and managing investments.

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

Among others, the following considerations should be taken into consideration when lending into Italy:

Usury Law

Pursuant to Law No. 108 of 7 March 1996, lending (whether commercial lending or consumer lending, whether from professional lenders or non-professional lenders) at a rate above the "usury threshold" is a criminal offence and results in no interest or fees being due, in accordance with article 1815 of the Italian civil code. In addition, the related security may be void.

The usury thresholds are updated quarterly by the Italian Treasury Department, in agreement with Bank of Italy, and are based on the average overall effective rate (*Tasso Effettivo Globale Medio*) charged by banks and other financial institutions during the quarter ending three months before the relevant period. The average overall effective rates are "*per annum*" and include the base rate (Euribor, Libor, etc.), margin (in cash or in kind), any mandatory costs, the fees and most of the other costs and expenses (other than taxes and other minor exceptions) relating to the financing. The registered overall effective rates are classified in different types of lending products depending on, *inter alia*, the nature, purpose, duration and amount of the financing. The usury thresholds are then calculated, for each type of lending product, at a rate of 125% of the relevant average overall effective rate registered, plus an additional margin of 400 basis points. In any case, the difference between the relevant average overall effective rate registered and the usury threshold cannot exceed 800 basis points. The applicable usury threshold is the one in place at the time the relevant interest rate is agreed, rather than when it is paid.

Compounding of interest

Compounding of interest is prohibited. Overdue interest can only be capitalised and accrue interest from the date legal proceedings are commenced or pursuant to an agreement entered into between the parties after the date the relevant interest is due.

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Chapter 39

Japan

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1 Overview

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

Japanese lending has traditionally relied upon mortgages over real estate to secure loans. In the case of small and medium-sized entities, personal guarantees by representative directors of the borrowers have also been common (a guideline called "*keieisha-hosho* guideline" on this type of guarantee became effective on February 1, 2014). While new types of asset-backed or cash flow financing such as (i) asset-based lending (ABL), (ii) debtor-in-possession (DIP) financing, and (iii) project financing are developing in Japan, the traditional practice of lending against real estate collateral remains one of the preferred methods 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 the bankruptcy trustee.

2.3 Is lack of corporate power an issue?

Corporate power is necessary for a guarantor to grant guarantees.

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

The Civil Code (Act No. 89 of April 27, 1896, as amended) requires that any guarantee agreement must be in writing. Shareholder approval is not required. Depending upon the materiality of the amount guaranteed, the board of directors' approval may be required. In practice, the loan and/or guarantee agreement will contain a representation and warranty as to the 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 cases 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, upon completion) are already registered with the LAB. The registration of the mortgage is made as an addition to such existing registration. Therefore, it is necessary to investigate the title and confirm whether the property is already 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 in the registration. Only the registrable 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 can be collateralised by a security interest (*joto-tanpo*) (discussed below).

In addition, Japanese law provides for two comprehensive security interests for property located in a factory. One is a factory mortgage (*kojo-teito-ken*), and the other is a factory estate mortgage (*kojo-zaidan-teito-ken*). A factory mortgage over the land covers all machinery and equipment located in the factory. A factory estate mortgage is a very strong security interest that can actually eliminate pre-existing security interests over movables in the factory estate. Notice regarding the factory estate is published in the Japanese official gazette and if an existing security interest holder fails to object within a certain period (specified from one to three months), the existing security interest is extinguished. Both a factory mortgage and a factory estate mortgage require identification of each piece of machinery and equipment, and therefore require more burdensome procedures and costs than normal types of mortgages. The factory mortgage and factory estate mortgage are not common and are used mostly for large factories.

(3) Machinery and equipment

Machinery and equipment are movables. Movables can be collateralised by way of assignment as security (*joto-tanpo*). This security interest can be created by a security agreement between an assignor and an assignee. In order to perfect this security interest, the target movable must be "delivered" from the assignor to the assignee. Delivery can be made by (i) physical delivery, (ii) constructive delivery, or (iii) if a movable assignment registration (*dosan-joto-toki*) is filed with the LAB, the registration itself is deemed delivery from the assignor to the assignee. The LAB located in the Nakano Ward of Tokyo is the exclusive designated LAB for any movable assignment registration.

In creation of *joto-tanpo*, it is necessary to identify the target movable by whatever means is enough to specify it, such as kind, location, number and so forth. This identification rule is also applicable in perfection of *joto-tanpo* by way of physical or constructive delivery. In perfection by movable assignment registration, there are two statutory ways to identify the target movable: (i) specification by kind and a definitive way to specify the target (such as a serial number); and (ii) specification by kind and location. The former is usually used for a fixed asset, and the latter is usually used for inventory (aggregate movables).

Note that the movable assignment registration is compiled by the assignor (not by the target movable). Therefore, unlike a real estate registration which can be searched by the property, a movable assignment registration cannot be searched by the target movable, and priority cannot be registered because there is no statutory registration system to reflect the priority in the movable assignment registration. 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 (*shichi-ken*) or assignment as security (*joto-tanpo*). These security interests can be created by a security agreement between the pledgor/assignor and pledgee/assignee.

In creation of the security interest, it is necessary to identify the target receivable enough to specify it (such as kind, date of origination and other items to the extent applicable). If the target is a claim to be generated in the future (*shorai-saiken*, "future claim"), the period (beginning and end dates) must be specified in the security agreement and in connection with perfection. If there is an agreement made between the debtor and the obligor of the target receivable which prohibits pledge/assignment of the target receivable, the pledge/assignment is basically invalid, with two exceptions: (i) if the pledgee/assignee is unaware of the prohibition

agreement without gross negligence, the pledge/assignment shall be valid; and (ii) the pledge/assignment will become valid retroactively from the time of the pledge/assignment (to the extent not harmful to a third party) if the obligor of the target receivable consents to the pledge/assignment, even if there has been a prohibition agreement.

The pledgee/assignee can assert the security interest ***against the obligor of the target receivable*** upon (i) notice to the obligor from the pledgor/assignor, or (ii) acknowledgment of the obligor. The pledgee/assignee can assert the security interest ***against a third party*** (such as a double pledgee/assignee or bankruptcy trustee of the pledgor/assignor) upon (i) notice to the obligor of the target receivable from the pledgor/assignor by a certificate with (a stamp of) a fixed date, (ii) an acknowledgment of the obligor of the target receivable by a certificate with (a stamp of) a fixed date, or (iii) a claim pledge/assignment registration with the special LAB located in Nakano Ward of Tokyo. The registration can be made with the LAB upon creation of the security interest without notice to the obligor. In such a case, practically, the notice to the obligor of the target receivable will be sent upon the event of default of the pledgor/assignor, and the notice must be accompanied by a registration certificate (this notice can be sent by the pledgee/assignee).

The claim assignment registration is not compiled based upon the target receivable, but by the assignor. Therefore, unlike the real estate registration, the claim assignment 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 are 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 has to seize the dividend before it is paid to the pledgor. In contrast, if the name and address of the pledgee and target shares are registered on the shareholders' list at the request of the pledgor (*toroku-shichi*), the dividend can be paid directly to the registered pledgee.

If the shares are not certificated, a pledge may be created by a security agreement between the pledgor and pledgee, and must be perfected against the issuer and any third party by registration of the pledge on the issuer's shareholders' list.

After January 5, 2009, all share certificates of all listed companies became null and void. The shares and shareholders of all listed companies are now subject to the book-entry system controlled by the Japan Securities Depositary Center, Inc. (JASDEC). A pledge over listed shares is created and perfected by registering the pledge with the pledgor's account established at the applicable institution under the book-entry system.

Please note that a company which is not listed may, in its articles of incorporation, restrict the transfer of shares and make any transfer subject to the approval of the issuer (such as consent by the board of directors).

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

Yes, inventory is usually regarded as an aggregate movable. Creation and perfection are as discussed in question 3.3 above.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, subject to the other items discussed within this chapter regarding guarantees and security interests.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Registration taxes are imposed on (i) mortgage registration (0.4% of the claim amount (as for revolving mortgage, 0.4% of the maximum claim amount)), (ii) movable assignment registration (JPY 7,500 per a filing (up to 1,000 movables)), and (iii) claim assignment registration (JPY 7,500 per a filing (up to 5,000 claims) and JPY 15,000 per a filing (exceeding 5,000 claims)).

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

No, except for the factory estate mortgage which requires the procedures discussed in question 3.3 above.

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

No regulatory consents are required to grant security, except for general consents for transfers required by the terms of the asset itself (such as licences).

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

Taking an example of a revolving mortgage over real property, loans up to the registered maximum amount will be secured by the mortgage in accordance with the priority of the original registration filing.

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

In general, most of the official documents are signed with a registered chop. The chop registration certificate is also necessary (for example, for filing an official registration). In many cases, there are alternative ways available to foreign lenders.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company: no.

(b) Shares of any company which directly or indirectly owns shares in the company: no.

(c) Shares in a sister subsidiary: no.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Japan recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

In the practice of Japanese syndicated loans, an agent usually exists for the syndicated group. However, even if one of the syndicated secured lenders serves as such an agent, it cannot enforce the security interest held by other creditors. In addition, enforcement on behalf of other creditors may be prohibited by the Attorney Act (Act No. 205 of June 10, 1949).

Under the general rule of the Civil Code and other related laws, it is generally understood that the "secured creditor" and the "security holder" must be the same person/entity ("Same Person/Entity Principle"). However, under a security trust system, separation between the "secured creditor" and the "security holder" can be achieved. Until 2007, based on the Secured Bonds Trust Act (Act No. 52 of March 13, 1905), such security trust system only applied to bonds. In 2007, a new Trust Act (Act No. 108 of December 15, 2006) provided for a more general security trust system. Under the new system, if a trust is created with a security interest as the trust property and the terms of the trust provide that the beneficiary is the creditor whose claim is secured, the trustee can be a security trustee ("Security Trust"). As the holder of the security interest, the security trustee may, within the scope of affairs of the Security Trust (subject to the instruction by trust beneficiaries in many cases), file petitions for enforcement and take other actions necessary, including distribution of proceeds.

One of the benefits of using a Security Trust is that no individual transfer and perfection procedures are necessary when a secured creditor assigns its secured claims because the security holder does not change under the Security Trust.

However, this new Security Trust system is not used often. While the Trust Act was amended to provide for the Security Trust system, other Japanese laws have not been amended to conform and retain features of the Same Person/Entity Principle. This lack of harmonisation creates practical enforcement risks that have yet to be tested in Japanese courts.

5.2 If an agent or trustee is not recognised in Japan, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Under Japanese practice, when a Security Trust is not used, secured creditors (such as syndicated loan lenders) elect a "security agent" for administrative purposes only ("Security Administrative Agent").

The basic difference between the security trustee and the Security Administrative Agent is that the Security Administrative Agent is not a holder of all collateral security for all secured creditors. As a result, (i) perfection must be obtained individually for each secured creditor, (ii) when a secured creditor assigns its secured claim and its collateral security, individual perfection procedures to transfer the collateral security are required, and (iii) each secured creditor has to take enforcement actions under its own name (subject to the majority approval of the syndication group).

Under Japanese law, when several secured creditors share the single/same collateral in the same ranking, there are two possible legal structures (where applicable): (i) "independent and in the same ranking security" ("Same Rank Security") where each secured creditor owns independent security of the same ranking; and (ii) "joint share security" where all secured creditors share one security ("Joint Security"). The basic difference is that each secured creditor may enforce its security in the Same Rank Security, while unanimous consent of all secured creditors is required to enforce security in the Joint Security. However, secured creditors in a Same Rank Security often enter into an intercreditor agreement prohibiting individual secured creditors from enforcing the collateral security without majority consent. Violation of the intercreditor 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, as of the submission date of this article (i) no withholding tax is levied on interest paid to all UK lenders under the tax treaty between the UK and Japan, and (ii) no more than 10% withholding tax is levied on interest paid to US lenders under the tax treaty between the US and Japan. Under the tax treaty between the US and Japan, if a lender is a bank, insurance company or registered securities dealer, the obligation to withhold tax in Japan is relieved entirely. As of the submission date of this article, the tax treaty between the US and Japan is scheduled to be amended, subject to the US ratifying the amendment. After the amendment, all US lenders (including other lenders which are not listed above) are to be exempted from the withholding tax in Japan.

Withholding tax is not levied on interest paid to domestic lenders because that interest is already taxed under the Corporation Tax Act of Japan (Act No. 34 of 1965) ("Corporation Tax Act").

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

Under the Corporation Tax Act and other local government tax laws, foreign creditors making loans to Japanese domestic borrowers, but not otherwise having a "permanent establishment" in Japan, are not required to pay (i) the national corporation income tax, (ii) the prefectural and municipal inhabitants' tax, or (iii) the prefectural enterprise tax. Under the applicable tax laws, the effective tax rate on corporations (based on the standard tax rate) in Japan is 34.62%. As of the submission date of this article, according to the amendment plan of tax laws (2015 outline of tax reform), the effective corporate tax rate is planned to be reduced to less than 30%. Subject to the tax reduction, the effective corporate tax rate for the fiscal year commencing on or after April 1, 2015 until March 31, 2016 is scheduled to be 32.11% and the effective corporate tax rate for the fiscal year commencing on or after April 1, 2016 is scheduled to be 31.33%, which is planned to be further reduced in the future. Activities in Japan such as (i) having a branch office, (ii) performing operating construction work for more than one year, or (iii) having independent agent(s), may constitute having a "permanent establishment" in Japan. If a tax treaty exists between Japan and the country where the foreign lender resides (such as the United States and the United Kingdom), special preferential tax treatment may be applicable to interest income.

A stamp tax is imposed based on the amount of indebtedness evidenced by a loan agreement and can range from JPY 200 to JPY 600,000. A flat fee stamp tax of JPY 200 is required for a guarantee. Collateral agreements such as mortgages and pledge agreements are not subject to additional stamp tax.

Registration tax is discussed in question 3.9.

Stamp tax and registration tax apply without regard to the foreign or domestic status of a lender.

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

No. There is no corporation income tax or individual income tax under the Corporation Tax Act or the Income Tax Act specifically applicable to foreign lenders solely due to the fact they are lending to Japanese borrowers (or accepting a guarantee or security in connection with a loan to a Japanese borrower).

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No. Documents can be notarised to facilitate compulsory execution in the future. If documents are notarised, a creditor does not need to obtain a court judgment when filing an attachment.

Possible additional fees include (i) process fees based on the Foreign Exchange and Foreign Trade Control Act (Act No. 228 of December 1, 1949) ("Foreign Exchange Act") (mainly attorneys' fees. See question 6.5 below), (ii) attorneys' fees and other fees required to draft contracts and process various registrations, and (iii) tax accountant fees.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Before starting to lend in Japan, foreign lenders must acquire a licence as a "branch office of a foreign bank" under the Banking Act (Act No. 59 of 1981) or register as a "money lender" under the Money Lending Business Act (Act No. 32 of May 13, 1983).

Based on the Foreign Exchange Act, a foreign lender (including both individuals and corporations) which lends money to a Japanese corporation is required to report to a government authority (such as the Ministry of Finance) if certain conditions are met. In most cases, only *post facto* reporting is applicable, and it is usually not burdensome. Also, there are wide exemptions from the reporting requirement (including, but not limited to, such cases: (i) if the lender of loans is a bank or other financial institutions specified in a Cabinet Order; (ii) if the term of loans does not exceed one year; or (iii) if the amount of loans does not exceed JPY 100 million).

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 an effect of temporary stay).

In a Bankruptcy and a Special Liquidation, secured creditors are not stayed from exercising their security interests (but, in Special Liquidation, may become subject to a suspension order by the court).

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

Yes. The Code of Civil Procedure does not specifically discuss the enforcement of a foreign arbitral award. However, Article 45 of the Arbitration Law (Act No. 138 of August 1, 2003) discusses recognition of arbitral awards generally, providing that "an arbitral award (irrespective of whether or not the place of arbitration is in the territory of Japan; this shall apply throughout this chapter) shall have the same effect as a final and conclusive judgment". The Arbitration Law is based upon the UNCITRAL Model Law on International Commercial Arbitration. Japan is also party to various international protocols and bilateral treaties, such as the New York Convention that addresses recognition and enforcement of foreign arbitral awards. Japan acceded to the New York Convention on June 20, 1961 and the Convention entered into force on September 18, 1961.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

As stated in question 7.6 above, in a Corporate Reorganisation proceeding, secured creditors are stayed from enforcing their security interests. The claims of secured creditors will be altered

by a reorganisation plan approved by creditors' vote and confirmed by the court.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In a Corporate Reorganisation proceeding, the Trustee exercises the right of avoidance. In the case of a Civil Rehabilitation proceeding, the Supervisor exercises the right of avoidance.

If a loan is "new money" and the collateral is fair equivalent value, the secured transaction (collateralisation) is, as a basic rule, not subject to avoidance. However, if the change of the type of the property (e.g. from real property to cash) gives rise to an actual risk of the debtor's disposition prejudicial to the unsecured ordinary creditors (in a Corporate Reorganisation, secured and unsecured creditors), and the debtor had such intention and the lender was aware of the debtor's intention as of the time of the transaction, such transaction may be subject to avoidance.

If a secured creditor obtained security for an existing debt knowing that the debtor became "unable to pay debts", the lien could be avoided. If collateralisation for an existing debt was carried out within 30 days prior to the debtor becoming "unable to pay debts" in the event where the debtor did not owe any duty to provide such security, it could also be avoided.

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

Among the four insolvency proceedings stated in question 7.6 above, Civil Rehabilitation and Bankruptcy are available for both legal entities (including companies) and individuals, while Corporate Reorganisation and Special Liquidation are limited to stock companies (*kabushiki-kaisha*).

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

A secured creditor may exercise its rights independently from the Civil Rehabilitation, Special Liquidation or Bankruptcy (however, in the Civil Rehabilitation and Special Liquidation, such exercise may be subject to a suspension order by the court).

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Japan?

Under the Code of Civil Procedure, the amendment of which has been effective since April 1, 2012, the parties' agreement on the foreign (non-Japanese) jurisdiction is, as a basic rule, legally valid and enforceable if:

(i) it is made with respect to an action based on certain legal relationships and made in writing; and

(ii) the exclusive jurisdiction of the Japanese courts over an action in question is not provided in laws or regulations.

If the parties' agreement on the foreign jurisdiction is exclusive, the following additional condition is required:

(iii) The designated foreign court is able to exercise jurisdiction over the case by the foreign law and in fact.

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?

Luxembourg's importance as an international financial and banking centre is well known. In relation to its activities in financing, debt financing structuring is the most relevant. Financing through public offers and listings of bonds has increased.

Since the financial crisis, debt restructuring has also significantly increased.

It is common market standard that lenders (either banks or private lenders) secure their lending through collateral arrangements under the law of 5 August 2005 on financial collateral arrangements, as amended (the "**Collateral Law**") or by taking similar security interests.

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

As elsewhere in Europe, there is a general trend in Luxembourg towards preferring personal lending to bank loans.

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 members of its corporate group (see questions 2.2, 2.3 and 2.5).

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 is no enforceability issue, but another concern could be the director's civil liability for mismanagement or his criminal liability for abuse of corporate assets.

2.3 Is lack of corporate power an issue?

The lack of corporate power might be an issue. This will depend on whether the company is a limited or an unlimited liability company.

In the framework of an unlimited liability company, and given the unlimited liability of the shareholders, the company is not bound by an agreement entered into by the manager/director that is not included in the corporate object. Based on the theory of the mandate, the manager/director has no power to enter into such an agreement in the name of the company. Therefore, he is bound to the agreement, not the company. However, the shareholders may ratify the agreement *ex-post*. In that case, the company is bound.

In the framework of a limited liability company, the company is bound by the agreement even if it falls outside the corporate object. Nevertheless, the company is not bound by such an agreement if it can prove that the third party knew or should have known that the agreement fell outside the corporate object, the publication of the articles of incorporation not being sufficient proof of knowledge of such fact.

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

Neither governmental nor other consents, filings or formalities are required as such, although for corporate governance purposes resolutions granting the guarantee should be taken by the management, but shareholder resolutions are only necessary if the articles of association so specify.

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

In order to avoid the risk of bankruptcy, it is generally market practice that guarantees provided by a Luxembourg guarantor are limited to a certain amount (90-95%) of their net assets (*fonds propres nets*).

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

Exchange control and similar obstacles to the enforcement of a guarantee do not exist under Luxembourg law.

3 Collateral Security

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

Security can be granted over immovable or movable properties. The types of security over immovables are mortgage and antichresis; securities over movables are pledge (the most common), transfer of title for security purposes (including fiduciary transfer), repurchase agreements and netting agreements.

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 the Collateral Law, the parties to a pledge agreement may agree that all collateral presently or in the future owned by the collateral provider are or will be subject to the pledge without the need to specifically designate it. However, the perfection of the pledge must follow the rules set out for each type of collateral and therefore it is more common to give security by a separate agreement in relation to each type of collateral.

See also question 3.7 in respect of pledge over a business.

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 is granted by way of a mortgage, which must be executed through a notarial deed and registered in the Luxembourg mortgage register (*Bureau de Conservation des Hypothèques*) and, less commonly, by way of antichresis.

As for machinery/equipment, such assets can be collateralised by way of a pledge governed by the Luxembourg Civil Code and executed by a public or private deed; however, this rarely happens in practice as these assets cannot be easily delivered to the creditor.

See question 3.7 in respect of pledge over a business.

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

Yes, under the Collateral Law a pledge over receivables (pledge or transfer of title for security purposes) can be established. The mere conclusion of the pledge contract is sufficient to perfect a pledge over claims. However, the debtor can discharge his obligations as long as he has no knowledge of such conclusion. Hence, in practice, it is better to notify the pledge to the debtor.

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

Yes. See question 3.4 as for the perfection requirements, given that cash deposits are treated as claims of the account holder *vis-à-vis* the bank. Furthermore, as banks usually obtain a first ranking security from the account holder, it is common practice to have such security waived by the bank in respect of the pledged bank account.

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?

Yes, under the Collateral Law, shares can be pledged or transferred for security purpose.

Shares can be issued in dematerialised, registered or in bearer form.

The perfection of the pledge over dematerialised shares requires a registration in the relevant account – as they are "book entry" securities. For registered shares, a registration in the shares register is required. This now also applies to bearer shares, as the Law of 28 July 2014 introduced an obligation to deposit the bearer shares with a Luxembourg established professional depository and to maintain a bearer shares register at the depository's office. Any transfer/pledge over the shares must be registered in such register.

It is not forbidden, in principle, to submit a pledge agreement to a foreign law (including US and UK ones). In practice, the law of the place where the financial collateral is located applies. The possibility of submitting a pledge/other financial collateral arrangement to a foreign law seems to be excluded *inter alia* for bearer shares, as the depository must be located in Luxembourg.

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

In general terms, the collateralisation of inventory faces the same "delivery" problems stated in question 3.3 as to machinery/equipment.

It is possible to grant a pledge over a business, subject to certain conditions (see Grand-Ducal Decree of 27 May 1937, as amended): among others, such pledge can be granted only to certain authorised credit institutions and breweries, by way of a written agreement which must be registered with the mortgage register, and may cover only 50% of the value of the stock of the collateral provider.

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, provided that it is allowed by its corporate object and its 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?

It depends on the type of security.

Instruments evidencing a financial collateral arrangement under the Collateral Law are not subject to registration formalities, but if they are registered, a fixed rate of EUR 12 applies.

A mortgage requires the payment of a registration duty (*droit d'enregistrement*) of 0.24% and an inscription duty (*droit d'inscription*) of 0.05% of the secured debt. In addition, variable notarial fees 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?

The filing, notification or registration (where necessary) does not involve a significant amount of time. See question 3.9 for the relevant expenses.

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

Not in general terms.

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)?

Not in general terms. Notarisation can be required under certain conditions (e.g. mortgage).

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 public limited company (*société anonyme*) may not, directly or indirectly, advance funds or make loans or grant security with a view to the acquisition of its own shares by a third party, except under the conditions set out by Art. 49-6 of the law of 10 August 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?

In general, the concept of agency (*mandat*) is known and recognised under the Luxembourg Civil Code. An agent may act in the name and on behalf of its principal pursuant to a contractual agency agreement. In addition, a trustee should be recognised pursuant to the Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition, ratified by the Luxembourg law of 27 July 2003 on trusts and fiduciary contracts.

For financial collaterals, the Collateral Law expressly provides that financial collateral can be granted in favour of a person acting on the account of beneficiaries (lenders) of the collateral, a fiduciary or a trustee, who benefits from the same rights as the beneficiaries.

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. In addition, a mechanism such as “parallel debt” or plurality of creditors (*solidarité active*) could be used for other security interests.

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?

To make a transfer of receivables enforceable towards third parties, Luxembourg law requires a notification to the debtor or an acceptance by the debtor of the transfer (Articles 1690 of the Civil Code). Such notification or acceptance may be made in a private deed or a public deed.

The transfer of receivables includes the accessories of the receivables such as personal guarantee, privilege and mortgage (Article 1692 of the Luxembourg Civil Code). Any independent guarantee (guarantee on first demand) is not considered an accessory and will not be automatically transferred.

If the transfer of the loan results in the assignment of the contract, Luxembourg law does not require the consent of the borrower unless it is provided otherwise or the contact has an *intuitu personae* character.

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 principle, there is no withholding tax on interest payment when paid to domestic or foreign lenders which are corporate entities.

There is no withholding tax on the proceeds of a claim further to the enforcement of a 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?

No tax or other incentive is provided to foreign lenders.

With respect to loans, mortgages or other securities, the registration of any document with the *Administration de l'Enregistrement et des Domaines* in Luxembourg may be required in the case of legal proceedings before Luxembourg courts (if competent) or, in the case that such document must be produced before an official Luxembourg authority, in which case either a nominal registration duty or an *ad valorem* duty will be payable depending on the nature of the document to be registered.

A registration fee may also be due if (i) the security document under private deed is voluntarily registered with the registration tax authority, or (ii) the security document is in the form of a notarial deed (e.g. mortgage, antichresis, pledge over certain specific assets). See further in question 3.9.

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.

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 any security interests which require a notarial deed, the notary's fees will be calculated on a sliding scale based on the value of the secured property or the secured amount, depending on the type of 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.

No.

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?

In principle, an international contract governed by a foreign law will be recognised and enforced by the courts in Luxembourg, provided its provisions or its enforcement are compatible with Luxembourg public policy.

Parties to a contract which is purely internal to Luxembourg are also unable to derogate from the legal rules that, under Luxembourg law, cannot be derogated from even by agreement.

Financial collateral on financial instruments transferable by book entry established under the Collateral Law are governed by the law of the country in which the relevant account is maintained, as for the matters listed in Article 23.2 of the Collateral Law.

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?

For decisions from countries out of the European Union, Luxembourg courts recognise and enforce foreign judgments which are enforceable in the country which gave them, provided they fulfil the conditions for their exequatur, without re-examining the merits of the case. The current principle is that the Luxembourg Court cannot re-examine the merits of the foreign decision if it is regular on a formal basis (decision regularly obtained against the other party).

For decisions from EU Member States, however, a simplified process applies. Generally, all civil and commercial judgments given in an EU Member State (therefore including UK judgments), resulting from proceedings initiated after 10 January 2015 and which are enforceable in that Member State are directly enforceable in Luxembourg without any exequatur proceedings (Regulation (EU) N°1215/2012 of 12 December 2012, "Recast Brussels I Regulation"). Decisions obtained before 10 January 2015 are still submitted to the Council Regulation (EC) No 44/2001 of 22 December 2000 and thus to the exequatur proceeding but without any re-examination of 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 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) Obtaining a first instance decision is likely to take approximately one year without recognition by the debtor. Its enforcement can be immediate if the judge expressly orders it to be. If not, the judgment would be enforceable once it has become unchallengeable (either by exhaustion of judicial remedies or, if no appeal is lodged, generally forty days after the judgment is notified). If the debtor grants a default, the decision could be obtained within three months and enforceable after the expiry of the opposition and the time allowed for appeal (40+15 days not including any further time allowance resulting from the foreign domicile of the debtor).

b) Except where no exequatur is needed (see question 7.2), judgments given by a jurisdiction located in a country bound to Luxembourg by an international convention on the mutual recognition and enforcement of judgments (including EU Members) must go through the "simplified" exequatur proceedings. The exequatur order is sought ex parte, granted within approximately one week, and immediately allows the claimant to take provisional measures (enforcement measures can only be taken once the order can no longer be challenged).

The exequatur of other foreign judgments (including US judgments) can only be sought via common proceedings. At first instance, a decision will be reached within approximately one year and can be enforced under the conditions described in question 7.3 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?

(a) Luxembourg law distinguishes civil, commercial and financial collateral securities.

Whereas the realisation of a civil collateral arrangement requires a judicial decision, the creditor of a commercial arrangement may either request appropriation of the collateral to a court or auction it after a prior formal notice.

For both, the collateral can only be liquidated at a price set by an expert or by auction.

On the other hand, financial collateral arrangements subject to the Collateral Law can be immediately realised without judicial intervention or prior formal notice and the creditor may appropriate, auction or more generally dispose of the collateral upon default.

(b) Under certain conditions, where shares of an entity under supervision of an authority are pledged or where the beneficiary of the pledge over shares is an entity supervised by an authority, some activities e.g. notifications to the competent supervisory authority may be required.

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?

a) Foreign claimants (except for claimants residing within an EU Member State, a Member State of the Council of Europe or a State that is bound with Luxembourg by an international convention excluding such security), including US claimants, may be requested by the judge to give security in order to cover the legal costs and the damages which it might be ordered to pay.

Also, foreign claimants will have to elect residence in Luxembourg (in practice, the residence of the Luxembourg counsel is chosen and is anyway compulsory for written procedures).

b) No specific restrictions apply to foreign lenders in the event of foreclosure on collateral security.

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?

From the opening of the bankruptcy proceedings, ordinary creditors and creditors which hold a general preferential right cannot launch or continue any enforcement proceedings against the debtor whereas creditors holding a special preferential rights are barred only until the end of the verification of claims.

Also, this moratorium does not apply to financial collateral arrangements governed by the Collateral Law.

As to other insolvency proceedings, controlled management ("*gestion controlée*") results in a moratorium against enforcement proceedings applicable to all creditors whereas, in the case of a stay on payment ("*sursis de paiement*") or preventive composition ("*concordat préventif de faillite*"), it only applies to ordinary creditors.

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

The Luxembourg courts will recognise and enforce an arbitral award without re-examination of the merits. Pursuant to Article 5 of the New York Convention 1958 and Article 1251 of the New Civil Procedure Code, the exequatur of foreign arbitral awards can only be refused on limited formal grounds as listed.

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?

a) Clawback rights

Agreements concluded during the hardening period ("*période suspecte*" – defined as the period during which the bankrupt was in a state of cessation of payments and which, as a principle, cannot exceed six months before the bankruptcy judgment) and the ten days preceding the hardening period, are void or can be annulled by the court on the request of the bankruptcy trustee.

However, these clawback provisions do not apply to financial collateral arrangements governed by the Collateral Law.

b) Preferential creditors

Certain creditors' claims take priority in terms of payment, including creditors of the bankrupt estate ("*créanciers de la masse*"), super-preferential employee claims for debts which relate to the last six months of work *or* preferential rights of the Public Treasury and welfare agencies.

Financial collateral arrangements governed under the Collateral Law are not affected by bankruptcy proceedings.

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

Entities whose activities are subject to supervision by the *Commission de Surveillance du Sector Financier* as is the case for professionals of the financial sectors, including notably credit institutions or common funds, or whose activities are subject to the supervision of the *Commissariat aux Assurances*, i.e. insurance companies, are subject to liquidation proceedings as defined under the relevant applicable laws (e.g. law of 5 April 1993 on the financial sector, as amended; law of 6 December 1991 on the insurance sector, as amended).

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Financial instruments and claims subject to a pledge governed by the Collateral Law can be seized out of any court proceedings.

Also, the enforcement of a claim can in principle be operated by mandatory set-off ("*compensation légale*") if the conditions to it are fulfilled prior to a bankruptcy judgment of either party.

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?

A party's submission to a foreign jurisdiction in civil and commercial matters is generally legally binding and enforceable under the laws of Luxembourg, provided that it is, *inter alia*, not manifestly incompatible with Luxembourg public order provisions (*ordre public*).

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

A sovereign entity's waiver of jurisdiction immunity is generally binding and enforceable under the laws of Luxembourg. According to the current jurisprudence, such a waiver must be certain and unequivocal.

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?

Following the law of 5 April 1993 on the financial sector, persons established in Luxembourg whose activity is to grant loans to the public, must either – depending on the precise activity – be a credit institution or a specialised professional of the financial sector.

Lenders from other EU Member States may generally, subject to the rules under the law of 5 April 1993 on the financial sector, exercise their lending activities in Luxembourg under their home country licence, through the establishment of a branch, as well as the provision of services.

Generally, lenders from a third country, carrying on lending activities, not being established in Luxembourg but occasionally and temporarily coming to Luxembourg for exercising these activities, must be authorised by the competent authorities 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.

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MOLITOR
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Founded in 1996, MOLITOR Avocats à la Cour is a well-established and independent business law firm in the City of Luxembourg. MOLITOR has a long experience in banking & finance advice. We regularly advise professionals in the financial sector on transactional and regulatory matters. We work closely with banks, insurance companies, payment service institutions and other professionals, including leading international law firms. Our services include among others structuring of finance transactions, drafting and negotiating financing documents, representation of lenders and borrowers, liaising with regulatory authorities, advising banks, payment services institutions and other professionals of the financial sector (PSF) in Luxembourg.

Our areas of expertise include Banking & Finance, Business & Commercial, Corporate & M&A, Dispute Resolution & Litigation, Employment & Pensions, IP, IT & Media, Real Estate, Zoning & Environment and Public Procurement. MOLITOR's reputation for excellence is supported by increased high rankings in the various Legal Directories.

Macedonia

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1 Overview

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

Lending markets in Macedonia in the last few years are recording more frequent practising of cross-border lending and cross-border securitisation. The finance market in Macedonia is small and the lending possibilities and financing terms of domestic banks are not so competitive and attractive for domestic companies, and on the other side the Macedonian laws are not providing any restrictions or additional burdens for foreign financing, so it can be said that the foreign lending is more and more trendy in Macedonia.

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

DDK Attorneys at law has very extensive and wealthy practice in advising lending transactions in the past 10 years. Lately, at the beginning of 2015, we have been working on two finance projects of EUR 200 million – syndicated facility agreements (SFA) – for which companies registered in Macedonia are providing guarantees and securities for their parent company's obligation to the foreign banks/lenders under the SFAs. Also, several cross-border finance projects have been part of our practice in the first quarter of 2015, in which we advised foreign lenders with respect to the domestic company's guarantee, in the form of an executive deed, on behalf of its mother company obligations to a foreign lender, amounting to approximately EUR 10 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)?

Macedonian laws recognise guaranteeing third party obligations, so a company may guarantee borrowings of one or more of the other members of its corporate group.

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

The benefit of the company providing the guarantee theoretically may impact the enforceability of the guarantee. This is not explicitly regulated by Macedonian law, but may be covered indirectly by other laws such as the Law on Obligations and insolvency law, which provide the possibility to challenge certain transactions (including guarantee) into which a company has entered, even if it was in a state of pre-bankruptcy or had the purpose of damaging its creditors.

The director/manager liabilities in these cases may be decreased and eliminated if the guarantee is previously approved by the shareholders of the company.

2.3 Is lack of corporate power an issue?

Lack of corporate power or shareholders' approvals may be legal grounds for challenging a guarantee.

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

Guarantees and securities provided by Macedonian companies shall be notified to the National Bank of Macedonia. Shareholders' approvals are mandatory for guarantees and securities, and in certain cases third party approvals (such as approvals of existing creditors of the company) or regulatory authority approvals may be required in case the company is active in certain industry sectors.

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

Generally the guarantor is liable to the creditors up to the amount of the main debt plus interest, for which the guarantee is provided. But the limitation or extension of the guarantor's obligations may be agreed otherwise in the guarantee contract.

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

According the Foreign Exchange Law, the cross-border capital transactions (payments between residents and non-residents) are free as long as they are supported with required documentation and are duly registered within the National Bank of Macedonia where it is mandatorily required.

3 Collateral Security

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

Macedonian laws recognise the following collaterals to secure lending obligations: (i) pledges over movable assets, securities and receivables; (ii) mortgages over real estate; and (iii) financial collateral.

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

General security agreements are not regulated by the laws of Macedonia. Separate agreements are required for different types of assets/collaterals, and the securities of different types of assets shall be registered with different official registers.

Generally, perfection and enforcement conditions for securities are: written form of security document; notarisation of the security document by a public notary in Macedonia; and registration of the security with the proper official register (such as land register for mortgages, pledge register for movable assets, etc.).

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, plant, machinery and equipment.

A security over land and plant is recognised as a mortgage. A mortgage may be established only under a written pledge agreement signed by and between the pledgee and the pledger. The agreement must be notarised by a public notary in Macedonia and then be registered with the Agency for cadastre of real estate.

A security over movable assets may be: (i) possessory when the pledger gives the assets in direct possession to the pledgee; in such case a written pledge agreement to be signed by the parties will be required, though there are no registration requirements; and (ii) non-possessory – registered pledge when the pledger keeps the assets in its direct possession, but the pledge agreement must be in written form, notarised and registered with the pledge register at the Central Register of Macedonia.

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

Collateral over receivables is also recognised by the laws of Macedonia. The procedure for perfection of security over receivables is the same as per the mortgage and non-possessory – registered pledge described above. The debtors must be notified of the security.

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

Collateral over cash in banks is also recognised by the laws of Macedonia, although not practised as much as real estate and movable assets pledges/mortgages. The procedure for perfection of security over cash deposits is the same as per the mortgage and non-possessory – registered pledge described above, and in addition the bank must be notified.

3.6 Can collateral security be taken over shares in companies incorporated in Macedonia? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Collateral security over shares in companies incorporated in Macedonia is possible under the laws of Macedonia. Shares in joint stock companies are in certified form and are registered with the Central Securities Depositary of Macedonia, so pledges over shares in joint stock companies must also be registered with the Central Securities Depositary of Macedonia. The procedure for perfection of pledges over shares in joint stock companies is the same as per the mortgage and non-possessory – registered pledge described above.

Pledges over shares in limited liability companies are also possible; it is more or less the same as pledges over securities (shares in joint stock companies) but differs in that a pledge over shares in limited liability companies must register at the Central Register, and not in the Central Securities Depositary as with pledges over shares in joint stock companies.

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

Security can be taken over inventory as well, and the procedure for perfection of such security is the same as per the mortgage and non-possessory – registered pledge described above.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, a company incorporated in Macedonia may provide security interest to secure its obligations or third party 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?

All the security documents (agreements) for the establishment of security over movable assets (except for possessory pledge), real estate, receivables, shares and inventory shall be notarised by a public notary in Macedonia. The notarisation fee depends on the value of the secured obligations; however it cannot exceed EUR 1,000.

All the securities over movable assets (except for possessory pledge), real estate, receivables, shares and inventory must be registered with different registers depending on the type of security collateral.

The registration fees are of minor value (less than EUR 100), except for mortgages over real estate which shall be registered with the Agency for cadastre of real estate. The registration fees for mortgages depend on the value of the secured obligation, and are calculated by a rate of 0.1% of the value of the secured obligations.

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 filing, notification or registration requirements in relation to security over different types of assets does not differ much between types of asset, though registration fees do depend on the type of asset. Please see the answer to question 3.9 above with respect to registration fees.

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

Regulatory consents may be required for certain companies involved in certain industry sectors or for state-owned companies. In all cases no matter the type of the security collateral or the type of the company, corporate/shareholders' consent is mandatorily required.

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

Macedonian law does not provide any special rules for securing borrowings under a revolving credit facility.

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

As described above, there are some perfection requirements for security documents such as written form of pledge agreements, notarisation and registration. While for the purpose of notarisation and registration of the securities, certain documentation is also required such as: company excerpts; a certificate to prove there are no active insolvency proceeding against the company; corporate approvals; and official deed for the ownership title over the asset being the subject of the security, etc.

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 Macedonian Trade Companies Law provides that transactions by which the company provides a third party with an advance payment, loan, credit, and/or security for the purpose of acquiring shares in that company, shall be considered null and void. This shall not apply to the normal legal transactions of banks and other financial institutions, unless otherwise stipulated by a separate law.

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

Macedonian laws do not provide specific rules on this kind of scenario.

(c) Shares in a sister subsidiary

Macedonian laws do not provide specific rules on this kind of scenario.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Macedonia 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 finance parties' agents and security trustees are not explicitly regulated by the laws of Macedonia, but it is possible for the finance parties to appoint an agent or security agent to enforce the finance documentation and collateral security and to apply the proceeds from the collateral to the claims of all the finance parties.

5.2 If an agent or trustee is not recognised in Macedonia, 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?

Even the term "security agent" is not recognised explicitly by Macedonian law, yet it is possible for the finance parties/lenders under a syndicated facility loan to appoint only one of them to act as security holder and enforce the security on behalf of all lenders.

5.3 Assume a loan is made to a company organised under the laws of Macedonia and guaranteed by a guarantor organised under the laws of Macedonia. 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 will be enforceable only if the borrower is notified on such transfer and the guarantee/security will apply for the benefit of the new Lender B, but in certain cases it will be required that the access of the new Lender and guarantee/security holder is confirmed with a written statement/contract and registered with the proper security registers.

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 Profit Tax Law there is a prescribed obligation to withhold tax from interest payable on loans made to domestic lenders.

There are no any obligations on deduction of or withholding the proceeds of a claim under 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 preferential incentives for foreign lenders; they are the same as for domestic lenders.

There are only effecting and registration fees; please see question 3.9 above.

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

Only income on the basis of interest payable on loans made to domestic lender, is taxable with 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.?

There are notarial fees and registration 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.

No, there are not, since cross-border lending is allowed according to Foreign Exchange Law.

7 Judicial Enforcement

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

The courts in Macedonia can recognise a governing law in a contract that is the law of another jurisdiction and they can enforce the same contract. In relation to security and guarantee agreements Macedonian law is mandatory in order for them to be enforceable.

7.2 Will the courts in Macedonia 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 Macedonian courts will recognise and enforce a foreign judgment without re-examination of the merits of the case. There is just a formal procedure that must be followed for the recognition and enforcement of foreign judgments.

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 Macedonia 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 Macedonia against the assets of the company?

The procedure described under question 7.1 will take a few years and the procedure described under question 7.2 may take from 6 months to 1 year. In relation to security and guarantee agreements, which are notarised with the enforceable clause, all above procedures will be skipped and direct enforcement against the guarantor can be conducted. In this case the enforcement will take from 1 to 6 months.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

The procedure of enforcement is usually first directed at the assets in the bank accounts, and if there are no assets in the bank accounts then the enforcement is directed at the movable or non-movable assets of the company. In this case public auction must take place in order to cash the assets, and this procedure can take a few months. There are no other significant restrictions 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 Macedonia or (b) foreclosure on collateral security?

Foreign lenders are treated equally to domestic lenders, so there are no restrictions.

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

If the claims become lawful and enforceable, bankruptcy, reorganisation or similar laws do not affect them. The same applies to collateral security that is notarised with an enforceable clause.

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

Yes, it is same for foreign judgments; please see question 7.2 above.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Collateral security, which is notarised with an enforceable clause and duly registered, is not affected by a bankruptcy 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?

Although the law prescribes those rights, they do not affect collateral security. Please see question 8.1 above.

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

In general, only state companies and bodies are excluded from bankruptcy proceedings. Also, financial institutions like banks, funds, insurances, etc., are separately regulated due to the regulated activity they conduct.

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 contract or collateral security is constructed in a written form, confirmed by a notary as a public deed and contains a clause of enforceability, one can directly go to enforcement and seize the assets of a 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 Macedonia?

In general, yes. Just be aware when it comes to enforcing such foreign judgment, again the recognition must take place in Macedonia and according to Macedonian law. Please see question 7.2 above.

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

Yes it is.

10 Other Matters

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

There are no such requirements.

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

There is nothing to add in addition to the above.

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Accepting the premise that no one can be equally versed in all fields of law, Debarliev, Dameski & Kelesoska Attorneys at law has been created as a company committed to be the leading business law firm in Macedonia.

Debarliev, Dameski & Kelesoska Attorneys at law is also the first law company established in the territory of R. Macedonia, distinguishing itself on the market with a clear business and corporate law orientation, complemented by an excellent network of legal experts covering the complete territory of R. Macedonia.

The quality of Debarliev, Dameski & Kelesoska Attorneys at law rests mainly upon the quality of its attorneys, their accessibility and efficiency. DDK's attorneys at law share outstanding academic backgrounds, as well as strong commitment to legal perfection.

The partners of DDK have more than fifteen years of law practice experience and have exceeded clients' expectations by providing sophisticated and efficiently managed legal services.

DDK offers excellent legal services to clients involved in all the biggest energy projects in Macedonia, and has been engaged as counsel in numerous successful PPP projects, privatisations, M&A, capital markets transactions, banking and finance projects, etc.

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 to its secured transactions laws. For example, Mexico approved a banking law overhaul which removed the single biggest obstacle for small and medium businesses to obtain loans by making it easier for banks to seize assets used as collateral in cases of nonpayment.

For companies, the options of non-possessory pledges which effectively result in a floating lien and guaranty trusts with similar effects still remain, as well as traditional securities such as mortgages and regular pledges, as well as asset-based loans (secured working capital loans or fixed asset loans).

The Sole Registry of Chattels, which is now operational, provides legal certainty to creditors or third parties regarding the priority of credits. The Commercial Code amendments and the Amended Registry Regulations permit a proposed lender to make a filing prior to the scheduled closing, which will have the effect of preventing any other lender from making a filing that would have priority over the later. This provides an additional level of comfort.

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

As a result of this year's reforms, the ability to realise collateral in Mexico has been enhanced in recent years and is causing foreign lenders to reconsider lending against Mexican collateral. Syndicated credits have increased, using Mexican operations as collateral in global deals. Financing investment projects through the issuance of securities certificates or debt through the capital markets are also common, allowing securitisation of non-performing assets, such as accounts receivable, among others.

However, Mexico's commercial bank credit to the non-financial private sector is about 17% of gross domestic product. This is below not only developed economies' standards but also emerging markets' credit ratios. By comparison, the credit penetration rate is close to 40% in Colombia, close to 50% in Brazil and more than 70% in Chile. The recent reforms intend to change such ratios and reactivate the economy.

2 Guarantees

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

A company can guarantee borrowings of one or more other members of its corporate group. It is important to verify that the social purpose allows for the grant of such guarantees and that the individuals that execute the support documents have sufficient authority to do so.

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

Transactions in which a company guarantees borrowings of one or more members of its corporate group are enforceable. However, if the directors are perceived to have a conflict of interest with the corporation with regards to a particular transaction, they must state this to the other directors and must abstain from any deliberation or resolution on such matter. Otherwise, those directors shall be liable for damages (out of pocket and loss of profit) to the corporation.

2.3 Is lack of corporate power an issue?

Under Mexican law, lack of corporate power can be a significant issue. The corporate purpose must specify the activities that the company can carry out, and on an individual basis directors and officers do not have the authority to act unless they have been granted specific powers to do so.

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

Shareholder/board approval requirements are governed by the bylaws of each company. This has to be analysed on a case-by-case basis. Governmental filings and other formalities will depend on the type of lending structure designed by the parties and the collateral used in each case. It is always necessary to comply with the relevant requirements for creating security interests, which in Mexico often

require that the security agreement be formalised under a formal deed (*escritura*), with the respective registrations at the existing public registries or the single chattels registry. The issuance of securities in the stock market requires a series of filings and formalities.

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

There are no specific limitations as to net worth. However, the value of the collateral itself would be a limitation. If a company has losses or is subsequently involved in insolvency procedures, the value of the collateral will govern specific secured transactions, although the creditor may encounter enforceability issues.

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

Mexico does not have exchange control obstacles to enforce a guarantee. However, the process for enforcement does imply that the guaranty must have been perfected and registered in accordance with the law, and the enforcer must undergo a time consuming court process. In addition, in the event of a judicial collection process, the payment can be made by the debtor in pesos, independently from any agreement in other currencies.

3 Collateral Security

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

Mexican laws allow for perfecting security interests on real estate and/or (movable) property or goods. Mexico has a variety of personal property security interests, including among others, the pledge, the mortgage, the industrial mortgage over all assets (available for financial institutions only), and the specialised security interests tied to credits for machinery and equipment or for raw materials that refer to personal property collateral devices (*crédito refaccionario or crédito de habilitación o avío*).

With the non-possessory pledge, the debtor can use as collateral all of its unspecified inventory and receivables, and can automatically subject newly acquired property to the pledge without any further filing. A guaranty trust can provide a similar effect.

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

Industrial mortgages allow for a general asset security but this type of security is restricted to financial institutions (i.e. banks). For other lenders, the subject to analyse is whether the property is real estate or another type of property. The type of agreement/security interest will depend on the type of asset that is used as collateral, as mentioned above. The process varies significantly in every case. Trusts will need to involve a Mexican financial institution and will require the execution of a formal deed before a notary public but can include several types of assets or even different security interests. Real estate transactions will also involve a formal deed and registration at the specific Public Registry of Property. Other asset transactions will typically involve the execution of the agreement before the notary public and registration at the respective single registry.

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

Collateral can be taken over real property, plant, machinery and equipment. As explained above, the process will depend on who the lender is (a financial institution or another third party) and on whether the debtor is using all assets as collateral or just specific property, equipment, etc. In any event, the process involves the execution of a formal agreement between the creditor and the debtor before a notary public and the registration of the respective deed at the corresponding registry.

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

With the new non-possessory pledge and the guaranty trust, receivables can be collateral security. In a non-possessory pledge, there is no need to notify debtors. However, in a guaranty trust, since the collection rights are actually transferred to the trust that will be the collecting entity, the debtors must be notified.

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

Cash deposited in bank accounts can be used as collateral in a non-possessory pledge along with the assets of a company and a bank can issue a letter of credit using that cash as the guaranty. The new reforms have also facilitated collection of debts to banks by allowing the bank to place a lien over existing cash in a different account. Before the existence of a non-possessory pledge, the parties could still pledge deposited cash, but it would have involved the actual transfer of the cash to be held in a different account by the creditor or by a mutually agreed third party.

3.6 Can collateral security be taken over shares in companies incorporated in Mexico? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares, as assets, can be pledged. The process involves the endorsement of the respective share certificates and the registration of the pledge at the company's shareholders' registry book. In this case, the pledge requires that the respective share certificates are delivered to the creditor. The pledge has to follow Mexican law requirements (specifically the Mexican Law of Negotiable Instruments and Credit Operations) in order for the pledge to be enforceable even if it is part of a larger transaction under foreign law.

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

Inventory can be collateral security under a non-possessory pledge. The process involves the execution of the respective pledge agreement before a notary public and its registration in order to attach the inventory as part of the 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. In both cases, the same process has to be followed. As mentioned above, the process will depend on who the lender is and what the assets (collateral) are.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notary fees are based on a fee schedule which has a direct relation to the value of the assets. It varies from approx. US$ 500 to US$ 5,500 for assets worth up to approx. US$ 1,500,000. For higher values, an additional 0.075% is added.

Registration fees vary significantly. Most of the 32 Mexican States have a fixed fee for registrations, but some local Property Registries still charge registration fees based on the value of the transactions; notwithstanding, this calculation method has been declared as unconstitutional by the Supreme Court in Mexico. Therefore it is important to verify this aspect before proceeding and, as the case may be, challenge payment based on value of the transaction.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Filing and registration requirements vary significantly on the type of transaction. Securities involving the stock exchange require significant time and pre-filing requirements. For other types of security transactions, there are no previous filings required; time is required for registration. This will vary depending on the State if it is real property and whether the single chattels registry is used. In any event, the priority for filing is important and the date of filing is the one that is taken into account for such priority.

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

Securities such as Securities Certificates and the introduction to the stock exchange do require regulatory consents, as well as some securities where collateral is constituted by rights or government concessions. All other lending transactions are governed by the will of the parties and require debtor consent.

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

Priority concerns are always an issue as priority will set the true value of the existing collateral.

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

Each transaction has its own documentary and execution requirements. Most of the transactions will require execution of the document by each party and verification that the individual that executes it has sufficient powers of attorney, and execution before a notary public and registration of the deed recorded at the appropriate registry.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

The only restrictions in the Commercial Companies Law relate to the acquisition of the shares by the company itself but there are no prohibitions or restrictions for the company to guarantee or give security support borrowings incurred to finance or refinance the direct or indirect acquisition of its shares by a third party (even if it is related). However, the company's purpose needs to be broad enough to support the issuance of guarantees.

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

There are no prohibitions or restrictions for the company to guarantee or give support to the finance or refinance of a company which owns shares in the company. However, the company's purpose needs to be broad enough to support the issuance of guarantees.

(c) Shares in a sister subsidiary

There are no prohibitions or restrictions for the company to guarantee or give support to the finance or refinance of a sister company. However, the company's purpose needs to be broad enough to support the issuance of guarantees.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Mexico recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Syndicated lending is allowed. The will of the parties and the provisions of the agreement will govern the transaction.

5.2 If an agent or trustee is not recognised in Mexico, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Syndicated lending with an agent or appointed trustee is enforceable.

5.3 Assume a loan is made to a company organised under the laws of Mexico and guaranteed by a guarantor organised under the laws of Mexico. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Yes, if the loan is transferred, all documents have to be amended accordingly, including the documents associated to the security interests and the respective notices to the debtor must be made.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest payable on loans is tax deductible only to the extent that the proceeds are invested in the borrower's business, thin capitalisation rules are met (please see question 6.5), and do not exceed market price (arm's length transaction). For foreign lenders, tax withholding obligations must be complied with in order to deduct interest; foreign banks are subject to a 4.9% rate of withholding tax. Under Mexico's domestic law, the withholding tax rates on interest for non-Mexican residents are 4.9%, 10%, 15%, 21% or 35%, depending on the type of loan and on the effective beneficiary of the interest. These rates are generally reduced in tax treaties; however, in case of loans between related parties, apart from other requirements, the Mexican tax authority is authorised to require a formal document from the non-resident lender evidencing that a double taxation exists with respect to the interest for which a treaty is being applied, specifying the provisions of the applicable foreign law producing such double taxation. If interest is paid to a foreign lender or to a related party, amongst others, the following tax returns must be filed in order to deduct interests: (a) an informative tax return of loans granted or guaranteed by foreign residents; (b) an informative tax return containing a description of tax withholdings and payments to foreign residents; (c) a transfer pricing study to support the arm's length principle with respect to related parties' transactions; and (d) an informative tax return containing transactions with related parties. Payments made to a foreign company that controls or is controlled by the taxpayer will not be deductible when said payments are, amongst others, for interest, and when the foreign company that receives said payments (i) is considered as transparent and its participants do not pay tax on this income, or (ii) considers such payments as non-existent or non-taxable income. In addition, payments made by a Mexican resident which, in turn, are deducted by a related party, are non-deductible if the related party deducting the payment does not accrue as income earned such payment in the same tax year or the next. There are no specific requirements for deducting or withholding tax from the proceeds of a claim under a guarantee or the proceeds of enforcing security; such proceeds will be taxed only with respect to the interest portion, liquidated damages, if any, and for the portion exceeding the principal amount.

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

There are no tax incentives provided preferentially to foreign lenders with respect to domestic lenders other than reduced income withholding tax rates provided in tax treaties for payment of interest. Foreign lenders are subject to withholding income tax on interest payable on loans, whether or not such loans are guaranteed or secured, at the rates indicated above or, as the case may be, at the rate of the applicable tax treaty. Liquidated damages are also taxed under domestic law at a 35% tax withholding rate but can be reduced in certain tax treaties. As indicated in question 3.9 above, recording before public registries is subject to fees.

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

No, if the lender has no permanent establishment in Mexico, only interest (and any other amounts different from the principal) is taxed.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No, the costs for granting the loan/guarantee/security for foreign lenders are normally the same as those applicable to lenders in Mexico; please see question 3.9. In addition, it is common practice to agree in the corresponding agreement that all costs (notarial fees, Public Registry fees, etc.) will be at borrower's sole cost and expense. Costs may be incurred upon enforcement in the event of default.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

As indicated in question 6.1, deduction of interest for a borrower that is a Mexican tax resident has more requirements in case of foreign lenders, in particular if a tax treaty is applied or if a borrower and lender are related parties. Thin capitalisation rules, for example, are applicable only to debts contracted with foreign-related parties. Under thin capitalisation rules, interest generated on debts held by the borrower with foreign-related parties exceeding triple the amount of the net-worth ("*capital contable*") – 3:1 – are non-deductible.

7 Judicial Enforcement

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

Generally, yes, except for the status and legal capacity of individuals and all rights related to real estate.

The application of foreign governing law is valid, in any other event, as long as the substantive matter is not considered contrary to Mexican law, to fundamental institutions or principles of Mexican public policy or to public interest; if foreign governing law is provided in a contract for the purpose of evading fundamental principles of Mexican law, it could not be applied.

7.2 Will the courts in Mexico recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Definitive foreign judgments from any country may be recognised and executed in Mexico through the respective homologation procedure, so long as, in general, such judgments are not contrary to law or public policy/interest, or related to real property rights. However, treaties and conventions to which Mexico is a signatory may provide differently in relation to certain countries.

The homologating court cannot examine the substance or legal foundation of the foreign decision; it can only examine its authenticity and enforceability according to Mexican law. The homologating court will decide all issues concerning attachments, bailment, appraisals, seizure, and matters relating to liquidation and enforcement; distribution of moneys from the auction will be turned to the foreign court.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Mexico, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Mexico against the assets of the company?

There is no mandatory prior procedure to file a suit, so it is basically immediate. However, obtaining a judgment and enforcing it, depending on the type of collateral, might take approximately 12 to 24 months. Enforcing a foreign judgment takes approximately 12 months, but if the defendant files a request for expert opinions or raises issues related to the nullity of a foreign judgment, the matter could take 18 to 24 months.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There are no restrictions; however, except for certain non-possessory pledge and guaranty trusts, a trial has to be filed in order to collect, and the enforcement of the decision can include a public auction.

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

There are no restrictions on foreign lenders, compared to those applicable to domestic lenders, related to filing suits or foreclosures on collateral security.

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

Yes, as further explained in question 8.1 below, bankruptcy law provides that all creditors must attend the bankruptcy procedure in order to register their credits and will be paid in the order of payment provided by law. Credits secured by a pledge or mortgage have a preferred collection right, except for certain privileged rights such as employee-related claims (wages for the previous year).

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

Courts in Mexico recognise and enforce arbitral awards without re-examination of the merits, but will analyse whether procedural requirements under the law (i.e. due process) or the arbitration rules were followed.

Notwithstanding the above, Mexican courts will not enforce an award contrary to public law or if the substance of the controversy could not be a matter subject of arbitration.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

When accepting a bankruptcy claim, the judge may impose injunctive measures to protect the assets which may hinder the ability of the creditor to enforce its collateral. Such measures are enforced until an insolvency decision is issued and the reorganisation/bankruptcy process starts. The insolvency decision (*sentencia de concurso mercantil*) prevents creditors from taking any action against the debtor or its property, including enforcement actions against collateral.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes, all preferred and secured credits have to be paid before regular (unsecured) credits. Credits secured by a pledge or mortgage have a preferred collection right, except for certain privileged rights identified as credits against the bankrupt's/bankruptcy estate, such as employee-related claims (wages for the previous year and severance payments). Tax debts have a lower priority than mortgages and pledged credits.

The law denominates a "retraction period" (270 days) which protects creditors against the fraudulent transfers of assets. Any transfers within such period may be voided by the judge if they are considered fraudulent (i.e. donations).

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

Bankruptcy procedures are only applicable to those individuals or entities dedicated to commerce in terms of Mexican law; financial institutions are excluded from the bankruptcy law and are subject to the procedures contained in the specific law regulating its activity.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No, there are not.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Mexico?

Yes, the parties can legally agree a foreign jurisdiction in a contract to the extent that the domicile of any of the parties, or the place to fulfil any of the obligations or the disputed object, is located therein.

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

The sovereign immunity doctrine does not apply in Mexico.

10 Other Matters

10.1 Are there any eligibility requirements in Mexico for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Mexico need to be licensed or authorised in Mexico or in their jurisdiction of incorporation?

There are no eligibility requirements for lending, but if a company pretends that lending is its main activity, then such company must register as a bank or a financial entity with a restricted purpose (*Sofom*). There are eligibility requirements for withholding rate treatments for foreign lenders, as described above.

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

In addition to the formalities involved in perfecting the security interests, foreign lenders should take into consideration the specifics for the application of the different withholding rates, as described above, and the timing involved in enforcement, in order to choose the best alternative.

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Ana Laura Méndez Burkart advises and consults principally in the areas of corporate, real estate and financing areas with a special emphasis on Government Incentive Programs. She obtained her JD from Universidad Iberoamericana, graduating *Magna Cum Laude* Valedictorian in 1992 and a Master's Degree in Corporate Law in 2009, with additional studies and workshops in the University of Chicago and Harvard Law School. She was a Senior Associate of Baker & McKenzie's Mexico City office before becoming a founding partner of Sanchez DeVanny & Associates in 1996. In 2005, Ana, with 4 other partners, established CMGD and in 2012 she joined Integrate Consulting LLC (IC).

Ana works for IC which continues to collaborate with CMGD in areas of her expertise such as with this publication. She specialises in foreign investment and incentive transactions, finance trusts and project finance from private and financial institutions and provides advice on the set up of operations including negotiation of incentives agreements with the local governments, acquisitions, financing and build out for such operations. Ana is a member of the Mexican Bar (*Barra Mexicana Colegio de Abogados*) and has a Foreign Consultant License from the State of Illinois.

Cornejo Méndez González y Duarte S.C. (CMGD) is a multidisciplinary firm made up of highly skilled professionals who provide integral services for multinational clients. In all of our practice areas, we bring local expertise and know-how with an international focus and experience.

CMGD provides high value added and specialised advice to domestic and international clients and their business transactions in Mexico. CMGD works hand-in-hand with its clients in structuring and implementing solutions that meet their needs.

CMGD is a local firm with global reach. CMGD accomplishes this by having numerous unique assets including the language skills and cultural familiarity of its members, all of whom are fluent in both English and Spanish, and an extensive network of relationships with law firms, businesses, multinational institutions and other contacts in Mexico and abroad.

CMGD's success is directly related to our clients' satisfaction and our ability to achieve their objectives. Building prosperous and longstanding relationships while looking out for our clients' interests is what we strive for.

Morocco

Hajji & Associés

Amin Hajji

1 Overview

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

The main trend in the lending markets in Morocco is the publication in 2015 of a new banking law, n° 103-12 of 24 December 2014, providing among others for Islamic financing products and for a stronger control of the central bank ("Bank al Maghrib") on banks and similar which are under scrutiny for compliance with new prudential ratios. However, the continuing increase of major infrastructure and development projects in Morocco involving multiple public and private international financing establishments and similar in Morocco make the lending market a strong and efficient support to the national economy in general. Besides, the Moroccan economy and corporations benefit from traditional funding from Moroccan banks which are regularly ranked as the best model on the African continent.

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

The significant lending transactions that have taken place in Morocco relate mainly to the financing of infrastructure projects, such as 850 MW wind farms in multiple Moroccan regions, the 500 MW solar power plants Noor I, II and III in Ouarzazate, the Nador West new maritime port and the Casablanca marina centre. In addition, other areas such as leisure resorts, new towns or highways have also benefitted from important syndicated financings in Morocco.

2 Guarantees

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

A company can guarantee borrowings of one or more other members of its corporate group even though the concept of a group of companies is not organised under Moroccan law. However, there are some restrictions or limitations on such financings as provided in the new banking law.

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

Moroccan corporate law provides that any director who would have misused in bad faith the company's assets or who would conducted corporate operations against its company's interests would trigger criminal liability.

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 person must have been duly authorised to bind the company.

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

Under Moroccan law, the contracting of a financing constitutes a normal and private management decision, which is made by the elected or empowered person.

Besides this, depending on the form of corporations which are governed by specific laws and articles of incorporation, the granting of a security has to be approved by the managing person(s) or directors. When such a prior approval is not implemented, the concerned operation would be construed as non-valid and unenforceable.

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

Net worth, solvency or similar limitations are not imposed by any law on the amount of a guarantee but any such operations must be entered into between the parties in good faith and in compliance with any of the parties' effective financing capabilities and any of the corporate approvals when provided for.

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

The enforcement of a guarantee linked to an international financing in Morocco and which would have already been disclosed to the Moroccan exchange control board ("*Office des Changes*") is freely transferable.

3 Collateral Security

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

Moroccan law offers a wide range of collaterals to secure lending obligations. There are mainly two types of securities, the first are real securities which can be taken on tangible or intangible, movable or immovable assets, and the second are personal securities which relate to reciprocal obligations between contracting parties.

It should be noted that a new Moroccan security law on movables is under discussion before its promulgation and besides, Moroccan law still does not recognise the concept of security trust.

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, each type of secured asset is subject to a dedicated specific agreement. There is, however, a corporate asset security on the going concern which includes, among others, corporate goodwill, acquired commercial lease rights, intellectual property rights and equipment materials and stable commodities. The most important procedure to make such securities binding and enforceable is to register them when necessary before the trade registrar.

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 without deprivation of the grantor with the related assets, such as for a real property including land and construction, or machinery and equipment which are not dispossessed from the grantor's assets. The main procedure is to register such collateral drafted as a deed with the concerned authority which is the land registrar for real property and the commercial trade registrar for equipment and machinery.

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

Receivables may be the subject of collateral security by way of a simple pledge or by an assignment by way of security. The validity of such collateral is mainly subject to the notification of the debtor of the existence of such collateral or the acceptance of the collateral by means of a deed bearing a set date. The assignment of receivables by way of a security can solely be granted by a borrower for the benefit of a bank. Besides, no notification of the debtor is necessary.

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, any existing credit entries in bank accounts are considered receivables. The bank account holder should be notified of the pledge over the concerned account in order to make the pledge binding and enforceable.

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. As in Morocco the shares are by law in dematerialised form, the procedure for constitution of collateral security over shares consists of a record on the company's shares register, and the notification to the debtor or to the shares account holder of said collateral.

Concerning security to be enforced before Moroccan jurisdictions, it is not consistent to grant such a security under foreign law.

Under the Moroccan Civil Law of 1913, the enforcement of such security over shares should be preceded by a notice letter to the concerned shareholder in order for it to remedy its default under a seven-day grace period and, if unsuccessful, a judicial auction sale of the secured shares should be perfected in order to satisfy the security's beneficiary.

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

A security with dispossession may be taken over said inventory and delivered to the creditor or to a third party acting 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)?

A company may grant security in order to secure its obligation as a borrower under a credit facility or as a guarantor of the obligations of other borrowers.

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 security deeds are subject in Morocco to the authentication of the contracting parties' signatures before a municipality officer and registration before the tax authority at different costs depending on the type of security interest.

Specifically and in respect to mortgages over real estate, the deed must be completed before a notary and registered with the land registrar with costs proportionate to the secured transaction value.

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 quite rapidly. The registration fees are generally calculated on the value of the secured transaction at official rates which depend on the nature of the property over which the security is established.

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

No regulatory or similar consents are required with respect to the creation of a security.

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

When the borrowings to be secured are under a revolving credit facility, there are no special priorities or other concerns. The sole condition is to ensure that the security related to the credit facility remains valid and thus is renewed when necessary.

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

The sole deeds in relation to real estate have to be completed and executed before a notary or an attorney-at-law accepted by the Supreme Court of Morocco.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Under Moroccan law 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.

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

Such a prohibition does not apply when the security is to support borrowings incurred to finance the acquisition of any company which directly or indirectly owns shares in the same company.

(c) Shares in a sister subsidiary

Such a 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?

In Morocco, an agent or a trustee, though the trust concept is not recognised under Moroccan law, 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 judicial procedures are possible as long as the agent or trustee 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 lenders or in the name of a security agent who should disclose the names of each of the secured creditors. It should also be noted, however, that some sophisticated security structuring such as parallel debt organised with a trust could be organised in Morocco and be perfected except when securities over real properties are included in the security package. The land register may not validate such parallel debt structuring.

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 above.

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 loans receivable is admitted under Moroccan law, subject to the notification of such transfer to the borrower by written notice bearing a set 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?

Generally, a withholding taxation on loan interests is applicable under Moroccan law, except for loans made to the State, and for loans in foreign currency for a 10-year period or more. In addition, a 10% VAT due on interests is paid in reference to 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?

Offshore banks located in Morocco are exempt from VAT on interest.

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?

The sole income of foreign lenders which is taxable is loan interest. However, a grant of security will not imply any taxation, except the registration costs of the deeds before the tax authorities.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

The constitution of a security over a real estate property involves the establishment of a notarial deed and registration before the land registry. This involves payment of land registry fees which amount to approximately one per cent of the amount of the transaction.

In respect of security over the goodwill or machinery and material, a registration before the trade registry is necessary, which entails payment of proportionate judicial fees and which generally amount to 0.5% payable on first registration and each time the security is renewed. In any event, a tax registration at a rate *pro rata* the amount of the deed is necessary.

Besides, the total costs of establishing a mortgage over a real estate are quite high as taxes and registration fees may account for around 2% of the secured amount. Recording a pledge over a going concern/ goodwill with the trade registry would give rise to a registration fee of 0.5% of the secured amount at each periodical deed renewal.

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's.

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?

Moroccan law recognises contracts governed by a foreign governing law. Courts in Morocco are able to enforce contracts which have a foreign governing law.

7.2 Will the courts in Morocco recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Moroccan courts do recognise and enforce judgments given by foreign jurisdictions. Said judgment may be enforced after an enforcement/*exequatur* of the foreign judgment or award. Such *exequatur* does not imply the re-examination of the merits of the case; the court will be limited to examining, mainly, that the judgment does not contain any provision that may be contrary to the Moroccan public order, that it originates from a competent jurisdiction, and that it is final.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Morocco, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Morocco against the assets of the company?

It should be noted that the enforcement/*exequatur* procedure is contradictory in Morocco, giving the right to the defendant party to challenge under first degree jurisdiction and even to appeal the enforcement grounds. Thus, said procedure could be as long as approximately 18 months. When the enforcing party obtains a favourable enforcement judgment, it generally requires a judicial auction sale of the debtor's assets, which would obviously require additional time.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

The enforcement of collateral security involves the prior notification through judicial bailiff service of the debtor.

Practically, the enforcement against the debtor'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 bid. The assets will be allotted to the winning bidder, but Moroccan law recognises the right of any interested person to place a new bid within ten days of the date of the successful first bid if this party deems that the price is inferior to the value of the concerned asset. Thus, the new bidder will have to propose a price superior by at least 1/6 of the price of the first auction amount. This additional procedure would obviously slow down the closing of the judicial 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?

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 a moratorium on enforcement of lender claims nor on enforcement of collateral security. It should be noted that Moroccan insolvency law encourages the continuity of the defaulting company. In addition, the receiver may impose payment deadlines, after discussions with the company's creditors, in order to allow the company to face its debts and to safely continue its activities as long 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. Morocco is indeed 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?

The opening judgment of an insolvency proceeding may not constitute sufficient grounds for termination of any existing contract. Therefore, the lenders may not insert a clause in the finance documents providing for the termination of the contract should the borrower go bankrupted.

It should be noted that entering into insolvency proceedings has the effect of freezing all of the creditors' judicial proceedings against the defaulting debtor which has entered into insolvency.

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 use eighteen-month clawback rights. Moreover, some creditors such as tax authorities, employees or post-insolvency creditors are legally super privileged even over secured creditors.

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, except some regulated entities as banks or insurance companies who are subject to specific insolvency procedures organised under the control of the related regulatory authorities.

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 proceedings other than court proceedings may be followed for the enforcement of a security.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Morocco?

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 an official waiver of enforcement and jurisdiction immunities for their private contracting parties.

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

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?

There are eligibility requirements for lenders in Morocco as there is a legal credit monopoly in favour of credit institutions. In order to establish a credit institution in Morocco, a licence is to be delivered by the central bank and any breach of the banking monopoly exposes the incautious to criminal penalties.

However, entities which provide credit occasionally and not as a professional activity are not affected by the credit institutions monopoly.

Moreover, facilities entered into 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 related documentation to be translated into Arabic. Indeed, translation of complex common law contracts could raise serious legal or contractual misunderstandings as judicial, on oath translators often do not have a fair level of understanding of some common law concepts.

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Working Languages:

Arabic, English and French.

Hajji & Associés was established in 1996 by Amin Hajji. It is composed of two partners and six associates. The firm is located in the business centre of the city of Casablanca. Nearly ninety per cent of its clients are international corporations, with an Anglo-Saxon predominance.

The firm has since developed activity oriented toward international business and our legal counsel activity has been elaborated in some areas such as project finance in energy, notably, aeronautic asset-based financing and leasing, mergers & acquisitions, telecommunication, distribution contracts, intellectual property, labour law, cyber law and competition issues.

Furthermore, the firm represents its clients before Moroccan courts in mainly commercial and civil litigations. International arbitration is also a new activity the firm is developing progressively.

Norway

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1 Overview

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

The financial situation in Norway over the last years has been strong and stable and has to a limited extent been influenced by the debt crisis which has hit many of the EU Member States. This is mainly due to the importance of the oil and gas industries for the Norwegian economy. The general view that the economic development is positive has had a corresponding impact on the Norwegian lending market, which has been considered to have recovered from the effects of the financial crises in 2008 and 2009. However, the banks are now experiencing pressure to meet new regulatory requirements, i.e. strict Norwegian regulations based on Basel III.

Furthermore, as the Norwegian economy is much dependent on oil, the fall in oil prices during the last part of 2014 and in the beginning of 2015 makes the prospects for the Norwegian economy slightly more uncertain. Even if the interest rates are on very low levels, it follows from the Central Bank of Norway's lending investigation for the fourth quarter in 2014 (issued January 2015) that the banks are expecting a decrease in demand for new loans in 2015 and that existing credit lines will be utilised to a larger extent. It is also expected that the requirements for security will be stricter, with a continuous decrease in "bankable" leverage. These trends apply in particular to the offshore and energy sector but are expected to influence other sectors as well.

During the last few years, there has been an explosive development in financing provided by bonds issued in the Norwegian debt capital market. The Norwegian bond market has been attractive both for Norwegian investors and foreign investors. The issuance of bonds are carried out through the Norwegian Bond Trustee, which is a trust operating on behalf of the bond holders and supervised by the Financial Supervisory Authority of Norway.

In 2013 and the beginning of 2014 the Norwegian bond market was considered to be one of the hottest high-yield bond markets globally. This situation continued during the first half of 2014 and many new bond loans were issued and traditional bank loans refinanced in this market. However, in the last half of 2014 there was a general shift in this trend. This applied in particular to the shipping and offshore industries where there has been very little activity in the bond market since autumn 2014. The activity has also slowed down generally in other markets, although the activity in the lower end of the bond market (i.e. bonds below MNOK 250) seems to have good pace.

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

During 2014, Norway experienced quite a few major lending transactions within acquisition finance. In April for instance, KKR, HgCapital and Cinven secured a total financing of NOK 11,850 million (approx. EUR 1,400 million) in connection with the acquisition of Visma ASA, the Norwegian accountancy software group. In August, Nordic Capital announced a bond issue of NOK 12,200 million (approx. EUR 1,435 million) in connection with its acquisition of Lindorff, one of the biggest and fastest growing debt collection companies in the world.

In recent years, the Norwegian lending market has seen many major asset-based lending transactions within the shipping and offshore industry. Major lending transactions have typically been arranged by Norwegian banks in cooperation with Norwegian or foreign export financing schemes. For instance, the USD 530 million financing of Odfjell Drilling's semisubmersible "Deepsea Aberdeen", which was delivered in November 2014, had DNB Bank ASA as facility agent and included USD 200 million of funding from Eksportkreditt Norge AS with a guarantee from the Norwegian Garanti-Instituttet for Eksportkreditt (GIEK). Similarly, Eksportkreditt Norge and GIEK had a USD 190 million share of the USD 950 million facility arranged by Nordea Bank Norge ASA for the financing of Seadrill's new drill ship "West Carina", delivered in January 2015.

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 the Norwegian Limited Liability Companies Act (the "**LLCA**") section 8-7, private limited liability companies (No: *aksjeselskap* or *AS*) may in most instances guarantee borrowings of one or more other members of its corporate group (No: *konsern*). The same applies to public liability companies (No: *allmennaksjeselskap* or *ASA*) pursuant to section 8-7 of the Norwegian Public Limited Liability Company Act (the "**PLLCA**", and together with the LLCA, the "**LLC Acts**").

The term "corporate group" is, however, quite narrowly defined in relation to limited liability companies. Pursuant to the LLC Acts, the term only includes groups which holding company is a Norwegian limited liability company (AS/ASA). Where the holding company

is not a Norwegian limited liability company, e.g. a Norwegian general or limited liability partnership or a foreign holding company of any kind, the company can only guarantee if such guarantee serves for the economic benefit of the group, i.e. for the benefit of at least one or more of the company's affiliates.

Should a company be required to guarantee for affiliates in other scenarios than the above, then the guarantee amount cannot exceed the distributable equity of the company and the company must receive adequate counter-security.

Similar restrictions as mentioned above apply to companies organised as limited liability partnerships (No: *Kommandittselskap*) pursuant to the Norwegian Partnership Act section 3-17. Other partnerships, such as general partnerships (No: *Ansvarlig selskap*), are free to guarantee borrowings of one or more members of its corporate group without any such restrictions.

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?

Unenforceability might be an issue if the guarantee/security has been issued by a limited liability company contrary to the provisions of LLC Acts Chapter 3, which provisions serve for the protection of the equity of the company. Chapter 3 imposes, *inter alia*, statutory obligations on the company to maintain its equity at a prudent level relative to its activities, to avoid exposing the company to unreasonable financial risks, and to enter into any intra-group transactions at arm's length basis, in addition to prohibiting distributions from the company in excess of distributable equity.

Except in cases where the guarantee obligation is deemed a direct distribution of equity, there is a condition for unenforceability that the guarantee beneficiary knew, or ought to have known, that the guarantee was provided contrary to the above mentioned provisions and that enforceability would be contrary to good faith. If the company has provided the lender with a copy of minutes from a BOD meeting or general meeting (as appropriate) approving the guarantee/security and expressly stating that it is in the best interests of the company, the lender will normally be deemed to have acted in good faith.

Directors negligently approving or issuing a guarantee contrary to the LLC Act Chapter 3, run the risk of liability towards the company, its shareholders or its bankruptcy estate if the guarantee is held to be enforceable against the company in accordance with the above. Negligent Directors of a general or limited liability partnership run the same risk of liability, although the Directors of a partnership do not have the same express statutory obligations to preserve the equity of the company.

2.3 Is lack of corporate power an issue?

Yes. Lack of corporate power might cause guarantees/securities to be held unenforceable. As mentioned in question 2.2 above, however, there is a condition for unenforceability that the guarantee beneficiary knew, or ought to have known, that the guarantee was issued by (a) person(s) lacking corporate power and that enforcement of the guarantee would be contrary to good faith.

The LLC Acts Chapter 6 contain strict provisions regarding corporate power to enter into any agreements or guarantees on behalf of a limited liability company. In addition to the Board of Directors (acting jointly), the general manager has corporate powers in matters of day-to-day character (except in matters of unusual character or of great importance). The by-laws of the company may authorise one or several Directors and/or the general manager to act singly or jointly on behalf of the company. The Board of Directors may also by board resolution issue "permanent" or *ad hoc* proxy or power-of-attorney.

Similar provisions apply to general and limited liability partnerships, *cf.* the Partnerships Act Chapter 2 and 3, however, so that each partner would have corporate power unless the company is formally registered with Board of Directors.

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

No governmental filings or formalities are required in connection with guarantee/security.

For most limited liability companies, the issuing of a guarantee would be deemed a matter of unusual character or of great importance. Thus, the matter must be approved by the Board of Directors and a BOD resolution should be obtained for the sake of good order.

Further, pursuant to the LLC Acts section 3-8, a shareholder approval might be required for certain transactions with related parties, *i.a.* a guarantee/security in favour of or for the benefit of a shareholder or its affiliates where the consideration from the company exceeds 10% (in case of AS) or 5% (in case of ASA) of the share capital of the company. For limited liability companies there are several exceptions to this requirement, e.g. where (i) the guarantee beneficiary owns 100% of the shares of the company, or (ii) the guarantee has been entered into as part of the company's regular business and on commercial terms.

For companies organised as limited liability partnerships (No: *kommandittselskap* or *KS*), the approval of the partnership meeting is required for any matter of unusual character or of great importance, such as issuing of guarantees in higher amounts or providing security over assets of material importance to the business of the company.

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

There are no such limitations imposed on the amount of the guarantee under Norwegian law. However, unlimited guarantees are unenforceable under Norwegian law, at least when issued in favour of a financial institution, *cf.* the Financial Agreements Act section 61. Guarantees issued in favour of financial institutions should therefore expressly state the maximum amount secured or to be secured by the guarantee.

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

As long as payment under the guarantee is made through a licensed bank or payment institution, there are no obstacles affecting the enforceability of the guarantee.

3 Collateral Security

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

The different collaterals that are available to secure lending obligations under Norwegian law are set out in the Mortgages and Pledges Act of 1980 (the "**MPA**"). According to the MPA section

1-2, paragraph 2, collateral security can only be validly agreed to the extent this is permitted by law (has legal authority).

The MPA permits that collateral security is agreed in *i.a.* real property, movable property, machinery and plant, inventory, a seller's claims for unpaid charges, securities, financial instruments registered in a securities registry, shares and receivables. Contracts as such cannot serve as collateral security under Norwegian law; however, claims on payment and other receivables under a specified contract may be pledged.

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?

There is no concept under Norwegian law to give security by means of a floating mortgage over all the assets of a person or entity. The main rule under Norwegian law is that only individualised assets or assets which can be individualised may constitute collateral security. Some important exceptions are, however, recognised from this rule as the MPA opens up for the possibility to mortgage groups of certain specified assets, such as receivables (factoring), machinery and plant, inventory, farming products and fishery tools and thereby create a floating mortgage over such groups of assets.

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

The MPA section 2-1 provides that collateral security can be taken over real property, registered rights in real property and undivided interests in real property. Leasing and owner-occupied units fall within this category. Unless otherwise agreed, the security encompasses the land (ground) and houses, buildings, plants, etc. on the ground. The mortgage is perfected by the registration of standard mortgage documents with the Norwegian Land Registry (No: *Statens Kartverk*).

Motor vehicles used in or determined for use in business activity, movable production machinery which are used or determined for use in construction business, and railway material used in or determined for use in railway traffic can be pledged as separate categories. The pledge can cover each vehicle or machine separately or be a fleet mortgage. The pledge is perfected by registration in the Register of Mortgaged Movable Property (No: *Løsøreregisteret*). Furthermore, there are some special provisions in the MPA sections 3-9 and 3-10 that certain assets related to farming and fishing equipment used in fishing industries may serve as collateral security. Perfection is obtained by registration in the Register of Mortgaged Movable Property (No: *Løsøreregisteret*).

A floating charge can also be established over an entity's operating assets, *cf.* the MPA section 3-4 (No: *driftstilbehørspant*) (e.g. machinery, plant and other equipment, certain intellectual property rights, such as rights in trademarks, patents and designs, acquired copyrights, plant breeders' rights and certain mineral exploitation rights, etc.). Perfection is obtained by registration in the Register of Mortgaged Movable Property (No: *Løsøreregisteret*).

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

Receivables which the mortgagor (i) has on a named debtor, and (ii) which the mortgagor will obtain against a named debtor in a specified legal matter, *cf.* section 4-4, paragraph 1 can be mortgaged. Legal protection is obtained through notification of the debtor that the receivable is pledged. It is not a requirement under Norwegian law that the debtor has accepted the notice but in practice banks often require such acceptance from the debtor to obtain evidence that the notification has been sent and that legal protection is obtained.

Pursuant to the MPA section 4-10 a business person or entity can pledge receivables which it has or will obtain in the future from sale of goods or services in its business or in a separate part of its business ("factoring"). This is done in a standard mortgage document. Legal protection is created by registration in the Registry of Mortgaged Movable Properties.

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

Cash deposited in bank accounts are considered receivables and can be pledged the same way as receivables on named debtors. Legal protection is established by way of notification to the debtor, in this case the bank.

There is a special regulation in the MPA section 4-4, paragraph 2 that cash on accounts in a credit institution can be pledged in favour of the credit institution. As regards consumers, such a pledge must be established through written agreement and the pledge can only comprise cash on a specified bank account which has been set up in connection with the agreement.

3.6 Can collateral security be taken over shares in companies incorporated in Norway? 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 limited liability companies, which are not registered in a securities register, can be pledged/mortgaged unless otherwise set out in the articles of association of the company, *cf.* the MPA section 4-2 a. Perfection is created by notification to the company that the share(s) is pledged.

If the company's shares are registered in a securities register, perfection is created by registration of the pledge in the securities register, *cf.* the MPA section 4-1, paragraph 3.

Partnership shares in Norwegian limited liability partnerships can also be pledged. Perfection is obtained by a transfer of the possession of the partnership shares to the pledgee and thus it is required that the partnership agreement allows for physical partnership shares to be issued.

Share certificates are no longer issued. Security over shares in Norwegian companies can validly be agreed regardless of whether the agreement is governed by New York or English law as long as the Norwegian law requirements for legal perfection are complied with.

When the company is notified that a share is pledged, this information shall without undue delay be recorded in the register of shareholders with a note of the day the information was added to the shareholders' register, the name, address and organisation number (if applicable) of the pledgee. The registration of the pledge in the shareholders' register does not in itself create legal protection for the pledge, as this is created already by notification of the pledge to the company. If the company's shares are registered in a securities register the shareholders' register is replaced by the registration in the securities register.

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

Business companies or persons can pledge their inventory pursuant to the MPA section 3-11. The security must either encompass the entire inventory of the pledger or a certain specified part of the inventory which operationally is separated from the other inventory and appears to be an independent unit. The pledge is a floating security and covers the inventory or parts of the inventory from time to time. Legal protection of the mortgage is created by way of registration on the name of the owner in the Register of Mortgaged Movable Property (No: *Løsøreregisteret*), *cf.* the MPA section 3-12, paragraph 1.

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 in order to secure its obligations as (i) a borrower under a credit facility, and (ii) a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility, subject, however, to the limitations which apply to intra-group guarantees and financial assistance, as further described under question 4.1, being complied with.

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?

Except for nominal fees for registration in applicable registries, which are limited, no stamp duty or similar fees or taxes are or will become payable in connection with execution of the pledge.

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, the time or expense required for the filing, notification or registration required to create legal protection of security is limited.

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

No, this is not applicable.

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

No. Collateral security will be provided as security for any and all amounts from time to time outstanding under the revolving credit facility, and the lender's priority in and to the security will only depend on the facility agreement and the time and date of legal perfection. Time and date of drawdown of the secured loan(s) is not relevant in this respect. The secured amount will typically amount to 110-120% of the facility amount, which under normal circumstances would be sufficient to avoid any priority concerns.

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

If the pledgor is a company or entity, the declaration of pledge must be signed in accordance with the signatory provisions of the company/entity or pursuant to a power of attorney which is executed in accordance with the signatory provision. Most standard mortgage documents provide that the signatures of the pledger must be confirmed by two witnesses. The same requirements as to form which apply to the execution of a declaration of pledge, will also apply to the execution of a power of attorney, meaning that the signatures on the power of attorney must be confirmed by two witnesses. If the pledger is a foreign person or legal entity it is required that the signature on the declaration of pledge or power of attorney be notarised and legalised.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Yes, the LLC Acts section 8-10 contains strict restrictions on a limited liability company's ability to give financial assistance in relation to the acquisition of shares in the company. Firstly, the company may not provide financial assistance in excess of the distributable equity of the company. Secondly, the guarantee or security can only be provided on commercial terms and against satisfactory counter-security. Thirdly, the Board's resolution to provide such financial assistance has to be approved by a shareholders' meeting with a qualified majority. Fourthly, the Board has to provide the shareholders' meeting with a report of its considerations. Fifthly, and only in case of public limited liability companies, the Board's report has to be filed in the Norwegian Business Register prior to such financial assistance being provided.

Thus, in relation to financial assistance by way of guarantees or security, the statutory restrictions on financial assistance are in practice a prohibition.

For limited liability partnerships (No: *Kommandittselskap* or *KS*) the Partnership Act imposes a prohibition against financial assistance. Such prohibition does not, however, apply if the acquiring company is already, prior to such acquisition, within the same company group as the company. For general partnerships there are no prohibitions or restrictions on financial assistance in respect of acquisition of shares of the company.

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

Yes, the same restrictions as outlined in sub-section 4 (a) above would be applicable if the target owns sufficient shares/parts to be deemed a holding company of the company.

(c) Shares in a sister subsidiary

For limited liability companies there are no prohibitions or restrictions on a company's ability to financially support the acquisition of sister companies.

For limited liability partnerships (No: *Kommandittselskap* or *KS*), however, the same prohibitions and restrictions, as outlined above, apply.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Norway 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?

Although Norwegian law does not recognise the concept of a security trustee as such, the role of a security agent and/or facility agent acting on behalf of the lenders will be recognised. As long as enforcement does not involve legal proceedings, the agent will be able to act on behalf of the secured parties (from time to time) in relation to enforcement of security and application of proceeds against the claims of the secured parties.

A facility agent or security agent will normally not be entitled to initiate legal proceedings on behalf of the lenders. In relation to bond trustees acting on behalf of the bond holders, the Norwegian Supreme Court recently confirmed that the bond trustee was entitled to initiate legal proceedings in its own name. Whether this in certain circumstances might also be the case for agents acting on behalf of a large syndicate of lenders remains unprecedented. To avoid risk of dismissal we regularly advise that agents formally include the secured parties as claimants in any legal proceedings, to the extent this is feasible.

5.2 If an agent or trustee is not recognised in Norway, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

See question 5.1 above. Alternative mechanisms such as joint and several creditor status are theoretically available, but such alternatives are less practical than the appointment of a facility agent or a security agent to act on behalf of the lenders.

5.3 Assume a loan is made to a company organised under the laws of Norway and guaranteed by a guarantor organised under the laws of Norway. 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 answer to this question will in most cases depend on the wording of the facility agreement and the guarantee. The wording which is often used is that the loan is outstanding, and guarantee is issued in favour of, the Finance Parties or Lenders, which is defined as the lender(s) from time to time. In these cases the loan and guarantee would be enforceable by Lender B without further notice or other actions.

In other cases it follows from the guarantee that the guarantee is issued in favour of a named lender and that a transfer of the guarantee to another lender requires the prior approval of the debtor/guarantor.

If the facility agreement and guarantee has no wording indicating that the guarantee is issued in favour of an individual lender or that any lender would be covered, one would have to fall back on the background rules of law. According to Norwegian background law the loan and guarantee can be enforced by Lender B if the debtor and the guarantor have been notified of the transfer. It is not required that the debtor and/or the guarantor approves the 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?

There are no such requirements to deduct or withhold tax under Norwegian law.

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. No taxes apply to foreign lenders with respect to loans, mortgages or other security documents for the purpose of effectiveness or registration.

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

There are no tax incentives to foreign lenders. No taxes apply to foreign lenders with respect to loans, mortgages or other security documents for the purpose of effectiveness or registration.

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.?

A foreign lender will not become taxable in Norway solely because of a loan to or guarantee and/or grant of security from a company in Norway. In order to become taxable in Norway the foreign lender must be considered tax resident in Norway and would in such case be subject to normal tax on income or gains.

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 to a borrower if some or all of the lenders are organised under foreign jurisdictions.

7 Judicial Enforcement

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

Yes, Norwegian courts will generally recognise and apply foreign governing laws to the extent the parties have agreed to such governing law in the contract or such governing law is otherwise applicable. The enforcement of a contract with foreign governing law is subject only to: (i) such choice of law being agreed to for

bona fide purposes; (ii) the application of overriding mandatory provisions in Norwegian law; and (iii) the application of such law would not be manifestly incompatible with the public policy (*ordre public*) of Norway.

7.2 Will the courts in Norway 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 Norway will recognise and enforce, without re-examination of the merits of the case, any final judgment against a company obtained in England and any other court of a country party to the Lugano Convention on jurisdiction and the enforcement of judgment in civil and commercial matters concluded on 30 October 2007 (the "**Lugano Convention**"), which is parallel to the European Union's Brussels Regulations 44/2001. Such recognition and enforcement would, however, be subject to Norwegian rules of public policy (*ordre public*) and certain circumstances where the judgment is given in default of appearance.

Further, the courts of Norway will recognise and enforce, without re-examination of the merits of the case, any final judgment against a company obtained in the state of New York or another state or country not being party to the Lugano Convention, if the relevant parties have agreed to such court's jurisdiction in writing and for a specific legal action or for legal actions that arise out of a particular legal relationship, in accordance with the Dispute Act section 19-16, *cf.* section 4-6, and if not in conflict with Norwegian public policy rules (*ordre public*) or internationally mandatory provisions.

As mentioned under question 7.7 below, Norwegian courts will also recognise and enforce arbitral awards given in England or New York (or any other 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 Norway, 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 Norway against the assets of the company?

(a) The time frame for obtaining a decision of a Norwegian court depends on the complexity of the case and the workload of the court. In most cases, a judgment in the first instance can be obtained within six months, and the recognition and enforcement proceedings may then be initiated when the ruling has become legally binding, which is a month after the ruling, unless the case is appealed. Enforcement is initiated by a petition to the Enforcement and Execution Commissioner (No: *Namsfogden*). The process of establishing distress over the company's assets should take approx. 2-4 months, and the realisation process has approximately the same time frame. If real estate is subject to a forced sale, special requirements apply; see question 7.4 below.

According to the Enforcement Act section 7-2 (f) a written claim against the defaulting party is considered a basis for enforcement of debt and the claim can be enforced directly by a petition to the Execution and Enforcement Commissioner (No: *Namsfogden*) without first obtaining a court judgment. If the company raises objections to the claim, however, the case will be referred to the Conciliation Board and/or the District court for judgment. If no objections are made, the Commissioner will establish distress on one or more of the company's assets, and the lender may then file a petition for a forced sale.

(b) The time frame for enforcing a foreign judgment which is recognised in Norwegian courts as more particularly described under question 7.2 above, would be approximately the same as for enforcing a Norwegian judgment. The enforcement of the claim will then be carried out by the Commissioner in accordance with the Enforcement Act, *cf.* the Enforcement Act section 4-1 (f) or (g).

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?

Depending on the collateral, different assets have different time frames with regards to realisation. Forced sale of real estate has to be approved by the district court and this might take up to 6 months. The Enforcement and Execution Commissioner (No: *Namsfogden*) will then administrate the sale. Moreover, depending on the nature of the real estate, licensing requirements may impact timing and value of enforcements. For other assets, the Commissioner may initiate a forced sale without a judgment of a Norwegian Court if the requirements set out in question 7.2 above are met.

The Financial Collateral Act section 7 provides an exemption from the rules in the Enforcement Act and enables the parties to enter into an agreement that entitles the mortgagee to redeem the pledge immediately at market value.

According to the Enforcement Act the forced sale of an asset is to be carried through in the way that provides the best possible economic outcome. It is generally up to the Commissioner to decide how the asset should be realised. Public auctions are an alternative if the asset is suitable for this. However, the Act also has provisions regarding handing over the asset to the secured creditor, which may be a good option if the market demand is lower than usual, and it is assumed that a sale will not achieve a reasonable price. In general, a forced sale will not result in a selling price in accordance with market value due to the circumstance that it is a forced sale.

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

According to the Dispute Act section 20-11, a party that does not have residence/registered office in Norway may under certain condition be required to put up collateral for costs incurred in a court case. However, collateral cannot be required if it would be contrary to obligations to treat all parties residing abroad and parties resident in Norway that follows from international law, or if it would be disproportionate with regard to the nature of the case, the relationship between the parties or other circumstances. The EEA Agreement and the European Human Rights Convention has provisions that limit the range of this provision.

If such requirement is imposed, the case will not be heard until the requirement is met. This provision will also apply if the foreign lender has to bring the case before the court in order to foreclose on collateral security. However, there is no such requirement for initiating enforcement proceedings before the Enforcement and Execution Commissioner (No: *Namsfogden*); please see question 7.2 above.

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

The main rule is that the mortgagee's rights, if established in accordance with the legal provisions applicable, are valid even if the company is taken under bankruptcy proceedings. However, the Debt Reorganization and Bankruptcy Act of 1984 have provisions regarding voluntary debt settlement and compulsory composition which may influence the mortgagee's security. The voluntary debt settlement requires acceptance from all creditors. Such proceedings require that the debtor files a petition to the District Court for debt settlement proceedings. The debt negotiations committee will submit a proposal for a composition. If the proposal entails that the creditors get more than 50% of their claims, such proposal requires that 3/5 of the creditors accept the proposal, and if the proposal is less than 50%, 3/4 of the creditors' votes are required. A compulsory composition also entails that mortgages or liens that are beyond the estimated value of the collateral will be annulled.

If the company has been taken under bankruptcy proceedings, claims can no longer be enforced by creditors unless the proceedings were initiated before the bankruptcy. However, if a creditor that has initiated enforcement proceedings that has resulted in distress over company assets within three months of the filing of bankruptcy, such distrains on assets will not be legally binding for the bankrupt estate according to the Act section 5-8.

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

Norway has ratified the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "**New York Convention**"). Thus, arbitral awards obtained in any jurisdiction whether party to the New York Convention or not, will be recognised and enforced without re-examination of the merits of the case. However, recognition and enforcement of arbitral awards will be subject to, *inter alia*, arbitrability, Norwegian public policy rules (*ordre public*), internationally mandatory provisions and certain circumstances where the judgment is given in default of appearance.

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 insolvency proceedings have been initiated, secured creditors generally have a right to preferential treatment (No: *separatistrett*), i.e., the right to get coverage from the realisation of the asset in which the creditor has collateral, which leaves only a possible surplus of the realisation to be divided among other creditors. In general, only the appointed administrator may realise the company's assets, and the bankrupt estate also has a secured right to obtain 5% of the proceeds if this is necessary for the processing of the bankrupt estate, according to the MPA.

The Bankruptcy Act section 117 states that the realisation of assets shall be carried out in the manner that is expected to provide the best price for the asset. However, according to the Bankruptcy Act section 117 a, the administrator may sell the asset even if the value of the asset is less than the secured claim, if the asset is sold along with other assets, and the combined sale is expected to provide a better price than by selling each asset separately, or if the sale is part of a transfer of the entire business. Further, the Act section 117 b states that the administrator may decide that the asset has less value than the secured claim, and therefore revoke the seizure in the asset to the company. The asset is then placed at the debtor's disposal. However, the administrator may also revoke the seizure and by agreement transfer the asset to the mortgagee according to the Bankruptcy Act section 117 c. Such agreement shall be entered into based on the market value of the asset, and the mortgagee may then realise the 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 Creditors Recovery Act of 1984 has provisions regarding both the priority of claims and clawback rights. In general, claims against the estate will be covered first according to section 9-2. The rank is then the preferential debts of first and second priority, according to section 9-3 and 9-4. Thus, most employees' claims and tax debts will be covered first, in that order. However, some parts of the employee claims, and tax debts may be considered without priority according to section 9-6 and 9-7.

As a main rule, the priority provisions will not affect a claim that is secure; in which case the mortgagees claim has the best priority in the collateral. However, security can under certain circumstances be set aside. The administrator may challenge a company act that has granted a creditor payment or security within a defined time period prior to the bankruptcy. The provisions are objective, in the sense that a creditor's good faith is irrelevant, and the time frame is then three months prior to the filing of the bankruptcy, unless the beneficiaries creditor is considered closely related to the company in which case transactions made up to two years prior to the bankruptcy can be set aside. According to section 5-7, security granted in order to secure existing debt ("old debt") and security for existing debt which has not received legal protection without undue delay, which took place later than three months prior to the bankruptcy may be set aside. There is also a subjective provision in section 5-9 that applies to dispositions which are considered unfair if the creditor knew or should have known that the debtor was in a difficult financial situation, and the circumstances that made the disposition unfair. This provision is applicable to dispositions which took place up to ten years prior to the bankruptcy.

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

A municipal entity (No: *kommunalt foretak*) cannot be taken under bankruptcy proceedings as such enterprise is not considered to be an independent legal entity. Further, a Norwegian Foreign Enterprise (No: *NUF*) is not considered an independent legal entity, but rather a branch of a foreign limited company, and does not normally have legal venue in Norway. A court may, however, commence bankruptcy proceedings against a company that has its principal place of business in Norway. Thus, if the foreign limited company is declared bankrupt based on the fact that its place of business is in Norway, the NUF will be processed as part of the bankruptcy proceedings.

The Bank Guarantee Act chapter 4 has provisions entailing that financial institution and insurance companies cannot be declared bankrupt. Such enterprises will be subject to administration by the authorities.

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. A creditor has to resort to legal proceedings in order to seize an asset of a company in an enforcement if rights are infringed or otherwise impaired. As stated above, there are different legal proceedings that may be initiated to enforce a claim, either by a petition to the Court to obtain a judgment or recognition of a foreign judgment, or a petition to the Execution and Enforcement Commissioner. Reference is also made to the provisions regarding debt settlement and compulsory composition in question 7.6 above.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Norway?

Yes, as long as such submission to a foreign jurisdiction has been made in writing and for a specific legal relationship, the party's submission to jurisdiction will normally be legally binding and enforceable. Please note, however, that certain statutory limitations to the parties' choice of jurisdiction might apply to, *inter alia*, consumer contracts.

Further, unbalanced jurisdiction clauses, e.g. jurisdiction clauses which are exclusive for one party (typically the borrower) and non-exclusive for the other party (typically the lender(s)), run the risk of being held unenforceable under Norwegian law.

If and to the extent that proceedings has already been instituted or are pending in a foreign jurisdiction at the time a matter is brought before a court in Norway, the courts of Norway shall stay or dismiss the Norwegian proceedings in accordance with the rules of the Lugano Convention and the Dispute Act section 18-1.

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

Norwegian courts are bound by international law regarding sovereign immunity, and a party's waiver of sovereign immunity will be legally binding and enforceable to the extent permissible under applicable international law.

A general waiver of sovereign immunity might be held contrary to international law, for instance in respect of diplomatic immunity. Enforcement of assets protected by diplomatic immunity for instance, might require an express waiver of immunity.

10 Other Matters

10.1 Are there any eligibility requirements in Norway 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 Norway need to be licensed or authorised in Norway or in their jurisdiction of incorporation?

There are a number of requirements applicable to lenders if they are considered a financial institution in Norway. Financial institutions in Norway must be licensed by the Norwegian authorities and comply with specific requirements with regard to capitalisation, financial positions, organisation and management.

Many foreign banks are licensed to provide cross-border services in the lending market or to operate in Norway through a branch office. Normally, these are financial institutions which are subject to supervision by another EEA state and have permission to operate as financial institution in or from another EEA state, and thereby are allowed to offer loans in Norway.

There is no requirement in Norway that a lender must be a bank or financial institution. A company whose normal activity is not to be a lender may for example give a loan to a Norwegian company or person, for instance to a customer, without being a licensed bank. However, the threshold is rather low before the company would be considered a financial institution that is subject to the applicable requirements. If the company grants one single loan and the granting of loans is not within its normal activities this would probably be fine but if there are two or more loans from the same company this conclusion may be more uncertain.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Norway?

No, there are no other material considerations which should be taken into account.

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Marit has a long and broad experience as a lawyer within financing transactions, primarily within the shipping and offshore sectors. Her experience extends from traditional bank financing to bond deals, leasing transactions and more transactional work such as private placements. Over previous years she has assisted clients in several complex financial transactions, such as sale lease backs, structuring of ship and rig financings and in a number of export financing transactions. She assists companies, managers and lenders with negotiations and closings.

During one of her previous positions as general counsel for a large shipping group over many years, she has gained considerable commercial knowledge and experience which adds value when advising clients. She is a member of the board of directors of GIEK – the Norwegian Export Credit Guarantee Agency.

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Kyrre W. Kielland holds broad experience with financing and other transactions within shipping, aviation and real estate. He advises banking institutions/lenders, companies and others with negotiations and closing of financial transactions and complex loan and leasing structures.

In addition to traditional bank financing, Kyrre advises clients on leasing transactions and bond deals in the Norwegian and European market (Euro Medium Term Notes). He holds precious experience with export financing to the benefit of our many clients from his secondment with Eksportkreditt Norge AS, the Norwegian export financing scheme.

Further, Kyrre is regularly appointed as an external examiner at the faculty of Law, University of Oslo and Lillehammer University College, within fields such as private international law, international commercial law and law of contracts.

Advokatfirma Ræder DA is a leading Norwegian law firm with more than 65 experienced lawyers, of which eight are dedicated to our department for Shipping, Offshore and Financing. We provide advice within most areas of commercial law and are centrally located at Solli Plass in Oslo.

The majority of our clients are national and international companies, organisations and government authorities. We focus on offering tailor-made, cross-disciplinary advice that suits the needs of each client.

We have an international focus and have built an extensive network of cooperative partners across national borders. Our international network and experience mean that we can provide prompt assistance to all our clients, including those situated outside of Norway.

We focus on each client and concentrate on building trust by providing good advice based on solid, specialist legal knowledge and commercial understanding. Our organisation is built on a foundation that is characterised by orderliness, commitment, quality and respect.

Peru

Juan Luis Avendaño C.

Miranda & Amado Abogados

José Miguel Puiggros

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Peru?

The Peruvian economy has grown significantly in the last ten years so financing needs have grown exponentially. Peruvian companies can obtain bank financing on a cross-border basis without restriction so the market has seen a great deal of competition between domestic banks and foreign banks. Banks have been active in trade finance, acquisition finance and project finance, participating individually and in syndicates.

1.2 What are some significant lending transactions that have taken place in Peru in recent years?

One of the largest bank financings ever to take place in Peru was the USD 2.3 billion syndicated loan for the construction of the Peru LNG project, which included a 400km natural gas pipeline, a liquefaction plan and a seaport. The whole project required an investment of more than USD 4 billion. Peru LNG is a limited liability company indirectly owned by Hunt Oil, SK, Repsol and Marubeni. The bank syndicate was led by Societé Generale and included K-Exim, SACE, US-Exim and the IDB, among others. The deal was completed by June 2008. Other important project financings were the financing granted by Bancolombia, Export Development Canada and HSBC Bank USA to Fenix Power (Ashmore) for the development of a combined cycle generating plant of 512 MW for an amount of USD 225 million and the financing granted by the International Finance Corporation, and European banks DnBNOR, Nordea, WestLB and Societe Generale to SN Power for the construction of the 168 MW Cheves hydropower plant owned by Norway's SN Power, a joint venture between Statkraft and Norfund for an amount of USD 250 million.

Last year we worked on, among others, two important financial operations. We advised a consortium of Chinese banks led by China Development Bank and including the Bank of China and Industrial and Commercial Bank of China in the financing for the acquisition and development by subsidiaries of China Minmetals Corporation (MMG) of the copper mining project "Las Bambas" (formerly of Glencore-Xstrata) in southern Peru, for a total amount of approximately USD 8 billion, the largest financial transaction in Peru's history. Additionally, we advised Abengoa Transmisión Sur S.A., a leading engineering and clean-technology company, in the issuance of senior secured notes due 2043 for the amount of USD 432 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)?

Under Peruvian law, there are certain circumstances that restrict the ability of a company to guarantee borrowings of one or more other members of its corporate group. Article 106 of the Peruvian Corporate Act (*Ley General de Sociedades*) prohibits Peruvian corporations from making loans, granting guarantees or creating security interests on their assets to back the acquisition of their own shares (please refer to our answer to question 4.1 below regarding financial assistance). In this regard, a Peruvian company is prohibited from granting any guarantee in connection with the acquisition of its own shares.

There are no restrictions in other scenarios. However, the granting of a guarantee to secure obligations of a related company could be declared void by a court if is not within the corporate purpose of the company (i.e. as an "*ultra vires*" act) or has no economic benefit for the company.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

There are no enforceability concerns if a disproportionately small (or no) benefit to the guaranteeing/securing company is shown. On the other hand, director or officer liability claims could be initiated only in the event their actions in connection with the granting of the guarantee have been made exceeding their faculties, with malicious intent (*dolo*) or gross negligence (*negligencia grave*). Liability claims may be initiated by (a) minority shareholders, or (b) creditors. Creditors will only have a valid action against directors or officers who entered into a certain transaction if the following requirements are met: (i) the claim is intended to reconstitute the company's equity; (ii) the claim has not been filed by the company or its shareholders; and (iii) the collection risk is substantially increased. The statute of limitations to file claims against directors and officers is two (2) years as from the date of execution of the relevant guarantee.

2.3 Is lack of corporate power an issue?

Yes. In accordance with article 13 of the Peruvian Corporate Act, in order for a guarantee to be binding and enforceable against

a company, the officers executing such guarantee must be duly authorised to do so.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No. Generally, having a guarantee executed in writing by duly authorised representatives of the company with sufficient powers is enough for the guarantee to be valid and enforceable. Specific consents could apply when dealing with certain types of counterparties such as banks, insurance companies, pension funds and governmental agencies (which should be answered on a case-by-case basis). Shareholder approval will not be necessary unless the company bylaws expressly require such approval for the granting of a guarantee or it is outside of the corporate purpose of the company.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no provisions under Peruvian law that limit the amount of a guarantee over the basis of net worth or solvency because, in any event, the guarantor company shall only respond up to the amount of its equity. However, in the case of bonds (*fianza*) the Peruvian Civil Code (*Código Civil*) establishes that the guarantee may not exceed the amount of the secured obligation after including all applicable interest, expenses, fees and enforcement costs. Hence, the guarantee may not exceed the amount finally owed by the debtor.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, there is no foreign exchange control applicable in Peru.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Under Peruvian law, in addition to personal guarantees (*fianzas* or *avales*) the following types of collateral may be mainly used to secure lending obligations:

(i) Pledges: over moveable property such as inventories, vehicles, ships, shares, credits, accounts, rights and, generally, all moveable assets (except for specific exceptions).

(ii) Mortgages: over immoveable property such as real estate, as well as exploitation concessions (mining, transportation, electric and public utility concessions).

(iii) Guaranty Trust: through which assets and rights are transferred to a trust, in *dominio fiduciario*, which created an autonomous and independent patrimony that is managed by a trustee (*fiduciario*) for the benefit of creditors in the terms and conditions established in the corresponding trust agreement.

Additionally, warrants are available to creditors and, in the financial sector, either guarantees such as stand-by letters of credit and credit derivatives are also acknowledged by the local regulation.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Yes, as long as the security agreement complies with all the formalities required for granting a security for each type of asset as described in our answer to question 3.1 above. Also, in Peru we have several alternatives when it comes to determining the composition of a security package. In the case of assets comprising a production unit, the obligor may grant a special type of mortgage known as "production unit mortgage", which enables the grantor to include under a single mortgage (and through the execution of a single mortgage agreement), a group of assets of different nature, both movable property and real estate property (i.e. buildings, *in rem* rights, equipment, machinery) as long as they are all pertaining to a single production unit. In case a collateral package is structured to include a production unit mortgage, the parties can still agree to have separate security documents (i.e. pledges and mortgages) over all the assets that, for some reason, were not included under the relevant production unit. Please refer to our answer to question 3.3 below with regards to the applicable procedure.

Likewise, a single guaranty trust agreement may be executed in order to create a guarantee trust that includes all types of the relevant assets and rights of the borrower, to the extent permitted by law (i.e. real property, accounts, moveable assets, contracts, concessions, shares, etc.). This mechanism could be combined with the execution, in parallel, independent security agreements over other assets not comprised in the trust, taking into account each asset's nature. All assets and rights subject to security would be part of the trust and administered by a designated trustee on behalf and for the benefit of the secured creditors.

A guaranty trust is created through the execution of a trust agreement (*contrato de fideicomiso*) between the guarantor (*fideicomitente*), the relevant creditor (*fideicomisario*) and the trustee (*fiduciario*). Please note that, in accordance with the General Banking Law (*Ley General del Sistema Financiero*), only entities that are duly authorised to act as trustees by the Superintendence of Banking and Insurance (*SBS*) may act as such (in addition to authorised trustee entities, banks may also perform such function). Although the guaranty trust will be created upon the execution of the trust agreement, in order to obtain enforceability against third parties the agreement must be executed as a public deed and registered in the Contracts Public Registry (*Registro Mobiliario de Contratos*) and, in case the assets comprised in the trust are registered assets (i.e. real estate and certain movable assets such as vehicles, aircraft, etc.), it must also be registered in the relevant registry (please refer to our answers below for detail regarding the relevant registries).

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. Mortgages are created by means of the execution of a private document and a public deed between the Obligor and the Lender (or the corresponding security agent or trustee, as applicable) and will be valid and perfected once registered before the public registries

(please note that, as opposed to pledges where registration is only needed for perfection/enforceability as explained below, in the case of mortgages registration is required for validity). Security interests over land and buildings must be registered in the file of the relevant asset in the Immovable Property Registry (*Registro de Propiedad Inmueble*). Security interests over concessions must be registered in the Public Registry of Concessions for the Exploitation of Public Services (*Registro de Concesiones para la Explotación de los Servicios Públicos*) or, in the case of mining concessions, in the Mining Rights Registry (*Registro de Derechos Mineros*).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. The Peruvian Pledge Law (*Ley de Garantía Mobiliaria*) expressly allows for pledges to be created over receivables. A pledge is created by means of the execution of a private agreement between the Obligor and the Lender (or the corresponding security agent). However, in order to file the agreement for registration before the public registries, a public deed must previously be granted before a Notary Public. The perfection of the pledge (to achieve enforceability against third parties) and a stronger level of publicity against third parties will be obtained by registering the pledge in the Contracts Public Registry (*Registro Mobiliario de Contratos*).

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. The Peruvian Pledge Law expressly allows for pledges to be created over cash deposited in bank accounts. Please refer to our answer to question 3.4 above for the applicable procedure.

3.6 Can collateral security be taken over shares in companies incorporated in Peru? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes. The Peruvian Pledge Law does not require the shares subject to pledge to be issued by a company incorporated in a particular country. A share pledge is created by means of the execution of a private agreement between the Obligor and the Lender (or the corresponding security agent). However, in order to file the agreement for registration before the public registries, a public deed must previously be granted before a Notary Public. The perfection of the pledge (to achieve enforceability against third parties) is obtained once the security interest is registered in the relevant stock ledger of the respective Obligor. In order to give the security a stronger level of publicity against third parties, share pledges are usually registered in the Contracts Public Registry (*Registro Mobiliario de Contratos*) as well. Share of companies in Peru may be in certificated form or in account entry form, in accordance with the Peruvian Corporate Act.

Peruvian law allows contracting parties to freely choose the governing law, dispute resolution venue and language used in all private agreements, including security documents. In that regard, a share pledge agreement may be granted under New York or English Law and the validity and enforceability of such agreement will be determined by such foreign law and not by Peruvian law. Thus, to the extent that the share pledge agreement is valid and enforceable under New York or English law, Peruvian law and courts will recognise such share pledge agreement. However, please note that, in case such agreements need to be filed as evidence or otherwise before Peruvian courts, they need to be officially translated into Spanish by a translator registered in Peru. When filed before government agencies (i.e. insolvency authority), translations need not to be official.

The shares can also be transferred in *dominio fiduciario* to a guarantee trust. Please see responses above regarding procedure for establishment of the trust, validity and enforceability.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes. The Peruvian Pledge Law expressly allows for pledges to be created over inventory. Please refer to our answer to question 3.4 above for the applicable procedure. In case the assets comprising the inventory are assets registered in the Public Registry, the pledge must also be registered in the Movable Assets Registry (*Registro Juridico de Bienes Muebles*) in connection with such assets.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

To the extent that the financial assistance restrictions (as explained in our answer to question 4.1 below) are not violated, a company may validly grant a security interest in order to secure its obligations both as a borrower under a credit facility and as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

(i) Mortgages (immovable assets):

The costs involved in the registration of mortgages are comprised by notary fees (required for execution of agreement as a public deed), which will vary depending on the designated Notary Public and are customarily calculated taking into consideration the secured amount (in a range between USD 500 and USD 5,000), and public registry fees. As of the date of this document, registry fees are set at 0.75/1,000 over the total secured amount (when less or equal than approximately USD 11,290) or 1.5/1,000 if the secured amount exceeds such amount, with a limit of one Referential Tax Unit ("UIT") (currently S/. 3,850.00 which is equivalent to approximately USD 1,242), with an additional S/. 31 (equivalent to approximately USD 10) qualification fee.

(ii) Pledges (movable assets and rights):

The costs involved in the registration of pledges comprise notary fees (required for execution of agreement as a public deed), which will vary depending on the designated Notary Public and are customarily calculated taking into consideration the secured amount (in a range between USD 500 and USD 5,000), and public registry fees. The costs of registering a pledge over movable assets in the public registries depend on the secured amount (*monto del gravamen*). As of the date of this document, registry fees are set at 1.5/1,000 of the total secured amount (expressed in Nuevos Soles) with a limit of one UIT, and an additional S/. 10.00 (equivalent to USD 3.2) qualification fee.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Please refer to our answer to question 3.9 above regarding the applicable expense. Regarding the duration of the applicable procedures, general timing for registration of pledges and/or mortgaged in the relevant public registries is sixty (60) business days. Please bear in mind that, as mentioned above, in the case of mortgages, registration is necessary for creation of the security interest, while in the case of pledges registration is advisable in order to obtain publicity and enforceability of the security interest against third parties.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Not generally (except, as mentioned, in the case of mortgages, for which registration is required for creation of the security interest). Specific consents could apply when dealing with certain types of counterparties such as banks, insurance companies, pension funds, governmental agencies and concessionaires of infrastructure concessions (which should be answered on a case-by-case basis).

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There are no special priority or specific concerns associated with granting security for borrowings under a revolving credit facility. In such case, priority shall be governed by the terms and conditions of the relevant facility agreement. However, please bear in mind that in case the borrower is subject to an insolvency procedure under the Peruvian Insolvency Act (*Ley General del Sistema Concursal*), the priority rights of secured creditors shall be subordinated to the rights of workers (in connection with their compensation and benefits) and the payment of contributions to social security programmes.

Nevertheless, secured creditors have priority over (x) tax claims (including fines, interest and penalty fees owed to the Peruvian State), and (y) unsecured creditors.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

As mentioned above, security documents must be executed as public deeds (through a notary) in order for them to be registered in the relevant Public Registry. Execution under power of attorney shall be necessary in case a special power requires to be granted by the company in favour of the person who shall execute the documents (i.e., in case such person is not a representative or officer of the company already duly authorised to execute the documents on its behalf, in accordance with the company's powers and faculties regime or the applicable Shareholders' Meeting resolution, as the case may be).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

As mentioned, article 106 of the Peruvian Corporate Act prohibits Peruvian corporations from making loans, granting guarantees or creating security interests on their assets to back the acquisition of their own shares. In this regard, a company is prohibited from guaranteeing or giving security in order to secure borrowings incurred to finance or refinance the direct or indirect acquisition of its shares. The granting of security in breach of this prohibition would be susceptible of being declared null and void (for which any interested party, including the grantor, may file a judicial claim), and the directors approving the transaction would be subject to liability. However, there is no case law on this matter, and there is uncertainty as to how a Peruvian court would rule on such claim.

(b) Shares of any company which directly or indirectly owns shares in the company

In our view, the financial assistance limitation applies only to direct acquisitions (i.e., acquisition of shares of the target company which are financed, guaranteed or secured by the target company), and that, therefore, indirect upstream and/or cross-stream acquisitions are outside the scope of the financial assistance prohibition. In that regard, a company could provide security in order to back borrowings incurred to finance the acquisition of shares of the company that owns its shares (upstream), or those of a sister subsidiary (cross-stream). The reasoning behind this interpretation lies in the fact that, under Peruvian law, prohibitions and provisions that restrict rights in general may not be applied by analogy or by extension, they must be expressly established. However, it is important to note that there are no regulations or case law interpreting the scope of the financial assistance prohibition. Hence, this conclusion represents only our legal judgment based on the laws of Peru and, while we believe that in a properly presented case before a Peruvian court such court would rule in accordance with our position, it is possible that such court could reach an adverse decision.

(c) Shares in a sister subsidiary

(Please refer to our answer to question 4.1(b) above.)

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Peru recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes, it will.

5.2 If an agent or trustee is not recognised in Peru, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Agents and trustees may enforce claims on behalf of lenders in Peru, without the need to have each lender participating individually on the enforcement actions.

5.3 Assume a loan is made to a company organised under the laws of Peru and guaranteed by a guarantor organised under the laws of Peru. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Generally, and notwithstanding any requirements and limitations under the assignment and participation provisions in the relevant loan documentation, the assignment of credits shall be communicated to the borrower and guarantor in order to be enforceable against them.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

For purposes of this analysis, we are assuming that the foreign lender does not have a Permanent Establishment ("PE") in Peru. Otherwise, tax consequences may vary.

Interest payments to domestic lenders (domiciled entities or individuals) are not subject to withholding income tax.

Conversely, in the case of loans granted by foreign lenders (non-domiciled entities or individuals) to local borrowers, interest will be subject to a withholding of the Peruvian-income tax. In this case, if the Peruvian borrower assumes the economic burden of the withholding tax, such borrower can deduct such amount as an expense for its income tax determination.

Below you will find a brief description of the tax treatment applicable to cross-border lending activities:

(i) Income tax

Interest paid to foreign lenders qualifies as Peruvian-source income and thus is subject to the Peruvian income tax, whenever the loan proceeds are placed or economically used in Peru or if the payer of such interest is domiciled in Peru. With respect to the proceeds of a claim under a guarantee or the proceeds of enforcing security, only the amount exceeding the amount guaranteed or secured paid by a domiciled entity or individual in Peru will qualify as Peruvian-source income.

The withholding tax rate applicable to interest paid to non-domiciled entities is 4.99%, provided that the following conditions are met: (i) in case of loans in cash, the foreign currency proceeds enter into Peru (deposited in a bank account in Peru); (ii) the borrower uses the proceeds of the loan in the ordinary course of its business, or to refinance existing loans; (iii) the debt service does not accrue an annual interest rate exceeding LIBOR +7 (any excess thereof will be subject to the 30% income tax withholding); and (iv) the borrower and lender are not deemed to be related parties (the operation cannot be structured as a back to back loan). For this purpose, the definition of "interest" includes expenses, commissions, premiums and any other additional fee agreed.

If the mentioned conditions are not met, the applicable withholding tax rate will be 30%.

The withholding tax rate applicable to interest paid to non-domiciled individuals is also 4.99%, unless the borrower and the lender qualify as related parties or the loan qualifies as transaction made from or through tax havens. In these latter cases, the rate will be 30%.

If the foreign lender is domiciled in a jurisdiction that is deemed to be a tax heaven, the borrower will be required to prepare, for income tax purposes, a transfer pricing analysis on the terms and conditions of the loan in order to determine that the interest meets the arm's length principle, pursuant to transfer pricing rules.

(ii) Value-added tax (VAT)

Interest paid to the lender will be exempted from VAT provided that the lender of the loan is a financial institution (local or foreign bank).

If the lender is not a financial institution, the interest to be paid by the domestic borrower will be subject to an 18% VAT, for the use of the financial service in Peru. For this purpose, the taxpayer will be the financial borrower, who will be able to use the paid VAT as a credit to be offset with its debit or output VAT, once paid.

(iii) Financial transactions tax

Additionally, in Peru there is a financial transactions tax ("FTT") that taxes at a rate of 0.005% any debit or credit made in an account opened at a Peruvian bank or any other financial institution, either in national or foreign currency. Hence, if the loan is disbursed and deposited in a Peruvian Financial System ("PFS") bank account, such credit will be levied at the corresponding FTT rate. Likewise, interest and principal paid from or deposited in a PFS bank account will also be subject to the FTT. The taxpayer of the FTT is the holder of the Peruvian bank account.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no incentives other than the application of the reduced withholding income tax rate of 4.99% mentioned in our answer to question 6.1.

Additionally, bear in mind that Peru has signed Double Tax Treaties that are currently in force with the following countries: Brazil; Canada; Chile; South Korea; Mexico; Portugal; and Switzerland. Those Tax Treaties follow the OECD Model and, in general, limit the withholding tax rate to 15%. This would be relevant if the mentioned requirements in order to qualify for the reduced rate of 4.99% are not met.

In addition, Decision 578 is applicable to countries of the Andean Community (Peru Colombia, Ecuador and Bolivia). According to this Decision, interest is only taxable in the country in which the expense is registered.

Furthermore, no taxes are levied on foreign lenders with respect to their loans, mortgages or other security documents, for the purposes of effectiveness or registration.

However, notarial and registration fees may be incurred, as mentioned to our answer in question 3.9 above.

6.3 Will any income of a foreign lender become taxable in Peru solely because of a loan to or guarantee and/or grant of security from a company in Peru?

No income other than interest, provided that the loan proceeds are placed or economically used in Peru or if the payer of such interest is domiciled in Peru, as we mentioned in our answer to question 6.1 above.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

As mentioned, notarial and registration fees may be incurred for executing security agreements. Please refer to our answer to question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are no adverse consequences in that case. However, if the lender is domiciled in a tax haven jurisdiction, transfer pricing rules will come into play in order to determine the market value of the interest.

Bear in mind that Peruvian legislation does include a thin capitalisation rule; however its application does not depend on the location of the lender. Pursuant to this rule, interest paid to related companies exceeding the result of applying a coefficient (debt/equity ratio) of "3/1" at the close of the preceding fiscal year is not deductible for income tax purposes.

7 Judicial Enforcement

7.1 Will the courts in Peru recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Peru enforce a contract that has a foreign governing law?

Yes, they will.

7.2 Will the courts in Peru recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes. The recognition procedure takes place before the Superior Court. A final, non-appealable foreign judgment against the borrower would be recognised, conclusively, and enforceable in the competent courts of Peru without reconsideration of the merits; provided that: (i) there is in effect a treaty between Peru and the relevant country regarding the recognition and enforcement of foreign judgments; or (ii) in the absence of such treaty, the following conditions and requirements are met:

(a) such judgment does not resolve matters under the exclusive jurisdiction of Peruvian courts;

(b) such court has jurisdiction under its own private international law rules and under international rules on jurisdiction;

(c) the defendant was served in accordance with the laws of the place where such court sits, was granted a reasonable opportunity to appear before such foreign court and was guaranteed due process rights;

(d) the judgment has the status of *res judicata* in the jurisdiction of the court rendering such judgment;

(e) there is no pending litigation in Peru between the same parties for the same dispute, which shall have been initiated before the commencement of the proceeding that concluded with the foreign judgment;

(f) such judgment is not incompatible with another enforceable judgment in Peru unless such foreign judgment was rendered first;

(g) the foreign judgment is not contrary to public order or good morals;

(h) the foreign judgment was not rendered by court in a country which denies enforcement of Peruvian judgments or engages in a review of their merits;

(i) the foreign judgment is (i) officially translated into Spanish by a translator registered in Peru, and (ii) certified with an "*Apostille (Convention de La Haye du 5 octobre 1961)*" pursuant to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, or if it is not party to such Convention, certified by the Peruvian consulate; and

(j) applicable court filing fees are paid.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Peru, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Peru against the assets of the company?

It could take between two and four years in each case. Even though a borrower could have no legal basis for opposing enforcement, still they could delay enforcement just by challenging on appeal a decision from the first instance court.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Court proceedings do require a public auction. Even for private foreclosures, we always recommend that the process includes certain minimum protections in favour of the owner of the assets, such as an obligation to obtain an independent appraisal, publicity and minimum bids.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Peru or (b) foreclosure on collateral security?

No, they do not.

7.6 Do the bankruptcy, reorganisation or similar laws in Peru provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes. As of the date of the release of the publication with the debtor's insolvency declaration in the Official Gazette (the "Bar

Date"), all obligations of the debtor originated until the Bar Date ("pre-publication claims"), including obligations owed to secured creditors, become temporarily unenforceable. The automatic stay suspends enforcement of any pre-publication claim against the debtor's estate until a reorganisation plan or liquidation plan is approved and new conditions are established. In addition, from the Bar Date, all execution proceedings for collection and injunctions against the debtor's estate are stayed. The automatic stay will suspend the enforcement of any credits against the borrower. It will also suspend the accrual of interest and late charges.

7.7 Will the courts in Peru recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. Peru is a member on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

A claim seeking recognition of the foreign award will need to be filed before a competent Superior Court in Peru.

As a general rule, foreign arbitration awards are recognised unless:

(a) the parties to the agreement under the laws applicable to them were under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of the country where the award was granted;

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In liquidation scenarios, secured credits shall be paid with the proceeds of the foreclosure of their respective collateral, unless such collateral has been sold and the proceeds have been used to pay labour or alimony claims (if the insolvency is of an individual). In those cases, all the creditors that hold collateral participate *pari passu* in relation to their contribution for payment of the credits ranked above them. If there should be any unpaid remnant, such amount is paid *pro rata* with non-secured claims. In a reorganisation/restructuring process, although priority is preserved, payments will be realised according to the reorganisation plan provisions (i.e. the priority will not apply). If fixed assets are sold during reorganisation, the priority rules for distribution will apply.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Under the Peruvian Insolvency Law, once the debtor files for its insolvency, or is given notice of an involuntary filing, all actions by management (a) during the prior year ("Suspect Period"), and (b) from that date on and until the date the creditors ratify or replace management ("Avoidance Period"), are put under scrutiny with two different tests. These tests may result in such actions being declared void.

The first test covers all actions or transactions, whether for consideration or not, performed during the Suspect Period. These will be declared void if they have a negative impact on the net worth of the company and are not related to the normal activities of the debtor (both requirements shall be met).

The second test covers the following actions by management if they happen during the Avoidance Period: (i) payment of unmature obligations; (ii) payment of mature obligations not made according to their terms; (iii) contracts for consideration that are not in the ordinary course of business; (iv) compensations (set-offs) among mutual obligations with creditors; (v) liens over, or transfers of, property; (vi) liens created in security of obligations incurred prior to insolvency; (vii) foreclosure on liens and attachments; and (viii) mergers/spin-offs if they have a negative impact on the net worth of the insolvent.

The priority ranking applicable in Peru is: (i) labour claims (included pension claims); (ii) alimony claims (applicable only when the insolvent is an individual); (iii) secured claims, including attachments and seizures; (iv) tax claims; and (v) non-secured claims.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Banks and insurance companies are subject to a different insolvency regime. Pursuant to the Peruvian Banking Law, the banking regulator ("SBS" for its acronyms in Spanish) has the power to interrupt the operations of a bank in order to prevent it from, or to control and reduce the effects of, a bank failure. Either of these actions, depending on the event, must be taken upon the occurrence of certain events, including: (a) suspension of payments; (b) repeated failure to comply with instructions from the SBS or the Central Bank; (c) repeated violation of the Peruvian Banking Law or the bank's by-laws; (d) unauthorised or unsound management; or (e) deficit of regulatory capital (to the extent that if it is in excess of 50%, then an Intervention is mandatory). Less drastic measures, such as (i) placing additional requirements, (ii) ordering a capital increase or an asset divesture, or (iii) imposing a financial restructuring plan, may be adopted by the SBS when the situation allows for them.

An Intervention may halt a bank's operations up to 45 days, which may be extended for a second period of up to 45 additional days, during which time the SBS may institute measures such as (a) cancelling losses by reducing reserves, capital and subordinated debt, and (b) segregating certain assets and liabilities for transfer to another financial institution. After an Intervention, the SBS will proceed to dissolve and liquidate the bank unless the bank merges with another acquiring institution or another recovery measure is adopted.

Beginning on the date on which a resolution of the SBS subjecting a bank to an Intervention regime is issued, and continuing until such Intervention is concluded (which period ends when the liquidation process begins), the Peruvian Banking Law prevents any creditor of the bank from: (a) initiating any judicial or administrative procedure for the collection of any amount owed by the bank; (b) enforcing any judicial decision rendered against the bank to secure payment of any of its obligations; (c) constituting a lien or attachment over any of the assets of the bank to secure payment of any of its obligations; or (d) making any payment, advance or netting payment obligations or assuming any obligation on behalf of the bank, with the funds or assets that may belong to it and are held by third parties, except for: (i) the netting of payment obligations that are made between regulated entities of the Peruvian financial system and insurance systems; and (ii) under certain circumstances, the netting of payment obligations arising from repurchase agreements and derivatives transactions entered into with local or foreign financial and insurance institutions.

During liquidation, claims of bank creditors rank as follows:

First order – Labour claims:

1st. Employee remunerations.

2nd. Social benefits, contributions to the private and public pension system and other labour claims against the bank accrued until the date when the dissolution is declared, retirement pensions or the capital required to redeem those pensions or to secure them by purchasing annuities.

Second order:

Claims for bank deposits and other types of saving instruments provided under the Peruvian Banking Law, in the portion not covered by the Deposit Insurance Fund.

Third order – Taxes:

1st. Claims by the Peruvian social security administration (*EsSalud*) related to health care benefits for which the bank is responsible as employer.

2nd. Taxes.

Fourth order – Unsecured and non-privileged credits:

1st. All unsecured and non-privileged credits against the bank, ranked on the basis of (i) the date they were assumed or incurred by the bank whereby obligations assumed or incurred on an earlier date shall rank senior in right of payment to obligations assumed or incurred by the bank at a later date, and (ii) obligations assumed or incurred by the bank on a date that cannot be determined shall rank junior in right of payment to all the obligations comprised in (i) above and *pari passu* among themselves.

2nd. The legal interests on the bank's obligations that may accrue during the liquidation.

3rd. Subordinated debt.

Except for unsecured and non-privileged credits, all claims within an order will be ranked *pari passu* among themselves. Each category of creditors will collect in the order indicated above, whereby distributions in one order will be subject to completing full distribution in the prior order.

Any security interest created before the issuance of the resolution declaring the bank's dissolution and the initiation of the liquidation process shall subsist in order to guarantee the obligations it secures. The secured creditors shall retain the right to collect from the proceeds of the sale of the collateral, on a preferred basis (except with respect to labour claims and savings, which are privileged claims), subject to certain rules established under Article 119 of the Peruvian Banking Law.

Peruvian banks are not subject to the regime of insolvency and bankruptcy otherwise applicable to Peruvian corporations in general.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Different types of securities would be subject to different regimes. Mortgages, for securing real estate assets only, shall always be enforced through court proceedings while pledges (for securing movable assets) may contain an agreement between pledger and beneficiary to have an out-of-court foreclosure process. Usually, an out-of-court foreclosure would be much faster than a court proceeding.

Another mechanism for securing assets under Peruvian law is the guaranty trust. Trusts are bankruptcy remote vehicles and can hold different types of assets such as any kind of movable assets, including flow of funds and bank accounts, and real estate assets as well. A trustee must be responsible for holding and administering the assets in accordance to a trust agreement, which makes this structure more expensive.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Peru?

Submission to a foreign court is valid and enforceable under the laws of Peru. In this respect, article 2060 of CC provides that the election of a foreign tribunal under an agreement with respect to patrimonial (monetary) or economic actions will be valid and enforceable under Peruvian law as long as such actions are not referred to matters in which Peruvian Courts have exclusive jurisdiction (i.e. when the dispute refers to real property rights or civil actions resulting from crimes or misdemeanours executed in Peru, or with effects produced in Peruvian territory).

There is no specific prohibition of non-exclusive jurisdiction agreements in Peruvian law. Considering that it is valid to agree an applicable jurisdiction different than the courts of Peru, we understand that parties could agree that jurisdiction (local or foreign) may be defined by the plaintiff. The only limit applicable to this kind of agreement will be the exclusive jurisdiction matters mentioned in the preceding paragraph. However, note that, although there is some experience in the drafting of commercial agreements in this sense, there is no experience regarding the enforceability of that kind of agreements.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Peru?

There is no sovereign immunity in Peru.

10 Other Matters

10.1 Are there any eligibility requirements in for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Peru need to be licensed or authorised in Peru or in their jurisdiction of incorporation?

In Peru it is not necessary to obtain an authorisation from the SBS or from any governmental entity, in order to provide credit in favour of Peruvian citizens or residents, individuals or companies. According to article 11 of the Peruvian Banking Law, any person willing to

enter into the business of banking in Peru shall hold an authorisation from the SBS; however, the business of banking has been defined as financial intermediation, meaning the activity of receiving funds from the public (i.e. taking deposits) AND granting loans with such funds. Therefore, any entity, such as foreign bank or foreign non-banking entity, may grant loans to Peruvian residents without restriction whatsoever.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Peru?

There is nothing that comes to our mind that has not already been covered in this chapter.

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Miranda & Amado is a full-service Peruvian law firm with an international outlook. A market leader across a range of practice areas, the firm is renowned for its expert handling of highly sophisticated transactions and cross-border deals for a predominantly multinational clientele.

The firm has won Peru Law Firm of the Year and Client Service Award at the Chambers Latin America Awards and is the only Peruvian firm to have ever been nominated for Latin American law firm of the year. Miranda & Amado covers all areas of the law while maintaining its boutique approach to highly sophisticated matters in electricity and gas, telecoms, mining, infrastructure, real estate and banking and finance. Expertise in these industries is well supplemented by market leading practice groups in corporate finance, M&A, litigation, labour, tax and competition.

The firm takes pride in having the right balance of experience and youth. A high proportion of the firm's talented lawyers studied at US and UK law schools and have worked at some of the best law firms in New York, Chicago, Washington, D.C. and London.

Puerto Rico

José Fernando Rovira Rullán

Ferraiuoli LLC

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Puerto Rico?

Commercial and consumer lending has seen a reduction in recent years due to the general economic downturn. Activity in the lending markets continues, albeit at lower volumes and somewhat driven by opportunity funds that have acquired loans in bulk from local banks. Local lending alternatives are limited as a result of (A) the assisted closure by the Puerto Rico Office of the Commissioner of Financial Institutions ("PROCFI") and the United States Federal Deposit Insurance Corporation ("FDIC") of three local banks during the second quarter of calendar year 2010, (B) the sale of the Puerto Rico operation of a multinational Spanish banking group during the fourth quarter of calendar year 2012, and (C) the expected assisted closure by the PROCFI and the FDIC of a fourth local bank during the first quarter of calendar year 2015. Though representing at present a small market share, it is noteworthy, however, that several well-capitalised opportunity funds and emerging institutions have commenced operations in Puerto Rico in recent years.

1.2 What are some significant lending transactions that have taken place in Puerto Rico in recent years?

On March 21, 2013, the Luis Muñoz Marín International Airport Public-Private Partnership Transaction came to a successful completion with the project's financial closing. The local component of the financial closing took place in Ferraiuoli and secured crucial funding for the Highstar Capital and Grupo Aeroportuario del Sureste-led Aerostar Airport Holdings, LLC. Ferraiuoli's multi-disciplinary practice was involved in all aspects of the financial transaction, which included (A) the re-financing of a portion of the leasehold fee and certain other costs and expenditures through the issuance and sale of senior secured notes in the aggregate principal amount of $350 million, and (B) the financing of certain other costs and expenditures through a senior secured term loan commitment in the aggregate principal amount of $50 million and a revolving facility in the aggregate principal amount of $10 million.

On September 22, 2011, the Abertis and Goldman Sachs Infrastructure-led Autopistas Metropolitanas de Puerto Rico closed a significant financing for the 40-year PR-22 and PR-5 real toll concession. The $1.136 billion financing is split between (A) a $750 million club loan with a seven-year bullet maturity, and (B) $386 million in equity. The aforementioned financing was also conducted within the parameters of the Puerto Rico Public-Private Partnerships Act and benefited from the active involvement of attorneys currently working for Ferraiuoli.

While other significant lending transactions have certainly taken place in Puerto Rico in recent years, the above referenced transactions are probably the most significant and groundbreaking deals completed to date.

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)?

Except otherwise restricted or limited in the company's governance documents, a company can guarantee borrowings of one or more other members of its corporate group. There is no statutory legal restriction or limitation in this respect.

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 guarantee will be effective and enforceable against the company if approved by the company in accordance with the company's governance documents.

2.3 Is lack of corporate power an issue?

Yes. The company needs to act and remain in good standing and in compliance with its charter and its internal governance documents. A guarantee authorised with insufficient corporate power could potentially render the same ineffective and unenforceable.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

The effectiveness and enforceability of a guarantee issued by a non-public corporation is generally not contingent to the consent or approval of, or the filing or registration with, any Puerto Rico governmental authority. Note, however, that any requirements of this nature need to be nonetheless examined on a case-by-case basis insofar as the same may vary depending on the type of legal entity issuing the guarantee and its internal governance mechanisms.

An opinion is generally obtained at closing from counsel to the loan parties confirming that neither the execution and delivery the guarantee, nor the consummation of the transactions contemplated thereunder, requires the consent or approval of, or any filing or registration with, any governmental authority except for those consents, acknowledgments and approvals which have been obtained and those notices which have been given on or prior to closing.

As stated in question 2.2, a guarantee will generally be effective and enforceable against the company if approved in accordance with the company's governance documents.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no statutory limitations imposed on the amount of a guarantee by reason of the net worth, solvency or similar criteria of the guarantor.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no statutory exchange controls or similar obstacles to the effectiveness and enforcement of a guarantee.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

There are infinite numbers of types of collateral as virtually anything can be used for such purpose as long as it is acceptable to the secured party. The most common types of collateral include real estate, equipment, inventory, accounts receivable, contracts, general intangibles and fixtures.

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 manner in which to perfect a lien or security interest varies depending on asset type.

In the context of personal property, a modified version of the United States Uniform Commercial Code Revised Article 9 governs. While most personal property collateral could be covered under a single blanket-lien Security Agreement, it is advisable for certain types of collateral, such as deposit accounts and life insurance, to prepare separate asset-specific Security Agreements.

In the context of real property, the execution of a Deed of Mortgage before a licensed Puerto Rico notary public together with the compliance with numerous substantive and procedural formalities and its recordation in the Puerto Rico Registry of the Property is obligatory for the creation of a mortgage lien.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

In the context of personal property, such as machinery and equipment, a modified version of United States Uniform Commercial Code Revised Article 9 governs, which generally requires the execution of a Security Agreement and the filing of a UCC-1 Financing Statement at the applicable filing office.

In the context of real property, it is obligatory to create a mortgage lien via the execution of a Deed of Mortgage before a licensed Puerto Rico notary public together with compliance with numerous substantive and procedural formalities and its recordation in the Puerto Rico Registry of Property.

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 can be taken over account receivables by the execution of a Security Agreement and the filing of a UCC-1 Financing Statement at the applicable filing office. Account debtors only need to be notified of the granting of the security interest at the time of the enforcement of the same.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Collateral security can be taken over cash deposited in a bank account by the execution of a Security Agreement and an acknowledgment of control of deposit issued by the depositary bank, usually in the form of an Account Control Agreement.

3.6 Can collateral security be taken over shares in companies incorporated in Puerto Rico? 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 certificated form in companies incorporated in Puerto Rico by the execution of a Security Agreement and the delivery of control over the pledged shares. A secured party obtains control over a certificated security which is delivered to the secured party in bearer or registered form and, if in registered form, is either endorsed to the secured party or in blank or is registered in the name of the secured party in the books of the issuer.

Collateral security can also be taken over uncertificated shares in companies incorporated in Puerto Rico by the execution of a Security Agreement and (A) the filing of a UCC-1 Financing Statement at the applicable filing office, or (B) by exercising control over the uncertificated shares. The secured party obtains control either by becoming the entitlement holder or, as has increasingly become the common practice, by entering into an Account Control Agreement with both the securities intermediary and the debtor pursuant to which the securities intermediary agrees that it will comply with all entitlement orders given to it by the secured party without further consent from or action by the debtor. It is important to reference that control takes precedence over the filing. Thus, if a secured party obtains a perfected security interest in the uncertificated shares by control after the debtor has already granted a security interest which was perfected by filing, the later security interest, perfected by control, will have priority over the earlier (filed) security interest.

Likewise, if any of the above operations are to be governed under foreign law, in such case the parties would need to comply with both the laws applicable to Puerto Rico and the laws of the foreign jurisdiction in question.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Collateral security can be taken over inventory by the execution of a Security Agreement and the filing of a UCC-1 Financing Statement in the applicable filing office.

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 proper corporate approval in accordance with the company's governance documents, a company can grant a security interest in order to secure its obligations under the scenarios contemplated above.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The answer to this question varies depending on the type of collateral subject of the security.

In the context of personal property collateral capable of being perfected by the filing of a UCC-1 Financing Statement, the filing of the same with the Commercial Transactions Registry of the Puerto Rico Department of State ("PRDOS") costs at present $25.00 per each registration.

On the other hand, in the context of real property collateral, perfecting a security interest in real property entails the payment of (A) internal revenue and notarial tax stamps, (B) legal assistance stamps, (C) recordation and filing vouchers, and (D) a notarial tariff, all of which are of a statutory nature and calculated based on the value of the transaction.

In general terms, internal revenue and notarial tax stamps, legal assistance stamps and recordation and filing vouchers can be estimated in the aggregate at roughly 0.56% of the value of the transaction. Likewise and subject to certain additional restrictions and thresholds, the notarial tariff can be negotiated by agreement between the parties and the notary public, but the same can never be more than 1% or less than 0.50% of the value of the transaction, and can never be less than $250.00.

Moreover, loan and security documentation notarised by a licensed Puerto Rico notary public also entails the payment of $5 internal revenue stamp per 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?

In general terms, the creation of a security interest on personal property does not involve a significant amount of time or expense. The creation of a mortgage on real estate can be more costly, depending on the complexity of the title and the amount of the mortgage. Please refer to our response in question 3.9 as to the costs and expenses of security over personal property collateral *vis-à-vis* real property collateral.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

In general terms, only debtor consent is necessary for the creation of a lien or a security interest. Note, however, that certain types of collateral, such as (A) receivables payable by an agency of the local or federal government, (B) airplanes and vessels, and (C) dairy produce quotas, among a few others, may require compliance with certain specific filing, notice and/or consent requirements.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No special priority or other concerns arise solely by reason of the borrowing to be secured being a revolving credit facility.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

All types of documents, both private and public, generally require execution before a licensed Puerto Rico notary public. In the case of mortgages, these need to be executed in deed form before a licensed Puerto Rico notary public and following numerous substantive and procedural formalities.

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?

Except if the company's organisational and/or governance documents dictate otherwise, there are no statutory prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance the aforementioned acquisitions.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Puerto Rico 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 syndicated credit facilities, which are fairly common in Puerto Rico in the context of larger credit facilities, an administrative and collateral agent usually acts on behalf and for the benefit of all participating lenders.

5.2 If an agent or trustee is not recognised in Puerto Rico, 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?

While certain jurisdictions of the United States of America recognise the concept of a security trust, that is not the case in Puerto Rico.

5.3 Assume a loan is made to a company organised under the laws of Puerto Rico and guaranteed by a guarantor organised under the laws of Puerto Rico. 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?

Puerto Rico loan documentation generally includes specific assignment provisions that enable the original lender to transfer the loan to a third party. Besides compliance with any transfer requirements provided in the applicable loan documentation and the completion of any necessary endorsements, there are no special statutory requirements necessary to make the loan and guarantee enforceable by the transferee.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest payments to domestic lenders are not subject to any Puerto Rico withholding requirements. Interest payments to foreign lenders are not subject to any Puerto Rico withholding requirements unless the borrower and the lender are related parties, in which case the interest payments are subject to a 29% withholding tax.

The above rules would also apply to the portion of a claim under a guarantee or security interest that consists of accrued but unpaid interest. The portion of the claim representing principal would not be subject to any Puerto Rico withholding requirements.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Foreign lenders are not subject to Puerto Rico income taxes on their interest income unless (A) the loan is attributable to a Puerto Rico office or place of business, or (B) the lender and the borrower are related parties.

6.3 Will any income of a foreign lender become taxable in Puerto Rico solely because of a loan to or guarantee and/or grant of security from a company in Puerto Rico?

Income generated by a foreign lender is not taxable in Puerto Rico solely because of a loan to or guarantee and/or grant of security from a company in Puerto Rico.

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. Please refer to question 3.9 for an overview of the principal costs and expenses applicable to Puerto Rico loan and security documentation.

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 a borrower company by reason of one or more lenders being are organised under the laws of a jurisdiction other than Puerto Rico.

7 Judicial Enforcement

7.1 Will the courts in Puerto Rico recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Puerto Rico enforce a contract that has a foreign governing law?

Puerto Rico courts generally find choice of law clauses valid. However, the choice of law clause must meet the following two requirements: (A) the chosen state has a substantial relationship with the parties or the transaction and there is a reasonable basis for the parties' choice; or (B) application of the law of the chosen state would not be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue.

7.2 Will the courts in Puerto Rico 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 United States Congress has mandated that federal courts grant full faith and credit to the judgments of all states, territories and possessions of the United States, including Puerto Rico. The method by which a judgment of another state is recognised and enforced, is determined by the local law of the enforcing state. However, foreign or state court judgments do not automatically operate in Puerto Rico. In order to be recognised and enforced, *exequatur* proceedings are necessary. Under Puerto Rico law, local courts must give full faith and credit to judgments from Courts in the United States when the following standards apply: (A) that the judgment has been issued by a state court with jurisdiction over the person and the subject matter; (B) that the state court that issued the judgment observed due process of law; and (C) that the judgment has not been obtained by fraud. The court must give full faith and credit to state court judgments when the *exequatur* proceedings factors are met.

In cases involving judgments by non-United States jurisdictions, a more complex test applies. In the absence of treaty or special legislation, foreign judgments may be validated in Puerto Rico only if (A) the foreign judgment was issued by a court with jurisdiction over the person and the subject matter, (B) the judgment was entered by a competent court, (C) due process of law was observed, (D) the justice system under which the judgment was rendered is characterised by its impartiality and absence of prejudice against foreigners, (E) the judgment is not contrary to Puerto Rico public policy or of the selected forum, and (F) the judgment was not procured by fraud.

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 Puerto Rico, 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 Puerto Rico against the assets of the company?

In general terms, a complaint where the defendant has no defence (and none are raised) can be resolved, and judgment obtained and enforced, in a period of five to nine months In order for a foreign judgment to be enforced, the interested party must commence *exequatur* proceedings in a court in Puerto Rico. Such proceedings can take anywhere from four to six months, without taking into account the time to obtain real property through the public sale process (depending on the municipality, another two 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?

Real property that is duly registered and serves as collateral security must be sold at a public auction in Puerto Rico which significantly impacts the timing and value of enforcement. No regulatory consent is needed for enforcing collateral security. However, in cases where the collateral security is a residential property that is the principal dwelling of the debtor, creditor and debtor must participate in mandatory mediation.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Puerto Rico or (b) foreclosure on collateral security?

Subject to certain exceptions and in order to file suit in local Puerto Rico courts (non-federal), a foreign corporation or a claimant who does not reside in Puerto Rico must pay a non-resident bond of at least $1,000.00. Court proceedings are stayed until the non-resident bond is submitted.

7.6 Do the bankruptcy, reorganisation or similar laws in Puerto Rico provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

The United States Bankruptcy Code ("Bankruptcy Code") has full force and effect in Puerto Rico, except when the debtor is the Commonwealth of Puerto Rico, its instrumentalities, corporations or municipalities. The Bankruptcy Code creates a forced moratorium on the creditor's right to enforce and execute his security interest. Upon the filing of a bankruptcy petition the lender needs to seek authorisation from the bankruptcy court to exercise any right to enforce a collateral security. Please refer to our response to question 8.1 for further insight as to the ability of a lender to enforce its rights as a secured party over the collateral security.

7.7 Will the courts in Puerto Rico recognise and enforce an arbitral award given against the company without re-examination of the merits?

Puerto Rico courts have adopted the standard of judicial restraint not to interfere with arbitration awards except when the parties agreed that the award must be issued according to law, in which case the court may correct errors of law in regard to the applicable law. In such a case, judicial review of arbitration awards in Puerto Rico is akin to judicial review of administrative decisions. Despite such judicial restraint a Puerto Rico courts may entertain a challenge of the award based on: (A) fraud; (B) misconduct; (C) due process violations; (D) violation of public policy; (E) lack of jurisdiction; and (F) because the award does not resolve all issues submitted for resolution.

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 automatic stay contemplated under the Bankruptcy Code prohibits any creditor from taking aggressive action against the debtor after the filing of a bankruptcy. In order for a secured creditor to enforce its rights, it must file a "motion for relief from the stay" in order to get permission to take various actions against the collateral held by the bankruptcy debtor.

In general terms, a secured creditor is entitled to relief from the stay only if it can show: (A) good cause, including lack of adequate protection for the secured creditor; or that (B) the debtor does not have equity in the property and it is not necessary for an effective Chapter 11 reorganisation under the Bankruptcy Code.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The power to avoid preferential transfers under section 547 of the Bankruptcy Code serves two broad purposes: (A) it prevents creditors from exerting undue pressure on struggling debtors; and (B) it discourages a debtor from engaging in unusual acts that either favour certain creditors or otherwise hasten the debtor's bankruptcy. To prevent this result, the Bankruptcy Code exempts certain transfers made within the ordinary course of the debtor's and creditor's business.

To prove the "ordinary course of business defence" the creditor must show that the preference payments were made in the "ordinary course of business" between the creditor and the debtor. Typically, this is done by showing that the same were: (A) not the result of any overt collection activity on the part of the creditor; and (B) were made in a similar amount of time and under similar terms and conditions as previous, non-preference period payments made by the debtor to the creditor. Alternatively, if the payments were not made in the ordinary course of business between the parties, the creditor can show that the preference payments were made on terms and conditions prevalent in the respective industry. All payments that are shown to have been made in the ordinary course of business are not avoidable as preferences and need not be repaid.

The Bankruptcy Code establishes a ninety-day period prior to the filing of a bankruptcy petitions as a preferential transfer period. In certain cases, such term can be extended to two years under the Bankruptcy Code and further extended according to available remedies in the state law.

The Bankruptcy Code also establishes different types of priority claims such as: domestic support obligations; extensions of credit in an involuntary bankruptcy case; wages/salaries/commissions; contributions to employee benefit plans; claims of certain farmers and fishermen; deposits by individuals, taxes and debt owed to governments; commitments to maintain capital of an insured depository institution; and claims for death or injury while the debtor was intoxicated. These priority claims are also subject to "the ordinary course of business defence". Therefore, in order to be avoided as preferential transfers, the transactions would have occurred during the preference period and outside the normal relations of the creditor and the debtor.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The Bankruptcy Code precludes certain entities from qualifying as debtors in bankruptcy proceedings. Entities from highly regulated industries such as domestic insurance companies, banks, savings banks, cooperative banks, savings and loan associations, building and loan associations, homestead associations, credit unions, or industrial banks or similar institutions have other federal statutes which control their restructuring; for these companies the Federal Deposit Insurance Act controls.

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 bankruptcy proceeding with an automatic stay order in effect on the debtor's assets precludes the creditor from seizing such assets. However, if the bankruptcy case is dismissed or the stay is lifted, the creditor can pursue the execution of its collateral. If the collateral is abandoned by the bankruptcy trustee, the creditor would also have certain rights over the collateral. It will depend on the chapter in which the bankruptcy is filed and the rights of the creditor under other applicable statutes outside of bankruptcy and court proceedings.

Moreover, depending upon the nature of the collateral and the provisions of the applicable security documents, creditors may be permitted to exercise self-help remedies, some contemplated under our modified version of the United States Uniform Commercial Code.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Puerto Rico?

It is well established that forum selection clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances. More specifically, a forum selection clause should be enforced unless the resisting party can show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching or that enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Puerto Rico?

Puerto Rico can waive its immunity in three ways: (A) by a clear declaration that it intends to submit itself to the jurisdiction of a federal court; (B) by consent to or participation in a federal programme for which waiver of immunity is an express condition; or (C) by affirmative conduct in litigation. But Puerto Rico's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts.

10 Other Matters

10.1 Are there any eligibility requirements in Puerto Rico 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 Puerto Rico need to be licensed or authorised in Puerto Rico or in their jurisdiction of incorporation?

If a lender intends to become involved in any *consumer* lending activities within the jurisdiction of Puerto Rico, such lender must first obtain an authorisation from the PROCFI. To the extent that such lender is qualified as a national association under a United States federal charter, the process for obtaining such an authorisation from OCFI should be fairly simple and expedient. As part of the aforementioned process, such lender will likely be required by PROCFI to become authorised to do business in Puerto Rico at the Corporations Registry of the PRDOS.

If a lender intends to become involved in any *commercial* lending activities within the jurisdiction of the Commonwealth of Puerto Rico, the licensing requirements are more lax. Depending on the nature and volume of the transactions proposed to be transacted within Puerto Rico's territorial boundaries, authorisation from PROCFI and registration with the PRDOS may not be required.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Puerto Rico?

The answers provided above properly addresses the main material considerations for lending transactions governed under Puerto Rico law.

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Mr. Rovira Rullán is a Capital Member of Ferraiuoli, Chair of its Commercial Lending Practice Group and member of its Recruiting Committee. Prior to joining Ferraiuoli, Mr. Rovira-Rullán worked for Puerto Rico's Thirteenth (13th) Legislative Assembly as Special Advisor to the Director of the Office of Legislative Services where he collaborated closely with lawmakers and other executive personnel and was actively involved in the legislative process.

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Mr. Lamoutte joined Ferraiuoli on May 5, 2014 as a Senior Member of the firm's Corporate Department. Mr. Lamoutte's main areas of practice are banking and finance, real estate, mergers and acquisitions, corporate and construction lending, mortgage and Registry of Property law, and UCC secured transactions.

As a business lawyer, Mr. Lamoutte principally focuses his transactional practice in the representation of major commercial lenders, real estate developers and business owners, both foreign and domestic, and also advises on business and regulatory matters. He also handles debt restructurings, collections, workouts and foreclosures.

Over the course of his career, Mr. Lamoutte has conducted hundreds of real estate and commercial financing transactions involving multiple types of collateral.

FERRAIUOLI LLC

Ferraiuoli LLC is one of the leading corporate law firms in Puerto Rico. The firm provides value added comprehensive legal advice to industry-leading private and publicly owned companies on corporate, real estate and finance, mergers and acquisitions, intellectual property, labour and employment, energy and land use, litigation, tax and other regulatory matters.

Ferraiuoli LLC has received international recognition in the legal field by Chambers & Partners, a London-based legal directory firm that publishes, on an annual basis, the leading directories of the legal profession identifying the world's top lawyers and law firms. In its 2015 Latin America and Global edition, Chambers ranked Ferraiuoli LLC as a leader in Corporate, Environment, Intellectual Property, Labour and Employment, Real Estate, and Tax and several firm attorneys were named "Leaders in their Fields" by the publication. Ferraiuoli LLC has further been honoured as one of Puerto Rico's outstanding firms by Chambers & Partners as it was shortlisted as one of the candidates for Puerto Rico's Law Firm of the Year for the years 2011-2014.

Russia

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Russia?

Lending markets in Russia have been under considerable pressure since the political circumstances in 2014 triggered the financial crisis in Russia. Many projects have been suspended or cancelled. Most of the banks changed their lending policies; some of them even limited the corporate lending programmes. In early 2015 the lending markets are resurging, although the situation is still far from clearly positive. At the same time it means that corporate lending has never been so sought after by the businesses in Russia.

From a legal stand point, recent years have been a time of major reform, which have been aimed at improvement of legislation. Some of them are still in progress. The Russian Civil Code has been amended in 2014, the new rules on pledge taking effect in July 2014. Pledge of receivables, pledge of bank account, a pledge register for movable property and many other mechanisms are now described in the text of the Civil Code in detail.

There has been a major issue with pledges: pledged assets had to be described in detail for the pledge to be valid and enforceable. There have been many cases when a pledge was challenged due to the fact that the assets were not determined. The law is now more reasonable and allows for flexibility: all the assets or its part can be a collateral and even the future assets of the company can be included into the contract, with reasonable description.

Pledge managers have been introduced into the Civil Code, which is important for syndicated lending.

A *register of notices of pledge of movables* has been created, enabling pledgees to ensure their rights with respect to third parties.

1.2 What are some significant lending transactions that have taken place in Russia in recent years?

Influenced by the 2008 financial crisis and the political and economic circumstances in and around Russia in 2014, the share of lending transactions in Roubles and the participation of private banks has increased in the lending market in Russia. For example, a private bank, Promsvyazbank, financed Uralkalyi, a major Russian company and the world's largest producer of potassium fertilisers, for USD 250 million. The same amount was credited to Sibur, a major oil company.

Uralkalyi has also received syndicated credit from Commerzbank, ING Bank, Nordea Bank, Societe General and Unicredit of USD 450 million and is supposed to receive a new syndicated credit of approximately USD 500 million from foreign banks in early 2015.

The mostly state-owned Sberbank organised a bridge loan for a Gazpromneft & Novatek joint venture of approximately USD 3 billion to increase participation in Italian oil company Eni, the final goal being rights to the subsoil use in Yamal-Nenetsk Autonomous Region.

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)?

First of all it is necessary to mention that there are two different types of guarantee in Russia. The first is a surety, when the guarantor becomes liable together with the party to the contract (borrower) for the performance of the contract. The second is a bank guarantee (can be issued by a bank only) which is to be replaced from 1st June 2015 by the "independent guarantee" (can be issued by any commercial organisation), under which the guarantor shall pay the agreed amount in case the creditor claims for the money and which is independent from the main obligation.

As a general rule any company can provide any of the above mentioned guarantees, including a member of the group.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

There is no special regulation on enforceability or director liability if only a small benefit to the guarantor can be shown.

However, according to the general rules and principles of law a director of a company is to act in good faith to the benefit of the company otherwise the director can be liable for the damages incurred.

There are enforceability concerns only if the guarantee is challenged in the court (e.g. if during the bankruptcy proceedings the guarantee is deemed as violating the rights of creditors).

2.3 Is lack of corporate power an issue?

The aspect of lack of corporate power due to the limitations of legal capacity is important only from a strictly formal point of view. The

company can limit its legal capacity and its business purposes in the charter. The deal can be challenged in the court if the other party knew or should have known about such limitations.

However, in practice the companies usually do not limit their legal capacity in their charters/by-laws/articles of association. This can be different in companies which are owned by the state: such companies may have special purposes and may have limited powers.

It is much more common for there to be a lack of corporate approvals (please see question 2.4 for details).

One should bear in mind that in September 2014 the *Four-Eyes Principle* has become available to companies: now there can be more than one director (CEO) in the company. The charter may provide that the directors act jointly (therefore two signatures are required) or separately (therefore only one signature is required). The directors may have different powers that should be set forth in the charter of the company. To check the number of directors and their names one can address the Unified State Register for Legal Entities, which is also available online at www.egrul.nalog.ru (in Russian). To check their powers, the charter should be analysed.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Yes, corporate approvals may be (and, in large-scale transactions, usually are) necessary. There are generally three types of transactions approvals that may be required:

- for a *large-scale* (major) transaction (a transaction which amounts to 25% or more of the net assets of the guarantor) the approval of the board of directors or the shareholders' meeting may be necessary;
- for a transaction which may amount to less than 25% of the net assets of the company, but the approval of which is required according to the charter of the company, the approval of the board of directors or the shareholders' meeting may be necessary; and
- for *"interested-party" transactions* (a transaction which may result in the benefit of the affiliates of the guarantor) the approval of the board of directors or shareholders which are not interested in the transaction may be necessary.

To make sure the deal will not be challenged in court, one should check the charter of the company, check the balance sheets and, if necessary, receive the necessary corporate approvals.

There is no special governmental control over guarantees and no consents or filings are required.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There is no *ex ante* control or limitations imposed on the amount of the guarantee. However, *ex post*, the guarantee can be challenged in the bankruptcy proceedings if it violates the rights of creditors.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There is no special regulation on the enforcement of a guarantee with regard to exchange control or similar. However, there are certain bank formalities that a company shall comply with according to the currency control.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

According to the new text of the Russian Civil Code effective from 1 July 2014 any assets, objects and rights can be used as collateral (pledge) with some minor exceptions (e.g. assets which cannot be foreclosed and rights which are inseparably connected with the personality of the creditor, such as alimony and others, cannot be used as collateral).

In fact movables and immovables, rights to receivables, bank accounts (including deposits), stock, bonds, rights of participants of the companies (shareholders' rights) and exclusive rights to intellectual property can be used as collateral. Pledge of immovable property is also called a "mortgage" and is traditionally regarded as one of the most reliable types of security.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

From 1st January 2015 the amendments regarding the pledge of all assets entered into force, making it possible for entrepreneurs to provide all assets or its part or certain types of assets (e.g. all vehicles or all equipment) as collateral. However, these provisions are still to be tested in practice and the rules on crystallisation of the assets shall be created through practice.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. The agreement shall be in written form and in some cases may require notarisation. A pledge of real property (land, buildings) shall be registered in the Register for Rights to Immovables (*Государственный реестр прав на недвижимое имущество и сделок с ним*), otherwise it shall have no legal effect with respect to third parties.

Pledge of machinery and equipment shall usually be deemed as pledge of movables. The agreement shall be in written form and may require notarisation in some cases. The pledge of movables can be registered in the electronic register for movable property which ensures that third parties are informed about the pledge even if they acquire rights to them. This register has been introduced in mid-2014 and is being maintained by the notaries public.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, pledge of receivables is possible and, after the amendments of mid-2014, more flexible. There are certain limitations when pledge of receivables is impossible. For example, if under the agreement between the debtor and the creditor, the debt is a collateral, pledge of receivables is forbidden without the consent of the debtor.

The debtor shall be notified of the security.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, the new text of the Russian Civil Code provides for such an instrument. Previously, pledge over bank accounts (or deposits) has not been forbidden, but there was not enough of a legal basis for this to be used in practice. After the introduction of the new provisions on pledge in summer 2014, some of the banks have commenced preparation of their drafts of agreements on pledge of bank account. However, many banks are still afraid of using this because they have been used little in practice.

For such pledge a special pledge account is necessary. There is currently a problem that, according to clarifications by the Russian Central Bank, a company cannot simply change the status of its current account into a pledge account, but has to open a new account.

An agreement between the pledgor and the pledgee is required in written form (and sometimes requires notarisation). The bank has to be notified of the pledge (a copy of the agreement shall be sent), after which the agreement becomes effective. If the bank is the pledge, the agreement becomes effective after signing thereof.

3.6 Can collateral security be taken over shares in companies incorporated in Russia? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

There are two types of pledge over shares in companies: pledge over shares in joint-stock companies (JSC or, in Russian, *AO*) and pledge of shares (participation interests) in limited liability companies (LLC or, in Russian, *OOO*). The shares are in non-documentary form.

Pledge over shares (agreement in written form is required, though notarisation is usually not required) in a JSC shall be registered by the special company which maintains the register of the JSC. As a general rule, the shareholder reserves the right to vote.

Pledge over shares in an LLC shall be notarised. A simple majority (or even more, if provided by the charter) of votes of other shareholders is necessary for the pledge to be valid. Pledge is registered in the Unified State Register for Legal Entities and the LLC is notified about the pledge.

For practical reasons it is not recommended to use foreign law as governing law for the agreement, but there are such cases (although not common) in practice.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, it can. A written form of the agreement is necessary (notarisation is usually not required). The value of the pledged inventory shall not be less than that agreed. As a general rule, the pledgor shall maintain the register of such pledged inventory, recording all incoming and outgoing transactions.

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)?

Generally, a company can guarantee both its own debt and the debt of other borrowers and/or guarantors, subject to the limitations described in questions 2.3 and 2.4 above.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

There is no stamp duty in Russia.

The registration fees are moderate and can usually be neglected.

The most significant is the notarisation fee which is calculated from the price of the transaction. Notarisation is necessary when i) the secured obligation had been notarised; ii) the pledge over shares in a limited liability company is in question; and/or iii) the parties agreed to use notarisation (e.g. for a non-judicial procedure of foreclosure, if applicable).

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 the procedure requires a moderate amount of time and expenses. Pledge of movable assets can be done relatively fast and easily. Pledge of immovable assets (and intellectual property), which requires registration in state bodies, may take approximately an additional month. Expenses are usually connected with notary fees.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Usually there are no such consents required (see also questions 2.3, 2.4 and 3.6 above), if the rights of third parties are not considered.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There is an issue of describing the secured obligation in Russia, if such description is not concrete enough. However, in 2014 the law has been amended clearly saying that the pledge of future debt is also possible and the wording of the law is now more flexible for entrepreneurs willing to secure future debt (e.g. in cases involving a revolving credit facility). However, these provisions are yet to be tested in practice.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Written form of the agreement are necessary (in practice this is usually done as a single document, not by means of exchange of the signed copies). Notarisation may be necessary (please see question 3.9 above). An additional counterpart is necessary if the registration is required (for the archives of the registration body).

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?

Currently, there is no special regulation of “financial assistance”

in Russia, as, for example, in Germany. However, the company's CEO may require necessary approvals for the deal. See question 2.4 above for types of approval.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Russia recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Pledge managers were introduced into legislation in June 2014, enabling creditors to choose one of the creditors or a third party as a person who will sign a pledge agreement with the pledgor and/or exercise all rights and duties of the pledgee under such agreement. The legal provisions governing agency relationships (in Russian – *поручение*) are applicable to the duties of the pledge manager, and the relationships between the creditors are governed by the provisions of simple partnerships – unless otherwise provided by the agreement of the parties – or stems from the essence of the obligation. This is yet to be tested in practice.

5.2 If an agent or trustee is not recognised in Russia, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Please see question 5.1 above. Major syndicated lending transactions in Russia have usually been governed by foreign law, although there were examples when the same documentation was used under Russian legislation with the arbitration clause providing Russian state arbitrazh courts as a place for dispute resolution. The situation may change in the future, when practice finds it reasonable to use pledge managers for these purposes. Hopefully, based on the principle of freedom of contract, set forth in the Civil Code and elaborated in the recent clarifications of the former Supreme Commercial Court, the contract for pledge management will include provisions on monitoring the status of the debt, solvency of the debtor, enforcing loan documentation, etc.

5.3 Assume a loan is made to a company organised under the laws of Russia and guaranteed by a guarantor organised under the laws of Russia. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Such transfer is usually done by means of assignment. Generally, the consent of the debtor (guarantor) is not required, unless otherwise provided by the agreement. General recommendations on the form of the transaction and necessary approvals apply.

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, interest payable on loans is regarded as income and is subject to Russian corporate income tax (CIT). If a loan is provided by a resident, it will be included into the tax base for CIT (general rate is 20%). If a loan is provided by a non-resident, it will be charged by the CIT at the rate of 20%, but in certain cases deductions can be made to reduce the taxable sum. Taxation of the proceeds of a claim under a guarantee or the proceeds of enforcing a security generally follows the rules of the main obligation (i.e. only interest is taxable).

International treaties and special regulation may apply in particular cases.

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 special incentives for foreign lenders. No special taxes are provided for purposes of effectiveness or registration.

6.3 Will any income of a foreign lender become taxable in Russia solely because of a loan to or guarantee and/or grant of security from a company in Russia?

Generally, if a company has no representative office in Russia from the standpoint of the tax legislation, it shall not become taxable in Russia solely because of the loan/guarantee/security. However, the interest on the loan may be subject to corporate income tax (see question 6.1 above).

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Generally, notarisation is not necessary. However, the parties may decide otherwise, in this case notary fees may be considerable as they are calculated based on the sum of the transaction. For expenses during pledge agreement execution 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.

Generally, there are no such consequences under Russian law.

7 Judicial Enforcement

7.1 Will the courts in Russia recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Russia enforce a contract that has a foreign governing law?

Yes, generally the courts recognise a foreign governing law, if this does not violate mandatory Russian laws, principles and public order.

7.2 Will the courts in Russia recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

In principle, judgments of foreign courts can be recognised in Russia. However, there are some requirements for this: presence of an international treaty or reciprocity principle. There are no such agreements in pairs Russia-USA and Russia-UK. The principle of reciprocity is quite unreliable, means providing evidence of recognition and enforcement of Russian courts' decisions in foreign jurisdictions and may depend on the political situation. However, should the requirements be met, the court will not re-examine the merits of the case unless public order in Russia is 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 Russia, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Russia against the assets of the company?

Statutory term (which can be prolonged, e.g. if the case is difficult or the notice of a foreign party is required) for the court of 1st instance to issue a decision is 3 months after the claim is filed. It takes an additional month for the decision to enter into force. The minimum time for execution of the decision (if executed through the bank) is approximately 1 week. In practice it takes about 6 months, if there is no appeal, for both options.

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 practice judicial enforcement is often necessary if the debtor does not agree with the claim. In most cases the pledged assets are to be sold via an auction. In 2014, certain amendments have been made to the Civil Code, reducing complexities for the pledgees; however, they are yet to be tested. According to them, entrepreneurs may agree that the pledged assets will be transferred to the pledgee or sold to a third person, the price being not less than the market price.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Russia or (b) foreclosure on collateral security?

Generally, there are no such restrictions.

7.6 Do the bankruptcy, reorganisation or similar laws in Russia provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, there is moratorium on enforcement of lender claims in bankruptcy. Usually the pledged assets can be sold within the final stage of bankruptcy.

7.7 Will the courts in Russia recognise and enforce an arbitral award given against the company without re-examination of the merits?

Russia is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958); therefore, generally, no re-examination of merits is required and the award can be enforced.

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 of the borrower usually means that the collateral security can be enforced when the final stage of bankruptcy commences (receivership). Depending on the type of secured obligation and the type of pledge, the creditor may receive from 70 to 80% of the value of the pledged assets, but in any case not more than the debt.

If the pledge of bank account is considered, there is no need to sell the assets and therefore no expenses for the auction will be deducted from the final sum.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

As indicated in question 8.1 above, secured creditors can receive only up to 70 or 80% of the value of the pledged assets. The rest of the sum is divided between the bankruptcy manager (bankruptcy proceedings expenses, bankruptcy manager fee) and the preferential creditors, such as employees, injured persons, authors, etc.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Legal entities with state participation may be excluded from bankruptcy; special rules apply.

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 is no alternative to judicial enforcement in bankruptcy.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Russia?

Generally, if one of the parties is a foreign legal entity, the court will recognise a party's submission to a foreign jurisdiction.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Russia?

According to the law, the state does not have sovereign immunity if it acts not as a public authority, but as a market player. There is no concept of waiver of sovereign immunity.

10 Other Matters

10.1 Are there any eligibility requirements in Russia for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Russia need to be licensed or authorised in Russia or in their jurisdiction of incorporation?

Almost all types of companies can be a lender, not only banks or credit institutions. However, only entrepreneurs and commercial organisations can be pledge managers (not natural persons).

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Russia?

One of the most important considerations currently are the changes in legislation, which has undergone significant reform. The changes have yet to be put into practice. Moreover, after the 2014 judicial reform when the Supreme Commercial Court has been dismissed and substituted by the Supreme Court with a subdivision for the commercial disputes, there is still no understanding as to whether the courts will maintain the recent flexible and active approach or stick to the formal wording of the law and interpret it conservatively.

Currency exchange rates should be taken into account and special provisions may be necessary to guarantee stability under the contracts.

Finally, it is necessary to remember about formalities described in the sections above (written form, registration and notarisation, if required, corporate approvals in written form), which may seem excessive in a particular situation, but neglect of which may result in long-term court disputes with large amounts of expenses.

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SIROTA & MOSGO

Law Firm

Sirota & Mosgo is a Russian law firm providing legal counsel mostly to foreign corporate clients from Europe and Asia doing their business in Russia.

Deep knowledge of the Russian legal system and a client-oriented approach enable us to advise our clients in the spheres of commercial, corporate and contract law. Sirota & Mosgo's practice covers M&A transactions and public regulation, such as antimonopoly clearance for M&A transactions. Our partners have great experience of successful representation in arbitration and litigation procedures, including arbitration in international commercial arbitration.

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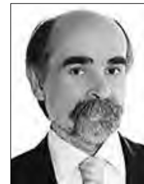
Serbia



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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Serbia?

The lending market in Serbia is dominated by bank lending.

Due to financial crises, Serbia has a problem with high participation of non-performing loans, which, in comparison to the total number of approved loans, constitute 22.5%. This is the main focus of the financial sector, the National Bank of Serbia, the Ministries and the international financial institutions. Per the studies of the National Bank of Serbia, non-performing loans are the result of structural economic problems, but also of bad risk evaluation by the banks.

In view of the abovementioned issues, the banks have taken a more conservative approach to lending with further severe impact on the economy.

Most of the loan products are oriented to liquidity short- to medium-term loans.

1.2 What are some significant lending transactions that have taken place in Serbia in recent years?

The most significant lending transactions relate to Government-backed/securitised projects for public infrastructure as well as to Government-guaranteed loans to public companies. In terms of volume, such loans were mostly given by international financial institutions, and rarely by local banks.

There were a number of project finance ventures with syndicated loans by Serbian banks for the purposes of financing local real estate and/or industrial projects, which could be regarded as successful.

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)?

It is possible for a company to provide such a guarantee. Actually this is usual collateral requested in practice by the banks.

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 related or a non-related, physical and/or legal entity, having capacity to do so, may provide a guarantee for a debtor to a bank. A bank is not entitled to assess the motives of a guarantor for the granting of a guarantee. However, the risk department of a bank has to ensure that a guarantee of a legal person is provided in a proper and legal manner. Also, the warrantor has to have credit capacity to provide the guarantee, i.e. as if it were the main debtor, for the amount of the guarantee.

If a guarantee is granted outside of good legal practice, or if there is a responsibility of a director, or a similar issue (a guarantee made to the detriment of the creditors of the guarantor, etc.), the creditor can conclusively prove absence of knowledge of any such action or circumstance, and the creditor should probably stay on the safe side. Otherwise, if the creditor cannot prove absence of knowledge of such actions or circumstance and/or its prudence in accepting the guarantee, one may not eliminate the risk of concerns and problems in the process of use/enforcement of the guarantee.

2.3 Is lack of corporate power an issue?

In advance of accepting a guarantee, a creditor should check whether the guarantor undertook all legal actions for issuing the guarantee in accordance with the law.

Otherwise, a creditor would run the risk of inability to prove prudence in the process of granting the loan and accepting the guarantee, which would be a risk for the creditor in a potential dispute.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Under Serbian Law, a company granting a guarantee for an amount equal to or higher than 30% of its assets has to have the consent of the shareholders. In this process, dissenting shareholders have the right to request redemption of their shares. In case of a two-tier corporate structure, the taking of credit or the taking or giving of loans or constitution of collateral is subject to prior consent of the supervisory board.

In case the guarantee involves bills of exchange, such bills would have to be registered.

Foreign banking guarantees have to be reported to the National Bank of Serbia.

In case of a resident company borrowing money from a non-resident, the loan would have to be reported to the National Bank of Serbia.

Further, if the guarantor constitutes mortgages and/or pledges, registration in the respective public registers is required.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Net worth, solvency and similar limitations can influence the legal ability to become a guarantor. The banks in Serbia, *de facto*, treat guarantors in the same way as a debtor, i.e. the guarantor needs to provide evidence of its economic capacity.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

If the legal requirements are satisfied, there should be no obstacles in the process of enforcement of a guarantee in cases of cross-border lending. However, one should have in mind that all business transactions involving foreign exchange can be subject to control and inspection by the respective governmental office.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

There are different types of collateral under Serbian law, including but not limited to: mortgage; pledge; bank guarantee; guarantee of a third party (related and non-related); bills of exchange; and a statement on blocking accounts, 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?

General security agreements do not exist in Serbian law, but it may function as a complex agreement which must meet legal requirements for each type of collateral in question. The procedure would depend on the type of collateral. In general, it involves a contract in written form, authorisation, notarisation (mortgages) and registration at the relevant registry. Any and all agreements/documents that include establishment of any kind of security on immovables are subject to notarisation. Other security documents do not need to be notarised.

Some types of collateral are subject to registration, i.e.: mortgages are subject to registration in public immovable records; pledges are subject to registration with the Register of Pledges; and bills of exchange are subject to registration with the National Bank of Serbia, etc.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, it is possible if a person granting the mortgage is the registered private owner of the immovable assets.

It is also possible to pledge a construction permit, granting a right to establish a mortgage once the construction is finished.

A mortgage on immovables may be established under a mortgage agreement/statement that must be notarised.

The mortgage is effective as of the moment of registration with the competent public register.

Machinery and equipment may be pledged under a pledge agreement registered with the Register of Pledges.

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, as a means of collateral security, may be subject to pledge. The formal requirements for a pledge on receivables are the same as for a pledge on movable assets; namely it requires a written contract and registration with the Register of Pledges.

A debtor of receivables is not required to provide any consent and only needs to be informed of the pledge established.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes it is possible to make this kind of pledge. The process is the same as for movable assets and/or receivables.

Please note that banks often establish a security deposit as collateral. The security deposit is kept with the creditor bank under special conditions until the repayment of the loan.

3.6 Can collateral security be taken over shares in companies incorporated in Serbia? 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 Serbia can be subject to collateral security.

Shares are in electronic form and registered with the Central Register of Securities.

New York or English law governed documents can be a valid basis for granting security subject to satisfaction of the mandatory provisions of the respective Serbian law.

In case of shares in a joint stock company, collateralisation of shares is subject to the procedure set by the Central Register of Securities. The process of registration requires: (a) establishment of a relationship between the creditor and a local broker; (b) the signing of a pledge agreement with the debtor; and (c) registration of the pledge with the Central Register of Securities. The shares under pledge are excluded from trading, i.e. the Central Register of Securities will not balance the trade with pledged shares, except in the process of collection by the creditor.

The capital of a limited liability company is not divided into shares, but is expressed as a percentage of the total capital of the company (quotas) and is registered with the Company Register. The quotas may be subject to pledge under the same rules and with the same requirements as a pledge on movable assets and/or receivables.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

It is possible to establish pledge over the inventory, as movable assets. The movable assets which are subject to pledge need to be

listed and identified in the respective pledge agreement. The pledge is subject to registration with the Register of Pledges.

As regards the inventory, one should consider the issue concerning control over the inventory, i.e. the manner of securing the quantities and existence of pledged assets. In practice, the most effective way would be seizing physical control of the assets or establishing a good control mechanism.

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 is possible as described 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?

Fees are usually related to the value of the secured claim or of the collateral.

For the pledge over movable assets/claims, the registration fee goes up to maximum of RSD 10,000.00 (approx. EUR 90/GBP 65).

Notarisation fee (for mortgages – usually not imposed for pledges) goes up to maximum of RSD 720,000.00 gross (approx. EUR 6,000/GBP 4,300).

For the registration of a mortgage, the registration fee goes up to RSD 150,000.00 (approx. EUR 1,250/GBP 900).

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, such requirements do not involve a significant amount of time. The issue of expense is relative.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

In addition to that mentioned under question 2.4, generally no, but security provided by a state-owned entity might involve a consent/approval/permit by the Government or a state regulatory body, depending on the particular situation.

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 no special priority or other concerns.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Collateral over property (land and objects) involves notarisation and registration at the Cadastre Registry. For pledges, see explanations given above.

All persons signing the respective document have to be authorised i.e. to have the power to sign the document, whether by law or by a power of attorney. The number of counterparts is usually not prescribed. However, a sufficient number has to exist for the purposes of the notarisation/registration/tax office or other relevant governmental body.

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

Transaction prohibited (to be declared null and void in private court proceedings).

(b) Shares of any company which directly or indirectly owns shares in the company

There is no explicit provision on the matter, but such acquisition bears the risk of being perceived as null and void (in private court proceedings) if it is found that the actual intention was to bypass the prohibition on financial assistance (guarantee or similar) of the company for acquisition of the shares of the company.

(c) Shares in a sister subsidiary

There is no explicit provision on the matter. One may not eliminate the risks in the court proceedings.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Serbia 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?

If the transaction is considered as a foreign exchange transaction, such enforcement would be allowed on the basis of a contract signed by all of the parties involved or on the basis of a statement of the resident (the payer) that he has been informed of the transfer (transfer of right to collect payment).

If the payer is a resident public company, a resident state-owned company or a company in the process of restructuring or privatisation, in addition to the aforementioned, prior consent of the Government has to be obtained.

5.2 If an agent or trustee is not recognised in Serbia, 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 Serbia.

5.3 Assume a loan is made to a company organised under the laws of Serbia and guaranteed by a guarantor organised under the laws of Serbia. 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 case Lender A and Lender B are non-residents, such transfer requires a contract among the transferor, transferee and the debtor/guarantor. The contract has to contain elements set by the Foreign Exchange Act of the Republic of Serbia. For the process to be perfect, collateral has to be transferred/registered to Lender B.

In case the debtor/guarantor is a resident public company, resident state-owned company or a company in the process of restructuring or privatisation, the transfer requires a contract or consent or statements of all parties involved, with prior consent of the Government.

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) Foreign lenders (non-residents) are to pay income tax (as a withholding tax) at a rate of 20%, in case there is no treaty on avoidance of double taxation; the tax rate for "tax haven/offshore" lenders is 25%. The interest payable to the domestic lenders is part of the income taxable annually.

(b) No withholding tax is payable.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Foreign lenders are exempted from paying withholding income tax in case of interest payable on debt securities issued by the Republic of Serbia, autonomous provinces of Serbia, local governments or the National Bank of Serbia.

For loan taxation, please see question 6.1 (a) above.

There is no taxation with respect to mortgages or other security documents, save for notary and/or registration and/or enforcement fees, if applicable.

6.3 Will any income of a foreign lender become taxable in Serbia solely because of a loan to or guarantee and/or grant of security from a company in Serbia?

No, because all incomes are charged separately, depending on the basis thereof. Therefore, income stemming from a loan can be taxed only if it is income from payable interest, as explained under question 6.1 (a) above.

The granting of a security or the giving of a guarantee by a company in Serbia has no (direct) tax effect on the lender.

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 (especially concerning mortgages), registration fees (Registry of Pledges/Cadastre) and/or administrative fees, if applicable. As to the value of notary and registration 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.

There are no adverse consequences of such type.

7 Judicial Enforcement

7.1 Will the courts in Serbia recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Serbia enforce a contract that has a foreign governing law?

Yes, the Courts of Law will recognise governing law in a contract that is the law of another jurisdiction if so agreed by the parties, in both litigation and enforcement processes.

7.2 Will the courts in Serbia 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 law sets specific cases in which recognition and enforcement of a foreign judgment shall be denied. Courts will deny recognition and enforcement if the foreign judgment is contrary to the basis of social order set by the Constitution of Serbia, in case of lack of reciprocity, in case a court in Serbia has reached a legally binding decision on the same matter prior to the foreign judgment or in case there is recognition and enforcement of another foreign judgment on the same matter, which was reached before the judgment in question or in case the merits of the foreign judgment fall in the exclusive jurisdiction of the courts of the Republic of Serbia. The Serbian Courts of Law will decide on the merits of a case only if the conditions for recognition are not fulfilled.

As regards the decisions made by Anglo-Saxon Courts, one should be cautious since the issue of reciprocity could be open, as it is not fully clear whether the relevant Courts would treat the Serbian Court of Law decision as the formal decision or just as evidence/a fact in the process. Therefore, one cannot eliminate the possibility of a Serbian Court deciding on the recognition and enforcement of such a judgment without examining 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 Serbia, 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 Serbia against the assets of the company?

(a) Probably within a period of 2 years (however, one may not eliminate the risk of a longer period in the case of a more complicated dispute).

(b) If the conditions for recognition by a foreign judgment are met, the legal requirements for enforcement would probably be met within a year.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There are no special regulatory consents, but a process before the public registers needs to be respected. If there are no public auction requirements under the respective documents on establishment of pledge/mortgage, and if the documents include all needed conditions under Serbian law for the purposes of private sale of assets, there is no requirement for a public auction in the process of collecting against granted collateral.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Serbia or (b) foreclosure on collateral security?

(a) If foreign lenders did not appoint an attorney in Serbia (concerning the lawsuit), a proxy for receipt of court filings has to be appointed. Also, foreign claimants may be ordered to make advance payment of court expenses (which would be returned in case of a claimant's success in the litigation).

(b) If a foreclosure would involve a court proceeding (for example, court enforcement of the collateral), the same requirements as under (a) would apply. Save for that, there is no other restriction as to judicial enforcement.

7.6 Do the bankruptcy, reorganisation or similar laws in Serbia provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Once the bankruptcy procedure is open, the claims/right to collateral are subject to examination and confirmation by the bankruptcy administrator appointed by the Court. Once the right to collateral is confirmed, the enforcement of collateral can be continued.

In case of an accepted reorganisation plan, all claims/rights shall be enforced according to the terms of the adopted reorganisation plan.

7.7 Will the courts in Serbia recognise and enforce an arbitral award given against the company without re-examination of the merits?

The competent court shall deny recognition and enforcement of the foreign arbitral award if it has been determined that the dispute cannot be a matter of arbitration according to the laws of Serbia or in the case that effects of the arbitral award are contrary to the public order of the Republic of Serbia. Further, if the debtor under award objects that there are some formal defects of arbitral award defined under the law (such as that it was impossible for the debtor to take part in the process before the tribunal), and if the Court finds that the evidence provided by the debtor proves such formal defects, the Court will not recognise and enforce the award. Therefore, if all the conditions for the recognition of arbitral awards are met, the merits of the case will not be re-examined.

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 bankruptcy, a secured lender is considered a secured creditor (preferential creditor). Once the secured claim has been confirmed by the bankruptcy administrator, the secured lender may collect payment from the collateral security. The holder of the collateral has the priority right to collect in the process of sale of secured assets. If the relevant creditor did not collect the entire amount of its receivables from the secured assets, the priority to the remaining amount of debt due to the creditor is equal with other non-secured bankruptcy 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?

There are no other preferential creditors' rights with respect to the security, once the right to collateral and the position of the lender in the bankruptcy proceeding has been confirmed by the bankruptcy administrator. The judicial/administrative tariffs, costs and expenses in connection with the sale of the secured asset, however, are collected from the proceeds of cashing the secured assets with priority for the secured creditor.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The Republic of Serbia, autonomous provinces, local governments, funds and organisations of mandatory pension, disability, social and healthcare insurance, legal entities founded by the Republic of Serbia, autonomous provinces or local governments which are exclusively or dominantly funded through transferred public revenues or via government, province or local budgets, the National Bank of Serbia, the Central Register of Securities and public agencies are excluded from bankruptcy proceedings.

There is a general law governing bankruptcy, but banks and insurance companies are subject to special law on bankruptcy.

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 case of bankruptcy, no.

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 Serbia?

In principle, yes, regarding commercial matters. However, per the Serbian law on conflict of laws, there are a number of issues that fall within the exclusive jurisdiction of the Serbian Courts of Law such as issues concerning immovables, corporate status issues, bankruptcy, etc.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Serbia?

In principle, yes. The Serbian law on enforcement regulates that the assets of a foreign country or of an international organisation on the territory of Serbia cannot be seized without prior written consent of the competent body of the relevant foreign country or of an international organisation which may be regarded as an acceptance of waiver of sovereign immunity.

There is a presumption that the Republic of Serbia is acting as a private person in economic relationships and may sign a written statement on waiver of its sovereign rights in respect of a specific matter. Some of the assets of the Republic of Serbia are exempt from the possibility of enforcement, such as the budget, diplomatic missions, etc.

10 Other Matters

10.1 Are there any eligibility requirements in Serbia 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 Serbia need to be licensed or authorised in Serbia or in their jurisdiction of incorporation?

If the matter concerns a foreign lender, such lender does not have to be a bank.

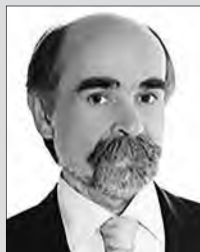
Otherwise, credit operations within Serbia may be carried out only by licensed banks. Other persons may enter into lending agreements (short-term and similar).

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Serbia?

Per the regulations of the National Bank of Serbia, in the case of borrowing from a foreign lender: (a) a minimum 6-month grace period; and (b) a minimum 1-year repayment period, must be agreed.

On the basis of extensive legal office and banking practices it would seem to be advisable and essential for a lender participating in financing in Serbia:

1. to conduct in-depth research on the borrower, its group and past practices;
2. to establish good collateral;
3. to prepare the documents allowing for the private placement of securities without a public auction and similar requirements;
4. to establish and maintain a good control system over the collateral taken; and
5. to keep good analyses of operations of the company and react in good time.



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Darko Spasić, Attorney at Law, has 35 years of professional experience.

He has been head lawyer/counsel in over 120 mergers and acquisitions, including (in chronological order):

- Lafarge in the first capital privatisation acquisition in Serbia;
- the BNP Paribas consortium in the sale of 3 banks, 3 breweries and the first privatisation in the insurance sector;
- the Bank Santander consortium for the sale of the biggest company in the former Yugoslavia;
- NBG in the acquisition of capital of Vojvodjanska Banka A.D.;
- the sale/purchase of 14 banks in SE Europe;
- investment in capital in 10 banks in SE Europe;
- 2 mergers of banks; and
- numerous mergers and restructurings in the real estate sector.

He has provided counsel:

- to construction companies in a significant number of projects that included Belgrade Airport, National Bank of Yugoslavia, office/industrial complexes and shopping malls;
- to shipyards regarding shipbuilding contracts and successful representation before international arbitration; and
- in various banking, financial, leasing, corporate and day-to-day operations of a significant number of leading international companies.

He is also a member of a number of corporate bodies of companies and banks.

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Ana Godjevac, Attorney at Law, has 15 years of professional experience.

She has participated in over 70 mergers and acquisitions, including (in chronological order):

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- the Bank Santander consortium for the sale of the biggest company in the former Yugoslavia;
- NBG in acquisition of capital of Vojvodjanska Banka A.D.;
- the sale/purchase of 14 banks in SE Europe;
- investment in capital in 10 banks in SE Europe;
- 2 mergers of banks; and
- numerous mergers and restructurings in the real estate sector

She has also acted as counsel in various banking, financial, leasing, corporate and the day-to-day operations of a significant number of leading international companies.

Spasic & Partners

Spasic & Partners are a leading law firm – a legal partnership specialised in providing legal services in Serbia, Montenegro, Bosnia and Herzegovina and FYRO Macedonia in:

- corporate law including corporate governance;
- investments, M&A, privatisation;
- all kinds of banking and insurance operations, financial transactions, credits and loans, collateral, licences;
- commercial law and international trade;
- securities law;
- competition law;
- civil engineering;
- mining rights;
- labour relations;
- real estate;
- representing before the courts and foreign arbitrations; and
- enforcement and debt collection.

As an innovative and creative firm we have dealt with:

- the first tender privatisation;
- the first purchase of assets by a foreign investor;
- the first sale of state-owned capital in a bank; and
- the first sale of socially owned capital in an insurance company.

Spasic & Partners have been asked to draft a number of regulations as well as amendments to the existing ones.

Singapore

Valerie Kwok

Drew & Napier LLC

Blossom Hing

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Singapore?

The year 2014 saw continued expansion of loans to larger businesses and non-residents, driven in part by rising loans to China. To promote the international use of Renminbi (***RMB***) and facilitate the growth of the RMB offshore market in Singapore, the Monetary Authority of Singapore (***MAS***) – the central bank of Singapore and key policy-maker overseeing the financial sectors – launched a facility for providing overnight RMB liquidity to financial institutions in Singapore. The facility is intended, amongst others, to bolster market confidence by giving financial institutions the assurance that their short-term RMB funding needs will be met.

As part of Singapore's bid to strengthen its real estate investment trust (***REIT***) market and improve its attractiveness to issuers and investors, MAS also published consultation papers containing proposals to enhance the transparency and corporate governance of the REIT market. Singapore is one of the largest REIT markets in Asia and REIT borrowings continue to form a significant portion of the loans market in Singapore.

In addition, the rapid growth of Islamic finance globally continued to benefit Singapore. More funds continue to be established here to meet demand from clients in Asia and the Middle East and several corporations have established sukuk programmes in Singapore to tap the market. The number of banks in Singapore involved in Islamic banking has also increased significantly over the last 5 years to cater to increased demand.

On the local property market front, as a result of the introduction of measures in 2013 by the MAS to stabilise and curb speculation in the residential property market, the number of housing transactions continued to fall in 2014 and was accompanied by a decrease in the volume of new housing loans and slowed growth of household debt. The banking sector continues to be challenged as a result of the high exposure to the private housing market.

Separately, the long-awaited overhaul of the Companies Act (Cap. 50, 2006 Rev. Ed.) (***CA***) concluded when the Companies (Amendment) Bill 2014 (***Amendment Bill***) was passed in Parliament on 8 October 2014. The Amendment Bill contains more than 200 amendments to the CA, including some key amendments that will impact financing transactions in Singapore and these will be discussed in greater detail below. It should be noted however that the provisions in the Amendment Bill are not yet in operation and as of the time of writing, are expected to come into effect in the second quarter of 2015.

1.2 What are some significant lending transactions that have taken place in Singapore in recent years?

The takeover battle for Fraser & Neave Ltd. (the largest in history in Singapore and Southeast Asia), between competing bidders TCC Asset Ltd (***TCCA***) and Overseas Union Enterprise (***OUE***) dominated headlines in 2012 and 2013 as the eventual winner, TCCA, completed its takeover bid in early 2013. This transaction involved financing estimated to be around S$13.8 billion, funded by, amongst others, DBS Bank and United Overseas Bank.

Other major transactions in 2013 include the S$2.6 billion syndicated loan facility granted to Senoko Energy – Singapore's largest energy supplier – to refinance its existing debts, in which DBS Bank was coordinating mandated lead arranger; as well as the S$1.2 billion leveraged loan granted to Universal Group Holdings.

Significant lending transactions in 2014 include the S$5.1 billion amendment-and-extension facility for casino operator Marina Bay Sands to, amongst others, extend the maturities of facilities, in which DBS Bank was coordinator and mandated lead arranger and bookrunner, and the USD 4.95 billion bridging loan for the Oversea-Chinese Banking Corporation's acquisition of Wing Hang Bank Ltd., underwritten by the Bank of America Merrill Lynch, the Hongkong and Shanghai Banking Corporation Limited and J.P. Morgan.

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. It is worth noting that pursuant to the Amendment Bill, a new exception will be introduced to allow for prior approval by the company in general meeting to permit such transactions.

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.

When the Amendment Bill comes into effect, the CA will deem the power of the directors to bind the company, or authorise others to do so, to be free of any limitation under the company's constitution, in favour of persons dealing with the company *in good faith*. It remains to be seen if the Singapore courts will find that knowledge of an act being beyond the powers of the directors under the constitutive documents of the company will, by itself, be sufficient to establish a lack of good faith for purposes of this new provision.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental consents or filings are generally required.

A guarantee will be required to be lodged with the companies' registry in Singapore, the ACRA, *only* if by its terms it also seeks to create a charge or agreement to charge within the meaning of s131 of the CA.

In terms of formalities, a contract of guarantee has to be in writing and signed by the person sought to be rendered liable under the guarantee. Board resolutions approving the terms, execution and performance of the guarantee should be passed. Shareholders' approval should also be obtained if there is any potential issue of lack of corporate benefit and breach of directors' duties, or where it is otherwise required by statute (for example, to whitewash the transaction) or the constitutive documents of the company.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No, unless otherwise restricted by the constitutive documents of the company.

If, however, the amount guaranteed is clearly disproportionate to the corporate benefit received, the issues discussed in question 2.2 above would arise.

Other considerations where a company is insolvent are set out in section 8 below.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange controls in Singapore which would act as an obstacle to the enforcement of a guarantee.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Under Singapore law, all types of collateral may potentially be available to secure lending obligations, provided the grant thereof is not against public policy.

Common types of collateral that can be used include real property (land and buildings), personal chattels, debts and other receivables, stocks and shares and other choses in action.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is possible to give asset security by means of a general security agreement, for example, by way of a debenture seeking to take

security over different classes of assets, save to the extent that a statutorily prescribed form is required (e.g. to effect a legal mortgage over land under the Singapore Land Titles Act (Cap. 157, 2004 Ed.) ("LTA") or take a legal assignment over book-entry securities).

The main types of security interests that can be created under Singapore law are mortgages, charges, liens and possessory pledges, and the 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 scripless 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 scripless form (i.e. book-entry securities, being essentially listed shares of companies on the Singapore stock exchange – Singapore Exchange Limited), by statute, a different regime will apply. Security may be taken over such shares by way of a statutory assignment or statutory charge in prescribed form registered with the Central Depository (Pte) Limited in Singapore or by common law subject to certain requirements prescribed.

There is no specific restriction to prohibit the general terms of security over shares to be governed by New York or English law, but the creation and grant of security over shares should be governed by Singapore law as the shares of Singapore companies (and exercise of certain enforcement rights) are regulated by the CA and local property rules.

Registration with ACRA will be required if the charge is floating or the shares fall under one of the prescribed categories of s131 of the CA. Other perfection steps are as discussed in question 3.3 above.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, a floating charge is most commonly created over inventory as it is ambulatory in nature. The chargor in this instance will generally be permitted to deal with the inventory in the ordinary course of its business until the occurrence of a default event under the facility or notice from the lender.

Registration with ACRA is required under s131 of the CA. Other perfection steps are as discussed in question 3.3 above.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes for both cases, subject to considerations like the existence of corporate power and corporate benefit, s162/163 of the CA (prohibition on loans to directors and related companies) and financial assistance, etc., as set out in this chapter.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The fee for the registration of a charge/security instrument with ACRA in accordance with s131 of the CA is currently S$60 per charge.

In addition, security interest over certain assets (e.g. aircraft, ships, intellectual property rights and land) will need to be registered at specialist registries and additional fees will be payable. For example, the fee payable for the registration of a mortgage over land with SLA is currently S$68.30 per mortgage.

Stamp duty is payable on a mortgage, equitable mortgage or debenture of any immovable property and stock or shares. A legal mortgage is subject to *ad valorem* duty at the rate of 0.4% of the amount of facilities granted on the mortgage of immovable property or stocks and shares, subject to a maximum of S$500. An equitable mortgage and a debenture is subject to *ad valorem* duty at the rate of 0.2% of the amount of facilities granted on the mortgage of immovable property, subject to a maximum of S$500.

Notarisation is not required for security documents which are executed and to be used in Singapore.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The charge/security instrument to be lodged with ACRA under s131 CA must be lodged within 30 calendar days after the creation of the charge where the document creating the charge is executed in Singapore (or within 37 calendar days if executed outside Singapore). The filing (once filing forms are completed) is instantaneous and confirmation of registration from ACRA will normally take 2-3 business days.

Registration at specialist registries will each have its own time frame. For example, the registration of a mortgage with SLA may take several weeks if complex and involving multiple units. In the interim, a lender may protect its interest by the lodgement of a caveat with the SLA.

Fees payable for such registrations are as discussed in question 3.9 above.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Regulatory consents may be required in certain circumstances. For example, where the subject land is state land leased from the Government or Government statutory boards like the SLA and Urban Redevelopment Authority.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Under Clayton's rule, security taken over a revolving loan may be 'reducing' as the loan 'revolves' as a result of the 'first in first out' rule. In the absence of contrary indication, a secured revolving facility may technically lose the security once an amount equal to the original loan and any associated charges and interest has been paid into the account, even though sums have been paid out in the meantime. In practice, this is however rarely an issue as finance documents will be drafted to provide for inverse order of payment and/or for security to be continuing notwithstanding any intermediate payments made as long as there is anything outstanding under the loan.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Execution requirements are predominantly set out in the company's constitutive documents and the CA. In addition, certain instruments are also statutorily required to be in writing or executed by deed. For example, a legal mortgage over land must be by deed. Certain statutory remedies (e.g. power to sell the mortgaged property, to insure the property, to appoint a receiver, etc.) given to mortgagees will also not be available unless the mortgage is by deed. Commonly, it is prudent in any event for securities to be executed by deed so that there is no issue of past consideration.

Where it is envisaged that the execution of the security instrument be completed by virtual means or using pre-signed signature pages, it is also good practice for it to be done in line with the principles set out in English case *R (on the application of Mercury Tax Group and another) v HMRC*.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

S76 of the CA provides *inter alia* that a company shall not, whether directly or indirectly, give any financial assistance for the purpose of, or in connection with the acquisition by any person (whether before or at the same time as the giving of financial assistance) or proposed acquisition by any person, of shares in the company or in a holding company of the company. The prohibition does not extend to sister subsidiary companies. The CA further provides that financial assistance for the acquisition of shares may be provided by means of a loan, *the giving of a guarantee*, *the provision of security*, the release of an obligation or the release of a debt or otherwise.

These provisions may therefore be triggered in the event of the giving of guarantees/securities or other accommodation which may directly or indirectly provide 'financial assistance' within the meaning of the CA. There are, however, whitewash provisions available under our laws, including short form whitewash procedures that would enable the company to effect a whitewash through *inter alia* the passing of shareholders' and directors' resolutions and lodgement of solvency statements and papers with ACRA without the need for public notification and objection period or court order. Where the company is unable to effect a short form whitewash, parties have to bear in mind that the need for public notification and objection period for a long form whitewash will mean that a timeframe of 6 to 8 weeks (assuming no objections) may be required.

In one of the more significant changes to the CA in the context of loan transactions, the Amendment Bill confines the prohibition against financial assistance to only public companies or companies whose holding company or ultimate holding company is a public company. A new exception will also be introduced to allow such companies to provide financial assistance if doing so does not materially prejudice the interests of the company or its shareholders or the company's ability to pay its creditors.

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 a foreign lender become taxable in Singapore solely because of a loan to or guarantee and/or grant of security from a company in Singapore?

Where the bank is not a tax resident in Singapore, withholding tax as discussed in question 6.1 may apply.

Where the bank is a tax resident in Singapore or has a branch in Singapore, any interest, commission, fee or any other payment in connection with any loan or indebtedness or with any arrangement, management, guarantee, or service relating to any loan or indebtedness if such types of income are borne, directly or indirectly, by a person resident in Singapore or a Singapore permanent establishment or is deductible against any income accruing in or derived from Singapore that accrues to or is derived by the bank or its Singapore branch will be deemed to be sourced in Singapore and subject to income tax in Singapore by virtue of s12(6) read with s10(1) of the ITA.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Apart from fees and tax payable as discussed above (i.e. questions 3.9 and 6.1), the provision of certain services, for example the provision of guarantee services, may be subject to goods and services tax (***GST***) in Singapore if the provider of the service is registered for GST purposes pursuant to the Singapore Goods and Services Tax Act (Cap. 117A, 2005 Rev. Ed.) unless the service qualifies as an international service or is an exempt supply on which no GST is chargeable. The rate at which GST is chargeable on standard-rated supplies of goods and services is presently 7%.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Thin capitalisation principles are not applicable in Singapore. However, it should be noted that should the banks be organised under the laws of a foreign jurisdiction, and no express choice of law is made in the finance documents, the applicable law for the finance documents may be that of the foreign jurisdiction. In such a situation, the borrower may not be able to enjoy the rights and remedies available to a borrower in Singapore, but not in that foreign jurisdiction.

7 Judicial Enforcement

7.1 Will the courts in Singapore recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Singapore enforce a contract that has a foreign governing law?

Provided that it is *bona fide* and legal and there is no reason for avoiding the choice on the grounds of public policy, the express choice of the laws made by the parties to a contract will be upheld as valid and binding in any action in the courts of Singapore and the courts will enforce a contract that has a foreign governing law.

In January 2015, the Singapore International Commercial Court (***SICC***) was established to hear international commercial disputes, including those governed by foreign laws.

The key features of the SICC are: (i) it is a division of the Singapore High Court. This means that SICC judgments can be enforced as judgments of the Supreme Court of Singapore; (ii) it has a diverse panel of judges that will include eminent international jurists and existing Supreme Court Judges; (iii) its proceedings are open court proceedings although parties may apply for the proceedings to be confidential; and (iv) there is flexibility for parties to seek leave of court to apply alternative rules of evidence (i.e. rules which differ from the existing Singapore rules of evidence) which they may be more familiar with; and to appoint foreign-qualified lawyers to represent them in court where the cases have no substantial connection to Singapore or to address the Court on matters of foreign 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, although sale by public auction is commonly carried out as a matter of practice. 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 an 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. 'Any person licensed, approved, registered or otherwise regulated by the MAS under any other written law' would fall outside the ambit of the prohibition as an 'excluded moneylender'. The question is whether overseas lenders that are not so licensed, approved, registered or otherwise regulated by the MAS are necessarily excluded. With effect 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 (and has lent) money solely to corporations. There has been academic debate on whether an overseas unlicensed lender would not be deemed to be excluded if it had in the past lent otherwise to individuals who were not accredited investors, but the prevailing view is that the Singapore courts are unlikely to allow such a defence without more to succeed in the context of legitimate financial activity of commercial entities.

The granting of loans to corporations *per se* is not otherwise regulated in Singapore. There are no eligibility requirements in Singapore for a lender lending to a company and, subject to the above, it need not be licensed or authorised if no other regulated activities (e.g. banking, securities or financial advisory activities) are being conducted.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Singapore?

The principal Singapore law considerations for lenders when participating in financings in Singapore have been covered by the above questions and answers.

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One of Singapore's leading and largest full-service law firms, Drew & Napier LLC was named Singapore National Law Firm of the Year 2012 by prestigious legal ranking publication, Chambers & Partners. The firm is preeminent in Dispute Resolution, Corporate Insolvency & Restructuring, Intellectual Property (Patents and Trademarks), Tax, and Telecommunications, Media & Technology, and has market-leading practices in Mergers & Acquisitions, Banking & Finance, Capital Markets, and Competition & Antitrust.

Drew has 5 Senior Counsel, more than any Singapore law practice and their involvement in landmark, high-profile cases and transactions gives them unique perspective in tackling clients' evolving challenges.

Drew counts governmental agencies and multinational corporations from a diverse range of industries amongst their clients. Their promise of quality has earned favourable repute amongst international law firms and Drew is often instructed to handle large-scale and complex matters that involve multiple parties and span across multiple jurisdictions.

Spain

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Spain?

As to Spanish financial entities, the focus on a healthy balance sheet continues. In this sense, they are becoming more active in the sale of non-performing loans as well as tickets in certain syndicated financings, giving rise to debt trading.

Lending is on the rise again and banks are getting more involved in new corporate and acquisition financing transactions (and in certain syndicated facilities achieving high levels of oversubscription). In particular, the real estate sector has come into the spotlight following a willingness to provide financing, and new transactions concerning the hotel industry are moving forward. Distressed debt entities and hedge funds continue irrupting into the Spanish market, taking substantial slices of Spanish debt.

Finally, the Spanish draft law for the promotion of business financing ("*Proyecto de Ley de Fomento de la Financiación Empresarial*") which will apparently be approved by the end of March 2015, foresees certain measures aimed to, among others: (i) enable private limited companies (*sociedades de responsabilidad limitada*) to issue and guarantee bonds, although subject to certain restrictions; (ii) regulate the so-called crowdfunding platforms; and (iii) make banking financing more accessible to SMEs as well as develop alternative financing means.

In this new scenario, the immediate future looks particularly promising for traditional lending activities with fresh money, new sources of finance appearing, distressed debt deals continuing, and the spectrum is getting broader for bond issuances.

1.2 What are some significant lending transactions that have taken place in Spain in recent years?

2014 has been another successful year for our practice. We have been chosen by the main financial and public institutions as legal advisors in the largest banking transactions carried out in Spain, having advised SAREB on their corporate finance issues, such as the bond issuances as a consequence of the roll-over of the previous bond issuances (€30 billion), as well as other disinvestment transactions.

- Refinancing and debt restructuring processes: This is still a market trend, taking into account the Spanish economic context. For some years now, and particularly this year, we have participated actively in debt refinancing and restructuring processes, involving large national and international companies from different sectors, which have required forming multidisciplinary teams with a high international element. Some examples are Aena, Elecnor, Ercros and Grupo San José.
- Corporate finance: After several years of putting this advice "on hold" due to the recession, we have become active again advising on transactions involving fresh money. We can outline ADIF and SABA Aparcamientos.
- Distressed debt: We are one of the most specialised law firms advising on distressed debt transactions, acquisition of corporate debt, loan portfolios and restructuring debt processes. We have been chosen by major international funds and have advised either the distressed/special situations funds (as a purchaser), or the financial institution (as a seller) in many significant deals. Among others, some recent transactions include: Project Meridian; Project Agatha; Project Olivia; Project Ibero; and Project Island.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, subject to the restrictions of financial assistance (see question 4.1 below). In addition, although Spanish law does not provide for any specific obligation to justify a company granting a guarantee or security based on corporate benefit, it is advisable (and in some cases expressly required by law) for both the Management Body and the General Meeting of Shareholders to pass a resolution approving the transaction, referring to the corporate interest or benefit that the company granting the guarantee or security or the group as a whole will obtain through such transaction.

Finally, subject to certain case law, the relevant guarantee constituted by a Spanish subsidiary in favour of its parent company might be challenged by a Spanish court if no consideration (*contraprestación*) is provided to such subsidiary.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Directors of a Spanish company have a duty of care towards the company and must act faithfully and loyally towards it. When there is an evident disproportion between the benefit for the company and

the granting of collateral by the guaranteeing/securing company, often borrowers request that certain limitation language is included both in the collateral documentation and in the corporate resolutions to minimise a potential liability risk for the Management Body of the company.

Additionally, in case of an eventual insolvency situation on the part of the company, there is a potential risk that the insolvency administrators might presume that the granting of collateral by the company could have resulted in the insolvency and allege that it is detrimental to the insolvency estate; in such case the Management Body could be held liable for its actions.

2.3 Is lack of corporate power an issue?

Yes, in Spain the agreements need to be executed by duly empowered representatives of the company, with sufficient corporate power to act on its behalf.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Usually, no governmental consents or filings are required to grant guarantees/security interests in Spain (see question 3.11 below).

Regarding internal corporate approvals, in general terms, any actions or activities which fall within the scope of the corporate purpose of the company are subject to fewer formalities. However, in case of private limited liability companies (*sociedades de responsabilidad limitada*), shareholders' approval must be obtained before carrying out certain transactions (such as upstream guarantees). In public limited liability companies (*sociedades anónimas*), despite not being mandatory, the shareholders' approval is also usually obtained. See also question 2.1 above in relation to corporate benefit.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No, although certain limitation language is included in case of disproportions (see question 2.2 above).

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange control regulations on the enforcement of a guarantee. However, Spanish Insolvency Law imposes an important restriction on lenders facing imminent or real insolvency of its debtors, as it renders unenforceable contractual early termination clauses solely based on a declaration of insolvency.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

The types of collateral most commonly used to secure financing transactions are generally classified into two main groups: (1) *in rem* security interests, the most common being: (i) mortgage over real estate (*hipoteca inmobiliaria*); (ii) ordinary pledge over movable assets with transfer of possession (e.g., pledge over shares, over credit rights or over bank accounts); (iii) chattel mortgage (*hipoteca mobiliaria*); and (iv) non-possessory pledge over assets (*prenda sin desplazamiento de la posesión*); and (2) personal guarantees, being mainly first demand guarantees (*garantías a primer requerimiento*).

The main difference between *in rem* security interests and personal guarantees is that, in the former, a specific asset secures fulfilment of the obligation, while in the latter, an individual or corporate entity guarantees fulfilment of the obligation. There are also material differences in proceedings for their enforcement and their treatment during insolvency (*concurso*) under the Spanish Insolvency Act.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Spanish law does not provide for a so-called "universal security" over the entire debtor's assets. Nor does it generally admit the creation of a "floating" or "adjustable" lien or encumbrance, except for certain mortgages over real estate. Therefore, a security agreement is usually required in relation to each type of asset.

The creation of guarantees and security interests requires notarisation in order for them to be considered as an executive title (*título ejecutivo*) in an enforcement scenario. Notarial deeds (being either *pólizas notariales* or *escrituras públicas*) provide certainty of the date and content of the applicable document *vis-à-vis* third parties. Furthermore, some of these types of security interests are subject to compulsory entry on public registries, such as the Land Registry (*Registro de la Propiedad*) (e.g., real estate mortgage) or the Chattel Registry (*Registro de Bienes Muebles*) (e.g., mortgage on inventory or non-possessory pledge over assets), while such registration is not required for other collateral (e.g., common pledge with transfer of possession).

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Real property is taken as security by means of a real estate mortgage (*hipoteca inmobiliaria*). Under Spanish law, real estate mortgages cover: (i) the plot of land and the buildings built on it; (ii) the proceeds from the insurance policies insuring such property; and (iii) the improvement works carried out on the property and natural accretions. Should the parties agree so, such mortgage may also include movable items located permanently in the property.

Security over machinery and equipment can be created by means of a chattel mortgage (*hipoteca de maquinaria industrial*) or a non-possessory pledge (*prenda sin desplazamiento de maquinaria industrial*). The choice will depend on whether the specific asset meets certain legal requirements.

For both types of security, notarisation is necessary, as well as registration with the relevant public registry (see question 3.2 above).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security over receivables can be taken in two different manners: (i) by creating a possessory pledge; and (ii) by creating a non-possessory pledge (*prenda sin desplazamiento de la posesión*) which may be registered in the Chattel Registry.

With respect to the possessory pledge over receivables, in order for the pledge to be perfected, notification to the debtor is required. However, and taking into consideration the commercial impact of

the notification, sometimes the notice to the relevant debtors will only be given upon potential or effective default.

On the contrary, the non-possessory registrable pledge (*prenda sin desplazamiento de la posesión*) does not require notification to the relevant debtor on the basis that the filing of such pledge with the relevant Chattel Registry would give it the necessary publicity *vis-à-vis* third parties.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

The pledge of bank accounts is simply a pledge of the credit rights of the holder of the account *vis-à-vis* the bank, which should typically correspond to the account balance.

The formal requirements are identical to those that apply in the case of any other possessory pledge over receivables (notarisation is needed). Possession is transferred by notification to the depository bank. The creation of the pledge does not imply, unless otherwise agreed by the parties, the freezing of the accounts.

3.6 Can collateral security be taken over shares in companies incorporated in Spain? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, collateral security can be taken over shares in companies incorporated in Spain. However, and by virtue of the *lex rei sitae* principle, such pledges should be always governed by Spanish law, not New York or English law. Exceptionally, creating a pledge under a law other than Spanish law might be considered, although enforcement proceedings will be longer and burdensome.

Perfection requirements for pledges over shares in Spain usually include: (i) endorsement of share certificates (if these have been issued); (ii) registration of the pledge in the relevant Registry Book of Shareholders or Shares, as applicable; (iii) registration of the pledge in the deeds of acquisition of the relevant shares; and (iv) in the event of shares represented by book entries (*anotaciones en cuenta*), registration of the pledge in the book entry register.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, Spanish law foresees a specific mechanism for creating security over inventory, which is the non-possessory pledge over inventory (*prenda sin desplazamiento de inventario*). As provided in questions 3.2 and 3.3 above, this type of collateral requires notarisation as well as registration in the relevant Chattel Registry.

However, it is also possible to create a security over inventory by means of granting a chattel mortgage over business (*hipoteca de establecimiento mercantil*), which will include not only the inventory, but the whole business.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, it can be done although always subject to the Spanish prohibition of financial assistance (see question 4.1 below) and certain corporate benefit issues (see question 2.1 above).

Aside from this, and considering the restriction in Spain regarding floating charges (see question 3.2 above), if the obligations to be secured arise from different types of credit agreements, the Spanish principle of integrity (by virtue of which a security interest can secure only a main obligation and its ancillary obligations, such as interest, costs, etc.) must be complied with, which in practice means that where two different main obligations are to be secured, two different security interests (over different assets or portions of the same asset) must be created.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notary fees are fixed amounts that vary according to the secured liability (approximately 0.03% of the secured liability), although in transactions with an aggregate value higher than €6 million, they can be reduced if negotiated with the notary.

As regards security subject to compulsory entry on public registries (particularly mortgages and non-possessory pledges), in addition to registry fees (approximately 0.02% of the secured liability), some also imply payment of stamp duty tax (varying from 0.5% to 1.5% of the secured liability – principal, interest and any related costs – depending on the Spanish region where the collateral is located). Stamp duty tax is not levied on ordinary pledges.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

As regards security documents that need to be filed within a public registry, the expected amount of time from the date the documents are notarised to the actual filing by the public registry is usually from 2 to 6 weeks, assuming the relevant security document was correctly drafted and no errors were found by the registry that need to be amended by the parties. As to related expenses, see question 3.9 above.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Regulatory or other consents with respect to the creation of security over real property or machinery would apply only in very limited cases, depending on the exact location of the asset, its nature and the parties involved (e.g. mortgage over administrative concessions).

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

In rem security interests securing a financing have, as a general rule and according to the Spanish Insolvency Act, the status of credits with special privilege. This privilege will be granted to claims arising under the credit facility as a whole, independent of the fact that it is of a revolving nature. Please see section 8 for a better understanding regarding the priority of such privilege.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

As explained in question 3.2 above, in Spain security interests are almost always notarised. To appear before a Spanish Notary, all

parties must be duly empowered (they can act under powers of attorney, which in case of foreign entities, must bear an apostille in accordance with The Hague Convention).

Signature in counterparts is not used in Spanish law governed agreements. It is worth mentioning that all parties that are signatories to a Spanish notarial deed must have a Spanish Tax Identification Number (*Número de Identificación Fiscal* or "NIF"), even for non-resident parties and their non-resident attorneys (either individuals or entities), which must request such number before the Spanish Tax Authorities (*Agencia Tributaria*).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Generally, Spanish law prohibits funds being provided (whether by way of loans, guarantees or any other kind of financial support provided before or after the acquisition) by a target company to a third party so that the third party is able to acquire shares or quotas issued by the target company, or by any other company in the group to which the target company belongs.

Financial assistance is currently prohibited in Spain for:

(a) *sociedades anónimas* (*S.A.*) (public limited companies): for their own shares or the shares of any direct or indirect parent company; and

(b) *sociedades de responsabilidad limitada* (*S.L.*) (private limited companies): for their own units and the units of any member of their corporate group.

The consequence is that, if financial assistance is deemed to have been provided, any such financial assistance will be null and void.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Spain recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Spanish law does not recognise trusts as a legal figure. Therefore, security trustees, although used in transactions where foreign lenders are involved, are seldom used for the Spanish security package. Instead, lenders tend to appoint an agent for the Spanish security, which would hold the Spanish security in its own name and on behalf of the other lenders.

It is possible for the security agent to enforce claims on behalf of the lenders and the other secured parties, as long as each party grants a notarised power of attorney to the security agent, authorising it expressly to carry out the enforcement proceedings. However, authors and case law are inconsistent regarding the role of an agent acting on behalf of the syndicate of lenders upon enforcement.

5.2 If an agent or trustee is not recognised in Spain, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

As stated in question 5.1 above, the appointment of an agent for the Spanish security is usual market practice for cross-border financings.

5.3 Assume a loan is made to a company organised under the laws of Spain and guaranteed by a guarantor organised under the laws of Spain. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

In Spain, debt is traded through assignment (*cesión*), and due to the accessory nature of security interests under Spanish law, any assignment of a participation in a secured financing agreement would entail the proportional assignment of the security interests created to secure the full and punctual satisfaction of such financing agreement.

However, for certain types of collateral (mainly those acceding to registers such as mortgages and non-possessory pledges), in order to be effective against third parties, the assignment of the relevant collateral must be notarised and registered with the relevant public registry.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

In general, interest that Spanish borrowers pay for loans made to domestic lenders (other than financial institutions) is subject to 20% withholding tax in 2015 (which will be reduced to 19% from 2016). Likewise, interest income payable on loans made to non-EU tax residents is subject to 20% withholding tax in 2015, reduced to 19% in subsequent years, unless a lower rate applies under a tax treaty (treaty rates range between 5% and 15%). Interest payments to EU residents and EU permanent establishments (except those residing in tax-haven jurisdictions) are not subject to withholding tax (irrespective of whether payments are made to a financial institution or a company).

Second, proceeds of a claim under a guarantee or the proceeds of enforcing security are generally subject to withholding tax as if these payments were made by the borrower.

Since 2012, under the Spanish Corporate Income Tax Act, there have been some limitations to the deductibility of financial expenses:

(a) Financial expenses derived from intergroup indebtedness are not tax-deductible if the funds are used to make capital contributions to other group entities, or to acquire from other group entities shares in other entities, unless the taxpayer proves there are valid economic reasons for doing so.

Overall, financial expenses deriving from indebtedness used for any other reason are fully deductible, unless anti-abuse clauses apply.

However, since January 1, 2015, interest paid for leveraged buy-out share acquisitions is not tax-deductible unless some requirements are met:

- Indebtedness must be lower than 70% of the purchase price.
- Indebtedness will be reduced proportionally in the eight years following the transaction up to 30% of the mentioned price.

(b) Net financial expenses (financial expenses minus financial income) exceeding 30% of the operating profit for the financial year are not tax-deductible, with a minimum of €1 million deductible amount guaranteed. Net financial expenses that, by applying the 30% limit, are not tax-deductible may be deductible in the following financial years without a time limitation. If the 30% limit is not reached, the difference may increase the applicable limit for the following five financial years.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

As a member of the European Union, Spain benefits from free movement of capital within the EU, including exchange rate fluctuations and transaction costs. Therefore, Spain's EU membership represents a significant part of its foreign policy.

Additionally, Spain currently has more than 85 income tax treaties in force and a solid treaty network with Latin American countries that reduce or eliminate Spanish taxes payable to residents of treaty countries.

The main tax incentive is the Spanish international holding companies regime, ("ETVEs"), a well-established legal framework that has helped Spain become one of the most favourable jurisdictions in the EU to channel and manage international investments. ETVEs can benefit from an exemption on inbound and outbound dividends and capital gains provided several requirements are met. Since ETVEs are Spanish regular entities, they are treated like regular limited liability companies, thus benefitting from tax treaties signed by Spain and from EU Directives.

Under Spanish law, no relevant additional taxes apply to foreign investments besides those applicable to Spanish investors.

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 paid to the lenders will not be subject to any withholding or deduction, provided that the lenders are lending entities or financial credit establishments entered on the special registries of the Bank of Spain and have their registered office in Spain, or entities resident in the European Union that have submitted certification of their tax residence.

None of the parties to a loan or guarantee and/or security from a company will be deemed as being domiciled, as being a resident or as having a permanent establishment in Spain solely because of entering into or performing its obligations under the above 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.?

To obtain enforceability regarding third parties and benefit from summary proceedings (see question 7.3 below) a loan, a guarantee or a security document must be notarised and eventually registered (depending on the asset).

For more detailed information on notarial and registry fees, and stamp duty tax, please see question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Most tax consequences do not differ as a result of the tax residency or applicable law of the borrower. Exceptionally, adverse tax consequences (documentation obligations) might arise when the borrower/lender is a tax resident in a tax-haven jurisdiction.

7 Judicial Enforcement

7.1 Will the courts in Spain recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Spain enforce a contract that has a foreign governing law?

Yes, courts in Spain recognise a foreign governing law in contracts, in line with Regulation (EC) No. 593/2008, of the European Parliament and of the Council of June 17, 2008, on the law applicable to contractual obligations ("Regulation Rome I").

Regulation Rome I has *erga omnes* effects. Hence, whatever it is, the foreign law chosen to govern the contract is enforceable, irrespective of whether or not it is an EU Member State.

Spanish Courts will certainly enforce a contract governed by foreign law; however, the choice of the parties will not avoid the application of *ius cogens* provisions of Spanish law that cannot be derogated by agreement (public policy). Also, the content and validity of foreign law must be proved in the proceedings; if the foreign law is not proved, the court will resort to Spanish law.

7.2 Will the courts in Spain recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

A distinction must be made between judgments rendered in English courts or courts of EU Member States and judgments rendered in New York ("NY") courts.

Regarding a judgment rendered in English courts, Council Regulation (EC) No. 1215/2012 of December 12, 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Regulation Brussels I") establishes that a judgment rendered in an EU Member State is to be recognised without special proceedings, in any other EU Member State, unless the recognition is contested. Under no circumstances can the merits of a foreign judgment be reviewed. A declaration that a foreign judgment is enforceable is to be issued following purely formal checks of the documents supplied.

However, a judgment will not be recognised if: (i) the recognition is manifestly contrary to public policy in the EU Member State in which recognition is sought; (ii) the defendant was not served with the document that instituted the proceedings in sufficient time and in such a way as to enable the defendant to arrange for his defence; (iii) it is irreconcilable with a judgment given in a dispute between the same parties in the EU Member State in which recognition is sought; (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; or (v) the judgment was adjudicated by a court lacking jurisdiction in case of exclusive jurisdiction.

Regulation Brussels I does not apply to a judgment rendered in NY courts. In the absence of a multilateral or bilateral treaty between Spain and the United States addressing the matter, under the Spanish Civil Procedure Act, judgments rendered by US courts will have the same force as is given in the US to final judgments handed down in Spain. Spanish courts usually recognise judgments rendered in the US based on the positive reciprocity principle, and subject to the fulfilment of certain conditions (*inter alia*, that the matter is not subject to Spanish exclusive jurisdiction for certain matters, does not infringe Spanish public policy, is not in contradiction with a previous Spanish judgment or the defendant has been properly served with the originating process).

In the absence of an applicable treaty or positive reciprocity, Spanish Courts will recognise foreign judgments provided that it complies with the requirements set forth in article 954 of the Civil Procedural Law of 1881, which are that: (a) the court of the country of origin is a court of competent jurisdiction according to Spanish rules on international jurisdiction and generally accepted principles; (b) the judgment has been rendered as a result of an action "*in personam*" (as opposed to an action "*in rem*"); (c) the defendant has been properly served with the originating process; (d) the obligation to be enforced is legal under Spanish law; (e) the documentation prepared for the purpose of requesting the enforcement meets all requirements under the law of the United States in order to be considered an authentic judgment and it also meets all requirements under the laws of Spain; and (f) the foreign judgment is not in contradiction with a judgment previously rendered in Spain or a judgment that has been previously recognised in Spain, and there are no outstanding proceedings in Spain that might produce a judgment in contradiction with the foreign judgment to be recognised.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Spain, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Spain against the assets of the company?

a) This depends primarily on whether the enforcement action is grounded on an executive title, such as public instruments (i.e. a public deed), or on an ordinary title, such as private contracts.

Executive titles can be enforced directly, through summary proceedings, which consist of a swift procedure that should not take more than six months. Otherwise, the so-called ordinary proceedings, which lead to a decision enforceable through a summary proceeding, take on average 15 months.

b) Enforcement of an English court decision will follow the same proceeding as explained in point a), given that the judgment will be recognised without special proceedings. Enforcement of a US judgment would require prior *exequatur* proceedings (it takes on average between 6 and 9 months). Once the judgment has been recognised, enforcement will follow the same proceeding as explained in point a) above.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Enforcement of collateral security is typically carried out through a public auction, in the context of judicial or notarial proceedings. For notarial enforcements see question 8.4 below. Additionally, the enforcement of pledges over credit rights may also be achieved through set-off or assignment of claims.

The rights derived from the relevant security can be judicially enforced either through declaratory civil proceedings or summary proceedings. The latter action is faster and more effective, while the former is costly and time-consuming. However, to start summary proceedings certain requirements must be met, particularly, the determination of the due and payable amount in accordance with the Civil Procedure Act.

Once the court has published a date for auction, the debtor will only be able to object under limited circumstances, such as the prior extinction of the pledge, full payment of the secured obligation, or the existence of a material mistake.

Concerning the enforcement of pledges over shares, the Financial Collateral Directive was transposed in Spain by means of Royal Decree Law 5/2005, which sets forth a speedy proceeding that applies to obligations of a "financial" nature and which permits direct appropriation of the collateral by the creditor where the financial agreement expressly states so.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Spain or (b) foreclosure on collateral security?

Generally there is no distinction between domestic and foreign entities when it comes to foreclosing Spanish security.

7.6 Do the bankruptcy, reorganisation or similar laws in Spain provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Bankruptcy declaration forestalls enforcement actions within the framework of bankruptcy's stay of actions against the estate. This also reaches security interests granted over assets needed to continue the business activity for a year, unless a composition that does not impinge on those rights is approved or the debtor goes liquidated before. In addition, debtors seeking to reach an out-of-court workout or support to propose a composition agreement may serve a notice that allows thwarting enforcement actions over assets that are needed to continue the business activity for three months (the so-called "5.*bis*" protection). Lastly, the submission of a court-sanctioned out-of-court workout also gives raise to the stay of lenders' enforcement actions, provided that 51% of the financial claims support such agreement. This regime does not apply to security interests subject to Royal Decree-Law 5/2005, which transposes the Financial Collateral Directive.

In relation to the enforcement of collateral securities, please see question 8.1 below.

In addition, since the recent Insolvency Act reform by Spain's Royal Decree-law 4/2014, of 7 March, the filing by the debtor of the protective shield of the "5.*bis*" protection also extends the moratorium of enforcement of lender claims from the date of such filing, if the assets are necessary for running the debtor's business. Likewise, since such reform, individual enforcement proceedings by "financial debt creditors" ("*acreedores de pasivos financieros*") will not be able to start, and those in process will also be suspended, if it is proved that creditors representing at least 51% of the existing financial debt have engaged in negotiations to reach a refinancing agreement and have committed to a standstill on enforcements.

Lastly, the Civil Procedure Act provides that the moratorium on enforcement on the grounds of criminal procedure may halt the enforcement and performance of such agreements until the criminal court issues a final resolution in such proceedings.

7.7 Will the courts in Spain recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes, Spain has been a party to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") since 1977, and it is therefore subject to recognition and enforcement of foreign arbitral awards in the terms established therein.

Given that Spain has not made any reservation to the New York Convention, its proceeding is applied to the enforcement of all arbitral awards, including those rendered in countries that did not sign the convention. The Spanish Arbitration Act specifically establishes that the *exequatur* of foreign awards will be governed by: (i) the New York Convention, without prejudice to the provisions of other, more favourable international treaties on the granting of foreign awards; and (ii) the proceedings established in the civil procedural system for judgments handed down by foreign courts.

Spanish courts will not re-examine the merits of the case. However, an arbitral award might not be recognised if certain requirements are not met (e.g. the arbitration agreement is not valid, irregularity in the composition of the arbitration authority or in the arbitral procedure, etc.). Furthermore, an award will not be recognised if the subject matter cannot be settled by arbitration in Spain or the recognition is contrary to public policy of Spain.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In the light of precept 56 of the Spanish Insolvency Act, once the insolvency proceedings are open, enforcements of collateral security may not be started if the assets are necessary to the debtor's business. The moratorium on enforcement will last until a settlement with the creditors is approved or otherwise until one year has passed from the declaration of insolvency without beginning the process of the liquidation of the assets.

In addition, since the Insolvency Act reform by Spain's Royal Decree-law 4/2014, of 7 March, as from the filing by the debtor of a "*pre-concurso*" or "5.*bis*" protection or if at least 51% of the "financial debt creditors" have engaged in negotiations to approve a refinancing agreement and have a standstill agreement in place, secured lenders will be prevented from enforcing their security.

Exceptionally, the above moratorium 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 moratorium period the insolvency administrator may decide to satisfy immediately any due amounts to the secured lenders, in order to avoid the relevant security being enforced.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The creditors' rights are divided into privileged, ordinary and subordinated. Aside from that ranking, there is a special and prioritised category of credits, namely credits against the insolvency estate (*créditos contra la masa*), which generally arise after the declaration of insolvency; such credits are not subject to ranking or acknowledgment and, in principle, must be paid by the insolvency administrator when they fall due.

Any claims of secured creditors will be qualified as "privileged claims" up to the value of the collateral on which they fall, any excess being qualified as an "ordinary claim" or, in the case of interest claims, as a "subordinated claim".

It may be possible to challenge security created "to the detriment of the insolvency estate" within the 2 years preceding the declaration of insolvency, even in the absence of fraudulent intent. However, the so-called "refinancing agreements" (and their related security) complying with certain requirements, such as certain quorum of consenting creditors and favourable report of an independent expert, may not be challengeable.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Governmental entities of any type (whether territorially based – such as national, regional, municipal authorities – or of a functional nature) will not be subject to the Insolvency Act. However, companies directly or indirectly controlled by governmental entities will also be subject to general bankruptcy laws.

Additionally, certain types of companies (such as banks and other credit entities, financial services companies or insurance companies) are subject to specific insolvency regulations, although the composition, appointment and operation of the insolvency administration will still be regulated by the Insolvency Act.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes, out-of-court foreclosure, available for certain types of security, is typically carried out by a Notary Public and takes the form of a public auction. The terms and conditions of such auction are loosely regulated in the law and hence they usually follow the provisions agreed by the parties in the relevant security document. For any unregulated aspects, the Notary Public tends to follow equivalent provisions applicable to judicial enforcements.

In the case of security over bank accounts or listed securities, particularly when the secured obligation consists of cash settlement agreements or derivative contracts, secured lenders may appropriate directly and immediately the secured assets, without conducting a

public auction. Equally, certain regional laws (such as Catalan law) expressly permit either private sales or, in the case of highly liquid security, appropriation by set-off.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Spain?

The submission by the parties to a foreign jurisdiction is valid, binding and enforceable in Spain: (i) in the case of foreign courts abided by conventions, in accordance with the provisions of Council Regulation (EC) No. 1215/2012 of 12 December 2012, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, which contemplates certain exclusive jurisdiction rules, or the applicable bilateral convention; and (ii) in the case of foreign courts not covered by 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 that 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. Regarding matters subject to exclusive jurisdiction, please see above.

10 Other Matters

10.1 Are there any eligibility requirements in Spain for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Spain need to be licensed or authorised in Spain or in their jurisdiction of incorporation?

There is no need for foreign lenders to be resident, licensed, qualified or entitled to do business in Spain to execute or enforce any rights in Spain under financing agreements or collateral agreements, provided that in their jurisdiction of incorporation they are qualified to do so (generally, there is no distinction between domestic and foreign creditors for the purposes of granting loans or security).

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Spain?

Most of the relevant issues have already been covered in the previous sections.

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The firm's Finance Practice consists of over 40 lawyers based in Madrid, Barcelona, Lisbon and London, with expert knowledge and extensive experience in complex national and international financial transactions. 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 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.

"**Bankruptcy & Restructuring Law Firm of the Year**" – (Corporate Livewire, Global Awards, 2012).

"**Only Iberian law firm among top 10 by value and volume for syndicated loan transactions (EMEA region)**" – (Bloomberg, 2014).

"**Ranked as leading Firm (1st tier) in Banking & Finance, Project Finance, Capital Markets and Debt Restructuring**" – (Chambers and Partners, 2014).

"**40 lawyers ranked in Finance practices in Spain**" – (Best Lawyers, 2014).

Sweden

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Sweden?

The debt capital markets in Sweden have been very strong during the last couple of years. The local banks remain strong and international banks and financial institutions are showing increasing interest in doing business in Sweden. Competition among lenders is fairly intense as many Swedish blue chip companies have limited need for debt funding due to strong balance sheets and plenty of liquidity. Another development that has increased the competition among debt providers is the development of a substantial and growing Swedish bond market where bonds are issued under local law documentation.

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 general rule under Swedish law is that a limited company (Sw. *Aktiebolag*) is free to guarantee the obligations of one or more other members of its corporate group, subject to certain restrictions described below under questions 2.2 and 4.1.

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 or security interest granted by a limited company may be invalid and unenforceable if the transaction reduces the company's net worth and cannot be commercially justified (i.e. lacking sufficient corporate benefit). Such a transaction is considered to be a value transfer under Swedish law. Such a value transfer may only take place if the company's restricted equity is fully covered after the transfer and the transfer can be justified in light of any additional funding requirements that might follow from the company's nature of business as well as the company's consolidation requirements, liquidity and financial position in general. The transaction will be considered to be an unlawful value transfer if these requirements are not fulfilled. In the event of an unlawful value transfer, the recipient of such transfer must return what he or she has received if the company shows that he or she knew or ought to have realised that the transaction constituted a value transfer from the company.

If a deficiency arises when restitution is made as described above, then those involved in the decision to make the value transfer will be liable for such shortfall. The same applies to those involved in implementing the value transfer. A director can therefore be held responsible for any losses incurred by the company as a result of guarantees and security interests being issued or granted without sufficient benefit for the issuing company.

Granting guarantees and security for wholly owned subsidiaries is typically considered to be commercially justified and therefore not subject to the value transfer restrictions referred to above. However, upstream as well as cross-stream guarantees and security interests are sensitive and may not be considered to be commercially justified. The value transfer restrictions may therefore be relevant in case of such guarantees and security interests.

2.3 Is lack of corporate power an issue?

Lack of corporate power is generally not an issue when Swedish companies enter into financing arrangements.

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 in order for a Swedish limited liability company to provide guarantees or grant security interests. Shareholder approval is generally not required for granting guarantees and security interests, but may sometimes be advisable, for example in the case of guarantees and security interests granted by companies that are not wholly owned.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

As further described in question 2.2 above, the granting of guarantees and security interests may in certain situations be deemed to constitute value transfers and as such only allowed if the company's restricted equity is fully covered after the value transfer and the transfer can be justified in light of any additional funding requirements that might follow from the company's nature of business as well as the company's consolidation requirements, liquidity and financial position in general.

Guarantees and security interests granted by an insolvent Swedish company will be subject to clawback risk should the company enter

into bankruptcy within certain hardening periods. Any director of an insolvent company that gives preferential treatment to certain creditors of the insolvent company may be held criminally liable as well as liable to pay damages.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Sweden has no exchange control provisions or similar obstacles restricting the enforcement of a guarantee issued by a Swedish limited company.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

There are a number of different types of collateral and security interests that can be made available under Swedish law. The most common security interest under Swedish law is the pledge agreement. Under Swedish law, as a general rule, any property or asset can be validly pledged.

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?

Swedish law does not recognise the concept of a general security agreement covering all or almost all of the assets of a security provider. Instead, the starting point is that separate security agreements must be entered into in respect of separate assets or separate classes of assets.

Notwithstanding the above, it is possible to grant security over different assets and different types of assets by way of one single security agreement. However, this is often rather impractical, as different perfection and enforcement requirements often apply for different types of assets, which makes all-inclusive security agreements rather extensive and burdensome to draft and apply.

The most common way to take security over assets in general is by way of a floating charge, in accordance with the Limited Floating Charges Act.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

The primary means of taking security over real property (i.e. land and buildings and other fixtures thereon) is by way of real estate mortgages. However, such real estate mortgages may, as described in question 3.9 below, be subject to stamp duty, so alternative security arrangements such as share pledges over the ring-fenced property companies are also common.

Collateral can be taken over machinery in a variety of different ways depending on the type of machinery. Machines that are movable goods can be pledged as collateral, but this requires that the movable goods are handed over to the pledgee or to a third party representing the pledgee. If the security provider needs to continue to use the machinery, then a so-called chattel-sale (Sw. *lösöreköpsregistrering*) can be made whereby a perfected security interest is created by way of a public announcement followed by a registration with the Swedish Enforcement Authority (Sw. *Kronofogdemyndigheten*).

Certain equipment and machinery which is more or less permanently incorporated into a real property can, subject to the prevailing circumstances, be either included in the real property (and thus covered by a real estate mortgage) or be considered as assets which are separated from the real property and therefore can be subject to other security arrangements besides a real estate mortgage.

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 and such security is established through a notification of the debtor under the receivable which is subject to such security arrangement. In order for the security interest to be perfected, all payments under the receivables must be paid to the secured party or to a representative of the secured party. This can sometimes be commercially sensitive as well as administratively onerous at least as regards account receivables. It is therefore quite common with delayed perfection that the notification of the debtor and the re-direction of payments are only made following a certain credit event relating to the security provider.

It should be noted that relying on delayed perfection (in respect of receivables as well as any other security interests) stands the risk of clawback during certain hardening periods should the security provider file for bankruptcy shortly after the completion of delayed perfection.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Security can be granted over cash deposited in bank accounts. Such security is granted by way of the bank account being pledged to the secured party. It should be noted that Swedish law contains very strict perfection requirements regarding bank account pledges. In order for the pledge to be perfected and enforceable, the pledgor must be deprived of all disposal rights to the bank account. Bank account pledges are therefore not suitable for bank accounts used in the day-to-day activities of the pledgor.

Due to the restrictions set out above, the standard approach in Sweden is to take security over deposit accounts rather than current accounts used for daily business. To the extent that current accounts are pledged, it is common to use delayed perfection arrangements so that the pledgor is only deprived of its disposal rights over the pledged current account following certain credit events.

3.6 Can collateral security be taken over shares in companies incorporated in Sweden? 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 is one of the most common security interests in Sweden and is established through a pledge agreement. The perfection requirements for a share pledge depend on whether the shares are represented by physical share certificates or if the shares are dematerialised (i.e. in register form). Physical share certificates must be handed over to the secured party or to a third party representing the secured party, whereas dematerialised shares are pledged via account entries with the Central Securities Depository as further set out in the Swedish Financial Instruments (Accounts) Act.

A share pledge agreement in respect of shares in a Swedish limited company does not have to be governed by Swedish law and can for example be governed by English or New York law. However, Swedish

law would nevertheless as a general rule still apply with respect to perfection requirements. Furthermore, Swedish law contains certain mandatory duty of care provisions that are aimed at protecting a pledgor, for example in connection with a security enforcement. It is therefore advisable that the share pledge agreement is governed by Swedish law; this is also the prevailing market standard.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

As mentioned above under question 3.1, any property or asset can be validly pledged as long as it meets certain criteria. However, in order for an inventory pledge to be perfected and enforceable, the pledgor cannot remain in the possession of the pledged inventory. Inventory pledges are therefore very impractical. A more common way to take security over a floating asset base such as inventory is instead to issue a floating charge as further described 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, please see above under questions 2.1 and 2.2 and below under section 4 for further details. The restrictions described above in respect of granting of guarantees also apply to the granting of 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?

No notarisation or registration costs, stamp duties or other fees are payable in relation to the granting of security over receivables and shares.

An application for new real estate mortgages is subject to a stamp duty of two (2) per cent, payable on the face value of such new real estate mortgages. Existing real estate mortgages can however be re-pledged an indefinite number of times without incurring any additional stamp duty.

An application for new floating charges is subject to a stamp duty of one (1) per cent, payable on the face value of such new floating charges. As with real estate mortgages, existing floating charges can also be re-pledged an indefinite number of times without incurring any additional stamp duty.

Finally, it should be noted that minor application fees are payable when applying for new real estate mortgage or floating charges, as well as when applying for a chattel sale to be registered.

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?

Most security interests can also be established more or less immediately and there are no significant costs for granting security other than the stamp duty referred to in question 3.9 above.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

There are no such consents 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)?

There are no such requirements.

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 restrictions on financial assistance are set out in the Swedish Companies Act. According to the Companies Act, a Swedish limited company may not pay an advance, grant loans or provide security for loans to a borrower (or certain affiliates to such borrower) for the purpose of funding the borrower's acquisition of shares in the company or any parent company in the same group as the company granting the financial assistance.

A Swedish limited company can therefore not support borrowings incurred for the purposes of (a) and (b) in the question above. As regards (c), there is some uncertainty under Swedish law. It is clear that the intention of the legislator has been that such financial assistance shall be forbidden, but the relevant provisions of the Companies Act seem to indicate otherwise. Great caution should therefore be exercised when considering such transactions.

It should be noted that Swedish law provides for some opportunities to grant financial assistance after the completion of an acquisition. Furthermore, there is a regime in the Companies Act whereby exemptions can be granted for otherwise unlawful financial assistance.

5 Syndicated Lending/Agency/Trustee/ Transfers

5.1 Will Sweden 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?

Lenders may appoint a facility and/or security agent to represent them in all matters relating to the finance documents as well as any security

interests. Such agents are allowed to enforce any rights that the lenders might have under the finance documents. Furthermore, the agent may enforce any collateral security and apply the proceeds from such enforcement in order to satisfy the secured claims of the lenders.

5.2 If an agent or trustee is not recognised in Sweden, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Please see question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of Sweden and guaranteed by a guarantor organised under the laws of Sweden. 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 of a loan is perfected and made valid and enforceable against third parties by way of notification of the debtor under the loan that is being transferred.

A guarantee in respect of a loan obligation will continue to apply and may be called upon by any new lender that has validly acquired the loan that is being guaranteed. The guarantor is sometimes notified of the loan transfer in order to avoid the guarantor fulfilling its guarantee obligation by way of payments to the initial holder of the loans.

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?

Swedish law neither contains an obligation to withhold tax as regards interest payable on loans made to a domestic lender or foreign lender, nor on proceeds of a claim under a guarantee or the proceeds following from an enforcement of security interests.

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 provided preferentially to foreign lenders.

No taxes apply to foreign lenders provided that such foreign lenders do not have any permanent establishment in Sweden with which the income from the loan, guarantee or security interest is effectively connected.

6.3 Will any income of a foreign lender become taxable in Sweden solely because of a loan to or guarantee and/or grant of security from a company in Sweden?

No, provided that such foreign lender does not have any permanent establishment in Sweden with which the income from the loan, guarantee or security interest is effectively connected.

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. 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.

There are no adverse consequences for a Swedish borrower if some or all of the lenders are non-Swedish, as long as such loans are made on market terms and are not made between related parties.

Swedish legislation does not contain any thin capitalisation rules. However, Swedish legislation does contain interest deduction restriction rules on intra-group loan structures including back-to-back structures involving third party lenders (e.g. banks). These rules apply both for loan structures involving only Swedish companies as well as loan structures involving both Swedish and non-Swedish companies.

Please note that new rules on interest deduction restrictions have been proposed and may enter into force as at 1 January 2016 covering all loans, i.e. regardless of being intra-group or not.

7 Judicial Enforcement

7.1 Will the courts in Sweden recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Sweden enforce a contract that has a foreign governing law?

The application of foreign law is recognised by Swedish courts, except to the extent that provisions in foreign law are contrary to the *ordre public* (i.e. such provisions that are inconsistent with fundamental principles of the legal system in Sweden).

7.2 Will the courts in Sweden 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 judgment rendered against an entity in the courts of a country which is not a contracting state under Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters made in Brussels on 27 September 1968 or the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters made in Lugano on 16 September 1988, would not be recognised or enforceable in Sweden as a matter of right without a retrial on the merits (but will be of some persuasive authority as a matter of evidence before the courts of Sweden or other public authorities). However, there is Swedish case law to indicate that such judgments could under specific circumstances be acknowledged without retrial on the merits.

A final and conclusive judgment rendered by a court in England which is enforceable in England can be recognised and enforceable by the courts of Sweden, according and subject to Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction

and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. In order to enforce a judgment under the aforementioned regulation in Sweden, the concerned party must submit an application for enforcement (Sw. *exekvatur*) to the Svea Court of Appeal (Sw. *Svea hovrätt*) and comply with the procedures of that court (as required).

From 10 January 2015, Council Regulation (EC) No 44/2001 has been repealed and replaced by Regulation (EU) No 1215/2012 (the "Recast Regulation"). The Recast Regulation will be applied by EU Member State courts from 10 January 2015 to all new legal proceedings. While much of the wording of Council Regulation (EC) No 44/2001 remains the same, there are some key changes. The Recast Regulation shifts the burden in relation to enforcement of judgments from the judgment creditor to the judgment debtor, who now has to apply to challenge the enforcement. In the absence of challenge, enforcement is automatic. The Recast Regulation abolishes 'exequatur'. A judgment creditor seeking to enforce (e.g. a judgment by an English court) now need only present the competent enforcement authority (in Sweden, the Enforcement Authority) with a copy of the judgment and a standard form certificate from the court which granted the judgment. Should the judgment debtor wish to oppose enforcement, it must apply to the designated court in the EU Member State of enforcement (in Sweden, certain designated district courts). Grounds for refusal are limited, and include, for example, public policy. Proceedings commenced before 10 January 2015 will continue to be dealt with under Council Regulation (EC) No 44/2001 as described above.

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 Sweden, 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 Sweden against the assets of the company?

The time it takes is highly dependent on which Swedish court is relevant in each case. If actions are taken by the lenders as fast as possible, it should not take longer than one (1) year to obtain an enforceable judgment against the assets of the company (however, it also depends on which asset is at hand). The application for enforcement (Sw. *exekvatur*) with the Svea Court of Appeal takes approximately 3 to 6 months to process. If the Recast Regulation applies (see question 7.2 above), a foreign judgment can, upon application, be enforced by the Enforcement Agency more or less immediately, if delay places the applicant's claim at risk and the judgment debtor does not apply for refusal of enforcement with the designated district court.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

If the pledge agreement has an enforcement clause, the creditor is free to enforce the collateral according to the regime set out in such enforcement clause. Otherwise the creditor may seek enforcement (assuming he has a title of execution) with the Swedish Enforcement Authority. The procedure is governed by the Enforcement Execution Act.

Notwithstanding the above, certain security interests, such as, for example, real estate mortgages and floating charges, can only be enforced through the Swedish Enforcement Authority.

There is a general duty of care obligation under Swedish law whereby a secured party must also look after the interests of the security provider when enforcing security interests. Any excess amounts following such enforcement must also be accounted for and paid out to the security provider.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Sweden or (b) foreclosure on collateral security?

(a) If required by an EU or EFTA defendant (i.e. including a Swedish defendant), a foreign plaintiff not domiciled in an EU or EFTA country must furnish security for the legal costs that he might be obliged to pay as a result of the proceedings. By virtue of several multilateral treaties to which Sweden is a party, plaintiffs of a large number of countries have been relieved from the obligation to furnish security.

(b) There are no restrictions for foreign lenders in the event of foreclosure on collateral security.

7.6 Do the bankruptcy, reorganisation or similar laws in Sweden 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 below.

7.7 Will the courts in Sweden recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. Foreign awards based on an arbitration agreement are recognised and enforced in Sweden. In 1972 Sweden ratified the New York Convention (*the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*) without reservation. Its provisions have been incorporated into Swedish law by the Swedish Arbitration Act.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Following a bankruptcy order, no independent enforcement is, as a general rule, available for secured creditors. However, a creditor that has a valid and perfected possessory pledge (Sw. *handpanträtt*) may sell such collateral at a public auction, subject to such auction not occurring earlier than four (4) weeks after the meeting for administration of oaths. Such creditor must also give the administrator the opportunity to redeem the collateral to the bankruptcy estate.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The Swedish Bankruptcy Act states that certain transactions can be made subject to clawback, and thus be recovered to a bankruptcy estate. There are several different circumstances that might give rise to such recovery.

There is a general right to clawback addressing *improper transactions* whereby: a creditor has been preferentially treated; the assets of the debtor have been withheld or disposed of to the detriment of the debtor's creditors in general; or the debtor's total indebtedness has been increased. Such transactions can be recovered if the debtor was insolvent, or became insolvent as a result of the transaction, and the benefitting party was aware, or should have been aware, of the debtor's insolvency and the circumstances making the transaction improper. An improper transaction is subject to a five (5) year hardening period, and a transaction made more than five (5) years prior to the bankruptcy may only be recovered if the transaction was made to a party closely related to the debtor (e.g. a person who has a substantial joint interest with the debtor based on entitlement to a share or financial interest equivalent thereto, or who through a management position has a decisive influence on the business operations conducted by the debtor).

In addition to the general principle of recovery, there are a number of recovery rules addressing specific types of transactions (e.g. gifts, payment of wages, payment of debts, granting of guarantees or granting of security interests). The majority of the specific rules differ from the general recovery rule in that they do not require the debtor to be insolvent or the benefitting party to have any knowledge of the debtor's insolvency. Furthermore, the hardening periods vary depending on the type of transaction and range between three (3) months and three (3) years.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

No. All natural persons and legal entities may be subject to 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. A creditor that has a title of execution (e.g. judgment, an arbitral award or a summary decision under the Summary Proceedings Act) can seek enforcement with the Swedish Enforcement Authority. The procedure is governed by the Enforcement Execution Act. A decision by the Enforcement Authority may be appealed to the district 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 Sweden?

Yes. Swedish law permits that parties agree between themselves to have their disputes adjudicated outside Sweden. The parties are free to choose the forum. The agreement must, however, be in writing. If the agreement is exclusive it will divest the Swedish court of jurisdiction, at least if a foreign court is willing to hear the case. Where one party is a weaker party, e.g. an employee or a consumer, a jurisdiction clause (i.e. an agreement on forum) which limits such party's access to Swedish courts will be disregarded, at least if the submission to foreign jurisdiction leads to the application of a foreign law which is less favourable to the employee or the consumer (than Swedish law).

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Sweden?

Yes. It is for example generally accepted under Swedish law that a valid arbitration clause constitutes a waiver of sovereign immunity.

10 Other Matters

10.1 Are there any eligibility requirements in Sweden 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 Sweden need to be licensed or authorised in Sweden or in their jurisdiction of incorporation?

Granting of credit to a company (i.e. not to a consumer) does not in itself require a licence or authorisation under Swedish law, but this may be required in case the lender conducts other types of financial activities as well. A Swedish lender might – even if no licence or authorisation is required – be obliged to notify its activities to the Swedish Financial Supervisory Authority pursuant to the Certain Financial Operations (Reporting Duty) Act (the "Reporting Act") and may thereby be subject to certain limited supervision, e.g. in the form of ownership assessments. The Reporting Act does not apply to non-Swedish entities granting credit to Swedish companies.

There is no specific Swedish regulation applicable to agents or security agents.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Sweden?

The key legal issues to be considered when lending to Swedish entities, and taking security over Swedish assets, have been addressed above.

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Switzerland

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Switzerland?

The Swiss lending market was more active than in 2013. According to statistics of the Swiss National Bank, the loan portfolios of Swiss banks increased by close to 10 per cent with both domestic and international clients.

Swiss banks are still heavily engaged in residential lending and public discussions are on-going as to whether there is a bubble in the Swiss (residential) real estate market.

1.2 What are some significant lending transactions that have taken place in Switzerland in recent years?

2014 has been a very active M&A year (LafargeHolcim merger, SIKA, Duffry, etc.). The biggest lending transactions were seen in connection with such transactions and commodity financings.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, a Swiss company can guarantee borrowings of one or more other members of its corporate group. Guarantees are widely used in secured lending transactions. According to Swiss law, a guarantee is a promise to another person that a third party will perform and that the guarantor will compensate for the damages caused as a result of the third party's failure to perform. There are no specific requirements as to the form of the contract. Once validly concluded, the existence of a guarantee is, in principle, independent from the existence of the obligation guaranteed.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Such concerns exist in certain circumstances.

First of all, a director of a Swiss company must act in the interest of the company. Non-compliance with such duty may lead to director liability. Further, Swiss corporate law does not recognise the overall legal concept of integrated company groups. Consequently, the board of directors of a Swiss group company may not take a consolidated view and fulfil its fiduciary duty merely by considering the overall interests of the entire group. It must rather assess and secure the financial status of the Swiss company on an independent and standalone basis, focusing on the company's distinct identity and status as a legally independent corporate entity.

In case the granting of a guarantee leads to so-called 'financial assistance', guarantees might not be enforceable and directors might become liable. Please refer to section 4 (financial assistance).

2.3 Is lack of corporate power an issue?

Yes, please see the answers to question 2.2 above and section 4 below.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Generally, no. However, in the case of financial assistance, it is customary practice in Switzerland to require formal approval of upstream or cross-stream guarantees (which potentially qualify as constructive dividends) not only by the board of directors, but also by the shareholders of the Swiss guarantor. Please see the answers in section 4.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

This is the case for financial assistance. Please see the answers in section 4. An upstream guarantee may not be given in an amount exceeding the guarantor's so-called 'free equity'.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, there are not.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

The most common types of collateral in Switzerland are security in the form of a pledge or a transfer of ownership (for security purposes) of real estate, tangible moveable property, financial instruments, claims and receivables, cash and intellectual property.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Different types of security can theoretically be contained in a single general security document. In practice, each type of security is usually documented in a separate agreement, particularly if a specific security must be documented in a public deed.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, collateral security can be taken over real property.

The definition of real estate under Swiss law includes: edified and unedified land (that is, land with or without buildings); a flat or floor of a building; and the right to build on a track of land for a limited period of time (*Baurecht*).

The following forms of security are commonly granted over immoveable property:

Mortgage assignment (*Grundpfandverschreibung*). This is to secure any kind of debt, whether actual, future, or contingent. The creditor of a claim secured by a mortgage assignment can demand an extract from the land register.

Mortgage certificate (*Schuldbrief*). A mortgage certificate establishes a personal claim against the debtor and is secured by a property lien. The mortgage certificate constitutes a negotiable security, which can be pledged or transferred for security purposes and is issued either in bearer form, in registered form or as a paperless version. An outright transfer has certain advantages in case of the security provider's bankruptcy and in multi-party transactions. Therefore, practitioners in cross-border banking transactions often prefer granting an outright transfer of a mortgage certificate instead of a pledge.

In both forms of security, the secured party's claims can be backed by property belonging to the borrower or a third party (third party security), subject to the rules on financial assistance and similar limitations (see question 2.2 above).

Mortgage assignments and mortgage certificates are created and perfected by the parties entering into an agreement regarding the creation of the security and finalised by means of a notarised deed and an entry into the land register.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, collateral security can be taken over receivables and rights under contracts in general. Common types of claims and receivables over which security is granted are: rights under contracts in general (existing and future); trade account receivables (existing and future); and balances in bank accounts.

Claims and receivables can be pledged or assigned for security purposes. The granting of security is based on the same principles as for security over moveable 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; or (ii) by crediting the intermediated securities to the securities account of the secured party. Alternatively, they can be granted by an irrevocable agreement (a so-called control agreement) between a security provider and its intermediary that the intermediary will comply with any instructions from the secured party. The security provider can, through the control agreement, grant a security right in specified intermediated securities, all intermediated securities in a securities account or a certain quota of intermediated securities in a securities account, determined by value.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Inventory is a form of tangible moveable property. Tangible moveable property comprises all property that is not classified as immoveable. Security over tangible property is commonly granted in the form of a pledge or an outright transfer.

The pledge is the most widely used type of security. A pledge entitles the lender to liquidate the pledged property if the debtor defaults, and to apply the proceeds in repayment of the secured claims.

In case of an outright transfer, the transferee acquires full title in the transferred assets, but can, under the terms of the transfer agreement, only use its title to liquidate the assets on the debtor's default to apply the proceeds to the repayment of debt. Although the transfer has certain advantages over a pledge on the bankruptcy of a Swiss security provider and in multi-party transactions, its use is restricted by increased liability concerns.

Perfection of a pledge or an outright transfer requires both: a valid security agreement; and the secured party to obtain physical possession of the relevant assets. The security holder does not have a security interest over the collateral as long as the security provider retains possession and control over it (certain moveable property, such as aircraft or ships, is not subject to this principle).

Certain moveable assets are subject to particular rules. The most important are aircraft, ships and railroads where the security is perfected by the entry of the security in the respective register. In addition, the Federal Intermediated Securities Act sets out specific provisions for the granting of a security over intermediated securities.

Swiss law generally does not recognise the concept of a floating charge or floating lien. Therefore, taking a security over inventory, machinery or equipment (often used as collateral in other jurisdictions) is not practical under Swiss law, at least in relation to assets necessary for running the pledgor's business. The requirement of physical control over the relevant assets is generally too burdensome, costly and unmanageable.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

There are no particular company law rules on a Swiss company granting collateral to secure debt used to purchase its own shares or the shares of a parent company or of a subsidiary. The company itself must not purchase more than 10% of its own voting shares.

The granting of security by a Swiss company to secure debt used to purchase its own shares can result in Swiss income tax being levied on the party selling the shares. In addition, the restrictions under corporate benefit rules (see section 4) apply to the granting of any upstream security (for the benefit of a direct or indirect parent company) and/or any cross-stream security (for the benefit of another group company not fully owned by the party providing the security). This is irrespective of the purpose of the secured obligations.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The granting or enforcement of a guarantee or security does not in itself trigger any Swiss taxes. However, certain transactions may be subject to Swiss tax.

If loans are secured over real estate, the following fees may be payable depending on the transaction: notaries' fees; registration fees (land register); and cantonal and communal stamp duties. The rates depend on the security's face value and the location of the real estate. The rates for fees vary widely from canton to canton.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Generally, filing, notification or registration of security interests is done within a couple of days. However, in case of a mortgage over real estate, the notarisation and, in particular, the entry into the land registry might take some time. Similarly, in case of registration of a pledge over intellectual property rights, such registration might take some time.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Generally, there are no regulatory consents required with respect to the creation of security. In case of a regulated entity granting security over certain of its assets, consents might be required.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

In case of a mortgage, the mortgage agreement needs to be notarised.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Yes, there are general limitations as to such upstream or cross-stream guarantees or security. The respective limitations apply in relation to guarantees or a security interest that guarantees or secures the finance or refinance of an acquisition of the shares of the company or shares of any company which directly or indirectly owns shares in the company or shares in a sister subsidiary.

Under Swiss law, it is market practice to deal with financial assistance as follows:

So-called upstream or cross-stream guarantees, i.e., guarantees granted to parent or affiliated companies (other than its direct and/or indirect subsidiaries), must generally meet arm's length conditions, as they would be requested by an unrelated third party, such as a bank, when granting the same guarantee. This means, generally, that: (a) the Swiss guarantor should carefully consider the third party's creditworthiness, as well as its willingness and ability to fulfil its obligations that shall be guaranteed; (b) the upstream guarantee should have customary terms of duration, termination and amortisation; (c) the upstream guarantee should provide for adequate interest to be paid regularly (and not just accrued); and (d) the upstream guarantee should be adequately secured (e.g., by the borrower providing a pledge or another form of security).

Non-compliance may notably lead to the invalidity of an upstream guarantee, as well as to directors' and officers' personal liability. Further, non-compliance may have adverse tax implications and may even, under certain conditions, qualify as a criminal offence (e.g., creditor preference or disloyal management) or as a fraudulent conveyance under the applicable provisions of Swiss bankruptcy law.

The following issues should be considered when granting a guarantee:

Corporate purpose: As a general rule, a commitment entered into on behalf of a Swiss company is binding on the company, to the extent it falls within the company's corporate purpose as set forth in the articles of incorporation. If that is not the case, the commitment in question could be deemed *ultra vires* (i.e., beyond the scope of its powers) and thus null and void from the outset. The fulfilment of this prerequisite is often questionable for upstream guarantees which are not entirely on arm's length terms. In case of doubt, it is advisable for the Swiss guarantor to amend its articles of incorporation by extending the article on corporate purpose to provide explicitly for the granting of financial assistance to group companies, including through upstream guarantees. In addition, it may be advisable to insert in the articles of incorporation a clear reference to the fact that the Swiss guarantor is part of a particular group of companies.

Adequate risk diversification: As a general rule, the board of directors of a Swiss company must adhere to the principle of adequate risk diversification. When granting an upstream guarantee, the board of directors must thus avoid an undue risk concentration by a substantial portion of the company's balance sheet assets consisting of such a guarantee to the benefit of a third party.

Guarantor's free equity: Unless it clearly meets the arm's length test, an upstream guarantee may not be given in an amount exceeding the guarantor's so-called 'free equity'. Free equity corresponds to the amount of the guarantor's total equity (as shown in the statutory balance sheet), minus 150% (or, in the case of a holding company, 120%) of the nominal issued share capital, minus any remaining special reserves which are not available for dividend distributions, such as any special paid-in surplus reserve.

An upstream guarantee exceeding the free equity threshold could be deemed to be an unlawful return of the shareholder's capital contributions and to violate the statutory limitations on the use of the company's legal reserves. As a consequence, such upstream guarantee could be challenged by any party as being null and void from the outset. This is particularly true where the guarantee was fictitious or where it was clear from the beginning that the borrower would not be in a position to fulfil its obligations when due.

Constructive dividend: Under Swiss corporate law, shareholders and related parties are obliged to return any benefits they receive from a Swiss company if those benefits are clearly disproportionate to the consideration received by the company, as well as to its financial status. An upstream guarantee which does not clearly have arm's length terms could be deemed as a constructive dividend. As a consequence, the board of directors of the guarantor would be forced to demand immediate repayment of the guarantee irrespective of its term. Characterisation as a constructive dividend would also lead to adverse tax consequences.

In this context, it has become customary to require formal approval of upstream guarantees (which potentially qualify as constructive dividends) not only by the board of directors, but also by the shareholders of the Swiss guarantor. However, this formal step as such does not necessarily prevent the upstream guarantee from being deemed as a constructive dividend.

Directors' and officers' duty of care: In general, the directors and the senior management of a Swiss company may become personally liable to the company, as well as to its shareholders and creditors, for any damage caused by an intentional or negligent violation of their duties. Such liability may also be incurred by the Swiss company's parent (and its corporate bodies) if the latter is deemed to be a *de facto* corporate body of the Swiss company. In addition, according to the Swiss Withholding Tax Act, directors and officers may become personally as well as jointly and severally liable for unpaid withholding tax obligations of a Swiss company which is liquidated or becomes bankrupt. This liability is stricter than the general directors' and officers' liability insofar as the officers and directors, in order to avoid liability, must prove that they have done everything which could reasonably be expected from them to ascertain and fulfil the company's payable taxes.

Withholding and income tax implications: Ordinary, as well as hidden, profit distributions by resident companies are subject to Swiss withholding tax (currently at 35%) at source. Subject to certain conditions and upon request, the tax may be fully or partially refunded to the recipient of the profit distribution. For non-Swiss recipients, a refund may only be granted based on a double tax treaty between Switzerland and the country of residence of the recipient. Further, profit distributions are not income tax deductible – they are added back to the taxable profit of the distributing company and thus become subject to corporate income tax. From a tax standpoint, a constructive dividend is always assumed when a company executes non-arm's length transactions with related parties. This is also the case with regard to upstream guarantees.

5 Syndicated Lending/Agency/Trustee/ Transfers

5.1 Will Switzerland recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

In Switzerland, the agent concept is recognised and frequently used for syndicated facilities and agency arrangements governed by Swiss or foreign law.

As for trustees, a substantive trust law does not exist in Switzerland. Therefore, it is not possible to set up a trust under Swiss law. Since July 2007, the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985 (Hague Trust Convention) is applicable in Switzerland. Certain provisions of the Swiss Private International Law Act (PILA) transpose the Hague Trust Convention into national law. These provisions essentially allow recognition of foreign trusts (as defined in the Hague Trust Convention) in Switzerland. The relevant PILA provisions grant a settlor unfettered freedom to choose the law applicable to the trust. The trust can also contain a choice of jurisdiction, which must be evidenced in writing or in any equivalent form. A Swiss court cannot decline jurisdiction if either a party, the trust or a trustee has their domicile, place of habitual residence or a place of business in the canton of that court or a major part of the trust assets is located in Switzerland.

A decision by a foreign court on trust-related matters is recognised in Switzerland if it is made in any one of the following cases: (i) by a validly selected court; (ii) in the jurisdiction in which the defendant has its domicile, habitual residence or establishment; (iii) in the jurisdiction where the trust has its seat; and (iv) in the jurisdiction whose laws govern the trust. The decision is recognised in the country where the trust has its seat, provided the defendant was not domiciled in Switzerland.

Generally, a security trustee can enforce its rights; however, this depends on the nature of the security:

Pledge: Swiss law is based on the doctrine of accessory (*Akzessorietätsprinzip*), meaning that the secured party must be identical to the creditor of the secured claim. A pledge cannot be vested in a third party acting as a security holder in its own name and right; instead, the pledge must be granted to the lender or, in the case of syndicated loans, all of the lenders as a group. The lender(s) can, however, be represented by a third party acting in the name and on behalf of the lender(s).

Security transfer or security assignment: The doctrine of accessory (see above) does not apply. For this type of security, therefore, a security trustee can enter into the security agreement and hold the security in its own name and on its own account for the lender(s).

Intermediated securities: It is not clear yet whether the doctrine of accessory applies under the Federal Intermediated Securities Act. It is probable that it will not apply where securities are transferred to the secured party's account, but it may apply where a control agreement is entered into.

5.2 If an agent or trustee is not recognised in Switzerland, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

The agent and/or the trust concept is recognised in Switzerland.

5.3 Assume a loan is made to a company organised under the laws of Switzerland and guaranteed by a guarantor organised under the laws of Switzerland. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

A transfer from Lender A to Lender B is only possible if such transfer is not prohibited under the guarantee. Legally, such transfer will be effected by an assignment.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

The granting of security upstream or cross-stream on terms other than arm's length may trigger a 35% dividend withholding tax which must be deducted from the gross payment made.

Dividend withholding tax is fully recoverable if the recipient is a Swiss-resident entity. Non-resident companies with a permanent establishment in Switzerland can claim a full refund, if the relevant asset is attributable to the Swiss permanent establishment. Non-resident companies can claim a full or partial refund of the dividend withholding tax, based on an applicable double tax treaty between their country of residence and Switzerland. If no double tax treaty applies, the dividend withholding tax may become a final burden for the recipient (subject to any measures required in the country of residence of the recipient).

The Swiss Confederation and the cantons or communes levy an interest withholding tax on interest which is secured by a mortgage on Swiss real estate. The combined rate of the tax varies between 13 and 33%, depending on which canton the real estate is located in. This interest withholding tax is reduced to zero under many double tax treaties, including the ones with the US, the UK, Luxembourg, Germany and France.

Further, the transfer of ownership of a bond, note or other securities to secure a claim may be subject to securities transfer stamp tax of up to 0.3%, calculated on the transaction value, if a Swiss bank or other securities dealer as defined in the Swiss stamp tax law is involved as a party or intermediary. The tax is paid by the securities dealer and may be charged to parties who are not securities dealers. If no securities dealer is involved, no transfer stamp tax will arise.

In addition to this stamp tax, the sale of bonds or notes by or through a member of the SIX Swiss Exchange may be subject to a minor SIX Swiss Exchange levy on the sale proceeds.

The sale of goods for consideration in the course of a business is generally subject to VAT. The standard tax rate is currently 8%. Most banking transactions, including interest payments and transactions regarding the granting of security, are exempt from VAT. However, corresponding input taxes on related expenses are not recoverable.

VAT on the sale of real estate is only chargeable if the seller opts for tax. The option is permissible for buildings (but not for land) unless the new owner uses the buildings only for private purposes.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no specific incentives of such types and no specific taxes that apply to foreign lenders.

6.3 Will any income of a foreign lender become taxable in Switzerland solely because of a loan to or guarantee and/or grant of security from a company in Switzerland?

Generally, the granting or taking of security between related parties must be at arm's length. This may mean that a security commission or guarantee fee is payable to the security provider. This commission or fee can be subject to income tax for a Swiss security provider as part of his overall earnings. The transfer of ownership of an asset to secure a loan may trigger corporate income taxes on the net income as part of the overall earnings of a Swiss security provider. Income tax rates depend, among other things, on the place of incorporation or residence of a person, entity or permanent establishment.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Please see question 3.9.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in Switzerland recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Switzerland enforce a contract that has a foreign governing law?

Yes. Subject to certain reservations, courts in Switzerland will generally recognise a governing law clause in a contract and will generally enforce a contract that has a foreign law governed contract.

The rules relating to conflicts of law applicable in Swiss courts are set out in the PILA. Generally, a contract is governed by the law chosen by the parties. The choice of law must be expressly and clearly evident from the terms of the contract or the circumstances.

These rules apply to different forms of security in the following ways:

Acquisitions or losses of rights *in rem* in moveable goods. These are governed by the *lex rei sitae*, that is, the law of the country of the asset's location at the time of the event giving rise to that acquisition or loss. The PILA allows the parties to subject the acquisition and loss of those rights to the law governing the underlying legal transaction (see above). However, that choice of law cannot be invoked against third parties who can rely on the *lex rei sitae*.

Outright transfers of a claim and/or of uncertificated securities effected by way of security. These assignments are subject to the law (PILA) chosen by the parties or governing the claim, in the absence of a choice. However, that choice of law cannot be invoked against the debtor of the claim and the issuer of uncertificated securities without the debtor's prior consent.

Pledges of securities and debts. If the parties have not chosen the applicable law, the pledge of securities and debts is not governed by the *lex rei sitae* but by the law of the pledgee's domicile. (However, if the parties make a choice of law, it cannot be invoked against third parties (see above).) Irrespective of the law applicable between the parties, the only law which can be invoked against the issuer of a security or the debtor of a claim is the law governing the pledged security or right.

Specific rules apply to intermediated securities. The law applicable to dispositions over intermediated securities, as well as further rights to such intermediated securities, is the law chosen by the parties to the relevant account agreement (Hague Convention on Intermediated Securities). However, this law can only apply if the relevant intermediary has an office (as described in the Hague Convention on Intermediated Securities) in that jurisdiction at the time the agreement is entered into. Otherwise, the applicable law is the law of the jurisdiction in which the intermediary's office, with which the relevant account agreement was entered into, is located.

7.2 Will the courts in Switzerland recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

A final judgment obtained in New York or English courts is amenable to recognition and enforcement in the courts of Switzerland according to (i) the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters dated 30 October 2007, (ii) such other international treaties under which Switzerland is bound, or (iii) PILA, provided that the prerequisites of the Lugano Convention, such other international treaties or the IPLA, as the case may be, are met.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Switzerland, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Switzerland against the assets of the company?

In case the guarantor is in possession of a so-called '*Rechtsöffnungstitel*', i.e. if the debtor recognised in a written document that it owes the amount to the guarantor, the guarantor's rights might get enforced in summary proceedings which may take two to three months. In the more likely case that no such '*Rechtsöffnungstitel*' is available, the guarantor will have to go through normal court proceedings. A judgment might be rendered within one year (first instance).

The latter is true also in case (b) if a foreign judgment needs to be enforced.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Under Swiss law, it is possible that in the security agreement the parties mutually agree that a pledgee take over the pledge in case of enforcement ('*Selbsteintritt*') and/or that the pledgee is entitled to sell the pledge ('*Privatverwertung*'). In case there is no such agreement and/or in case of formal bankruptcy proceedings, the enforcement of collateral will take place by public auction in accordance with the Swiss procedural rules. The Swiss bankruptcy law foresees several different time lines depending on the type of collateral (moveables, real estate, etc.).

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Switzerland or (b) foreclosure on collateral security?

No, they do not.

7.6 Do the bankruptcy, reorganisation or similar laws in Switzerland provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Generally, in the case of bankruptcy, pledged assets form part of the bankrupt estate. As a result, the private enforcement of pledged assets is no longer permitted and enforcement can only occur according to the Debt Enforcement Act. Intermediated securities traded on a representative market are not subject to this restriction, and private enforcement remains possible.

The pledgee's priority rights remain effective, and the proceeds from the sale of the pledged assets in the bankruptcy proceedings are first used to cover the claims secured by the pledge. If the proceeds from the sale of the pledged assets exceed those secured claims, the surplus is available for distribution to other creditors.

All claims against the bankrupt company become due at the time the bankruptcy is declared and the enforcement of all claims occurs in accordance with the procedures prescribed by the Debt Enforcement Act.

As to moratorium, Swiss law provides for company rescue procedures (*Nachlassverfahren*) in the Debt Enforcement Act. The rescue proceedings can be started by the company or in certain circumstances by a company's creditor. In those proceedings, the competent court can grant a moratorium (*Nachlassstundung*). A moratorium may, if certain conditions are fulfilled, lead to a composition agreement (*Nachlassvertrag*) that is binding on all creditors and affects the creditors' unsecured claims. For a composition agreement to be effective, it must be approved by at least a majority of the creditors holding two-thirds of all the debts or a quarter of the creditors holding three-quarters of the debt, and the competent bankruptcy court.

If a moratorium is granted by the competent court, the security granted by the company is not directly affected. However, as a rule, enforcement proceedings for the security cannot be started or continued as long as the moratorium is in effect. Private enforcement (see question 8.4) should still be possible and not be affected by a moratorium. If the rescue proceedings result in a composition agreement, the security granted by the company will not be affected by this. A composition agreement does not affect security granted by the company.

7.7 Will the courts in Switzerland recognise and enforce an arbitral award given against the company without re-examination of the merits?

An arbitration award rendered against a Swiss company in an arbitration proceeding is generally enforceable in Switzerland according to and subject to the New York Convention of 10 June 1985 on the recognition and enforcement of foreign arbitral awards.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

All claims against the bankrupt company – as well as claims resulting from a guarantee – become due at the time the bankruptcy is declared and the enforcement of all claims occurs in accordance with the procedures prescribed by the Debt Enforcement Act.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The Debt Enforcement Act provides, in connection with bankruptcy and composition of a security provider, that a transaction is voidable if any of the following apply:

- The security provider or the guarantor disposes of assets for free or for inadequate consideration (not at arm's length) in the year before the adjudication of bankruptcy or an equivalent event.
- The security provider repays debts before they become due, settles a debt by an unusual means of payment or grants collateral for previously unsecured liabilities, which the security provider was not obliged to secure, in the year before the adjudication of bankruptcy or an equivalent event, provided that both the security provider was overindebted (i.e., its liabilities exceeded its assets) at that time and the secured party was aware of the overindebtedness of the security provider. A *bona fide* secured party is therefore protected. However, the law presumes the secured party's knowledge of the security provider's overindebtedness, so the secured party bears the burden of proof in relation to his good faith.
- The granting of security by the security provider (or the granting of the guarantee) occurred in the five years before the adjudication of bankruptcy proceedings or an equivalent event, provided that the security provider intended to disadvantage or favour certain creditors or should reasonably have foreseen that result and the security provider's intent was, or must have been, apparent to the secured party.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Under Swiss law, it is not possible to start debt enforcement proceedings against Swiss municipalities ('*Gemeinden*') with the aim of inducing bankruptcy. In accordance with the applicable ordinance on debt enforcement, only enforcement proceedings on the enforcement of collateral are possible against Swiss municipalities.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

The conditions under which security (including guarantees) can be enforced are determined by general principles of law, as well as by the specific provisions of the security agreement. This applies to loans, guarantees, pledged assets and assets transferred by way of security. For a secured party to be permitted to enforce security, the secured party must have a secured claim, and this claim must be due. The relevant security agreement may set out additional conditions for the enforcement of the security. Usually, security agreements refer to the occurrence of an event of default, as specified in the credit agreement governing the secured loan, as a condition for enforcing the security.

Guarantees under Swiss law are basically independent from the underlying claim. Therefore, it is not a requirement for the enforcement of a guarantee that an underlying claim must exist or be due (in contrast to pledges). It is sufficient that the conditions for enforcement set out in the guarantee are fulfilled. However, depending on the circumstances, the enforcement of a guarantee where there is no underlying claim may constitute an abuse of rights, which is not protected under Swiss law.

In the case of pledged assets, there are two main forms of enforcement, namely by way of a private enforcement and under the rules of the Debt Enforcement Act. Private enforcement is generally only permitted where the parties have agreed to this in advance, for example, in the security agreement. Private enforcement is possible in relation to all forms of assets, but in practice mainly occurs in connection with moveable assets. Private enforcement can take place by a private sale or a public auction or, in relation to assets, the value of which can be objectively determined (for example, listed securities), the pledgee itself purchasing the pledged assets, and applying the proceeds to its claims (*Selbsteintritt*). For securities over intermediated securities, as a matter of law, private enforcement does not need to have been agreed between the parties but is only permitted in respect of intermediated securities that are traded on a representative market. Pledges over intermediated securities can also be enforced privately on the bankruptcy of the security provider. This is in contrast to pledges over any other assets.

In all forms of private enforcement the pledgee must protect the interests of the pledgor and, in particular, must obtain the best price possible in the sale of the pledged assets, fully document the enforcement and provide the documentation to the pledgor and return any surplus remaining after the application of the proceeds to the secured debt to the pledgor.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Switzerland?

Basically, yes.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Switzerland?

A sovereign entity is either acting with its so-called administrative assets or with its financial assets. The administrative assets are the assets that directly serve the administrative tasks of an administration. The financial assets do not directly serve such purpose. If a sovereign entity is entering into agreements concerning its financial assets, it may validly waive sovereign immunity because in such cases the sovereign entity is acting as a normal third party. In the case of administrative assets, a sovereign entity may also waive sovereign immunity; however, in extreme cases (e.g. public policy issues) such waiver might be doubtful.

10 Other Matters

10.1 Are there any eligibility requirements in Switzerland for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Switzerland need to be licensed or authorised in Switzerland or in their jurisdiction of incorporation?

No, there are no eligibility requirements in Switzerland for a lender to a company. Any person can lend to a third party.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Switzerland?

No, there are not.

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He graduated from the University of Zurich (*lic. iur.*, 1998) and the London School of Economics and Political Science (M.Sc., Law and Accounting, 2002). He was admitted to the bar in Switzerland in 2000 and, as a solicitor (not practising) of England and Wales in 2003, is an authorised issuer's representative at the SIX Swiss Exchange and is recognised as a trust and estate practitioner (TEP) by STEP. Oliver Widmer joined Pestalozzi in 2001. In 2003/2004, he was seconded to head the Swiss law and compliance department of one major US investment bank.

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Pestalozzi's roots go back to 1911. Of the major and most respected Swiss law firms, Pestalozzi has the longest tradition.

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- We are committed to attracting and retaining dedicated and skilled people.

Taiwan

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Taiwan?

In 2014, the government-owned banks still had the majority of the syndicated loan market shares. According to the report of the Ministry of Finance to the Parliament on January 7, 2015, the total amount of the Taiwan syndicated loan market in 2014 was around US$31.64 billion and there were 225 syndicated loans in Taiwan, among which the market share of the government-owned banks was about 54%.

Five Taiwanese banks and five Chinese banks entered into a memorandum of understanding (MOU) for cooperation in extending syndicated loans during the Cross-Strait Entrepreneurs Summit held on December 14 to 16, 2014 in Taipei. The five Taiwanese banks were Bank of Taiwan, Taiwan Cooperative Bank, Land Bank of Taiwan, CTBC Bank and Taipei Fubon Commercial Bank. The Chinese counterparts were Bank of China, Bank of Communications, China Development Bank, China Minsheng Bank, and Bank of Nanjing.

It was reported that the purpose of the MOU is to reinforce cooperation between banks on the two sides of the Taiwan Strait and to diversify the risk of syndicated loans; for instance, all banks in a syndicated loan consortium comprising banks from two sides would have equal rights to payment or priority over collaterals. In addition, the banks are encouraged to recommend potential clients to each other and exchange relevant information.

1.2 What are some significant lending transactions that have taken place in Taiwan in recent years?

(1) It was reported that in February 2015 Bank of Taiwan, acting as the facility agent of some Taiwan financial institutions, will enter into a three-year syndicated loan agreement with Innolux Corporation ("Innolux") in the amount of NT$80 billion (US$2.59 billion approximately), marking the largest syndicated loan of its kind in Taiwan in the most recent year.

(2) On September 4, 2014, four banks signed an agreement to provide a combined US$1.07 billion (NT$33.05 billion approximately) five-year syndicated loan respectively to TCC International Limited (US$720 million) and TCC International Holdings Limited (US$350 million). Management of the syndicated loan was led by Mega International Commercial Bank, ANZ Bank (Taiwan) Limited, BNP Paribas, and DBS Bank (Taiwan) Limited.

(3) On August 7, 2014, Asia Cement (China) Holdings Corp. announced that the company entered into a syndicated loan agreement for a loan in the sum of US$300 million (NT$9.3 billion approximately), with a repayment term of 5 years (which is extendable for another 2 years after the initial 5-year term). Bank of Taiwan was the facility agent for this syndicated loan, with supports and participation of a consortium of other banks, including First Commercial Bank, Land Bank, Sumitomo Mitsui Banking Corporation, Standard Chartered Bank, United Overseas Bank, and DBS Bank (Taiwan) Limited, etc.

(4) On June 4, 2014, Bank of Taiwan, acting as the facility agent of 12 financial institutions, entered into a five-year dual-currency financing syndicated loan agreement with Fujian Fuxin Special Steel Co., Ltd. ("FUXIN") in the amount of US$186 million (NT$5.77 billion approximately) and RMB650 million (NT$3.25 billion approximately). Management of the syndicated loan will be led by United Overseas Bank, Taiwan Cooperative Bank, Hua Nan Bank, Chang Hwa Bank, Land Bank, Taiwan Business Bank, Citi Bank (Taiwan) Limited, Bank SinoPac, and DBS Bank (Taiwan) Limited.

(5) On May 6, 2014, First Commercial Bank and Bank of China, acting as the facility agent of some financial institutions, entered into a seven-year dual-currency financing syndicated loan agreement with E United Group in the amount of RMB872.55 million (NT$4.37 billion approximately) and US$38 million (NT$1.18 billion approximately). In this syndicated loan, Yieh Phui (China) sealed a RMB872.55 million loan deal through both facility agents of First Commercial Bank and Bank of China, with Shanghai Pudong Development Bank, Land Bank, Taiwan Cooperative Bank, Taiwan Business Bank as participants. In addition, Yieh Phui (Hong Kong) has sealed a US$38 million loan deal through sole bookrunner First Commercial Bank, and the facility was split into a US$31 million term loan and a RMB42 million loan, with Bank of Kaohsiung, Export-Import Bank of China, Hua Han Commercial Bank, Sunny Bank and Taichung Bank as participants.

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.

However, where a Taiwanese company provides a guarantee to its overseas affiliate (incorporated in a jurisdiction other than China) who borrows funds to make investment in China, the guarantor will require a prior approval of the Investment Commission, the Ministry of Economic Affairs ("MOEA") with respect to the investment in China.

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 answer to question 2.1. The provision of security other than a guarantee generally will be deemed as providing a guarantee as well and is subject to the same prohibitions and restrictions.

In addition, according to the Company Act, a company cannot redeem or buy back any of its outstanding shares unless permitted by law. For instance, a company may purchase up to 5% of its outstanding shares and transfer the same to its employees. To give another example, a listed company may buy back its outstanding shares in the circumstances permitted under the Securities and Exchange Act. The restriction on a company's ability to buy back its outstanding shares extends to the company's controlled company; in addition, the violation of such restriction may cause the buy-back to be void. A subsidiary of the parent company cannot purchase the shares of the parent company. Nevertheless, the Company Act does not prohibit a sister subsidiary from purchasing the shares of another sister subsidiary.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Taiwan recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

As a general practice for a syndicated loan, syndicated banks will appoint an agent bank to act for and on behalf of the syndicated banks, including registering the agent bank as, for instance, a mortgagee and foreclosing the mortgaged property. In addition, there will be a clause in the syndicated loan agreement to the effect that the syndicated banks' claims against the borrower under the syndicated loan agreement are joint and several. Given this, the agent bank may claim the whole amount of the loan from the borrower and distribute the proceeds obtained therefrom to the syndicated banks in accordance with their proportion of participation in the loan.

5.2 If an agent or trustee is not recognised in Taiwan, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

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 28 jurisdictions, namely, Australia, Austria, Belgium, Denmark, France, Gambia, Germany, Hungary, Indonesia, India, Israel, Kiribati, Luxembourg, Macedonia, Malaysia, New Zealand, the Netherlands, Paraguay, Senegal, Singapore, Slovakia, South Africa, Sweden, Swaziland, Switzerland, Thailand, the United Kingdom and Vietnam.

(b) Where the portion of the proceeds is to indemnify the principal of the loan made by the lender, it will not be subject to income tax. If the portion of the proceeds is to indemnify the default interest sustained by the lender, it may be subject to income tax as mentioned above. Moreover, in the event that the proceeds include a penalty pursuant to an agreement between the lender and the borrower, such penalty will be

subject to income tax unless the lender may prove that the penalty is to indemnify losses suffered by the lender.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

(1) Income tax on the following categories of income shall be exempted:

Interest derived from loans offered to Taiwanese government or legal entities within the territory of Taiwan by foreign governments or international financial institutions for economic development, and interest derived from the financing facilities offered to their branch offices and other financial institutions within the territory of Taiwan by foreign financial institutions.

Interest derived from loans extended to legal entities within the territory of Taiwan by foreign financial institutions for financing important economic construction projects under the approval of the Ministry of Finance.

Interest derived from favourable-interest export loans offered to or guaranteed for the legal entities within the territory of Taiwan by foreign governmental institutions and foreign financial institutions which specialise in offering export loans or guarantees.

Moreover, some of the tax treaties provide an exemption from income tax withholding for interest payment. For example, the Netherlands-Taiwan Tax Treaty provides that the interest which is paid in respect of a bond, debenture or other similar obligations of a Taiwanese public entity, or of a subdivision or local authority of Taiwan, should be taxed only in Netherlands.

(2) For the purposes of effectiveness or registration, there is no tax applicable to foreign investments, loans, mortgages or other security documents.

6.3 Will any income of a foreign lender become taxable in Taiwan solely because of a loan to or guarantee and/or grant of security from a company in Taiwan?

No, a foreign lender (except for a foreign entity's Taiwan branch) will not be subject to Taiwan income taxes solely because of a loan to or guarantee and/or grant of security from a Taiwanese company.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Please refer to our answer to question 3.9.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

A thin capitalisation rule was incorporated into the Income Tax Act effective from January 28, 2011. That is, retroactively from January 1, 2011, if the ratio of a company's debts (to its related party) to its equity exceeds a certain ratio, the interest expense arising out of the portion of the debts exceeding said ratio is not deductible, except for financial institutions (including banks, cooperatives, financial holding companies, bills finance companies, insurance companies, and securities firms). The Ministry of Finance, by referring to international practices, has set a safe harbour debt-equity ratio of 3:1.

The same treatment in respect of the thin capitalisation rule applies to both domestic and foreign lenders.

7 Judicial Enforcement

7.1 Will the courts in Taiwan recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Taiwan enforce a contract that has a foreign governing law?

Generally, the choice of a foreign governing law to govern a contract would be recognised as a valid choice of law and given effect by the courts of Taiwan, provided that the relevant provisions of the foreign governing law would not be applied to the extent such courts hold that: (i) the application of such provisions would be contrary to the public order or good morals of Taiwan; or (ii) such provisions would have the effect of circumventing mandatory and/or prohibitive provisions of Taiwan law. However, where the contract is about the creation/perfection of a security interest, such as a pledge and mortgage, the choice of law will be subject to the conflicts of 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 will 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, MOEA is required.

As to the foreign exchange control, please refer to our answer to question 2.6.

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Hsin-Lan has advised on many: (1) offshore and onshore fund raising projects, such as ADRs issued by Chunghwa Telecom, ECBs issued by Taiwan High Speed Rail and EEBs issued by Yuen Foong Yu Paper MFG. Co., Ltd. and Asia Cement, as well as several TDR offerings and IPOs in Taiwan; (2) mergers and acquisitions of financial institutions, such as the tender offer of Grand Cathay Securities by China Development Bank, acquisition of Hsinchu Commercial Bank by Standard Chartered Bank and acquisition of Polaris Securities by Yuanta Financial Holding Co., Ltd.; and (3) asset sale and purchases and general corporate finance. In addition to transactions, Hsin-Lan has provided general advices in the field of financial-, investment-, data protection- and corporate-related inquiries.

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Lee and Li, Attorneys-at-Law 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

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Trinidad and Tobago?

Trinidad and Tobago has become heavily industrialised in the past 20 years through the development of industrial estates, in particular the Point Lisas Industrial Estate where a large variety of manufacturing plants have been established. In the early stages, loan financing for these plants was provided mainly by foreign lenders with minimal participation by local lenders. In recent years, local banks have grown substantially in lending capacity and expertise and can now participate to a much greater extent in loans for large projects. Local banks are now willing to offer different financing packages through a variety of bonds, notes and other securities in addition to standard loan transactions. The Government has also become a significant borrower to raise funds for its development projects and is now the largest debtor to local banks.

1.2 What are some significant lending transactions that have taken place in Trinidad and Tobago in recent years?

Typically, the significant lending transactions have been the loans to establish or acquire large plants or aircraft projects, strategic acquisitions and loans to the Government.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Generally yes. In Trinidad and Tobago, a parent can guarantee the debt of a subsidiary, a subsidiary may guarantee the debt of a parent and a subsidiary may guarantee the debt of a sister company. The power of guarantee is subject to certain restrictions under Section 56 of the Companies Act, Chap. 81:01 ("the Companies Act") which is discussed at length in our response to question 2.5 below.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

It is a general principle of company law that the directors of a company must exercise their powers in the best interests of the company. That principle is codified in section 99 of the Companies Act which provides *inter alia* that every director and officer of a company shall, in exercising his powers and discharging his duties, act honestly and in good faith with a view to the best interests of the company. Based on the foregoing, there must be a commercial justification for what the directors cause the company to do. Failure to act in the best interests of the company amounts to a breach of trust or a breach of duty owed by the directors to the company which is enforceable by the members of the company. A breach of that duty gives rise to a claim by the members of the company against the directors for breach of trust or misfeasance.

If a transaction is entered into otherwise than in the best interests 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(1) 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 is contrary to the articles.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

The guarantee must be properly authorised, which generally means that the procedural rules of the company as set forth in its constituent documents must be followed and the board of directors take the proper measures to authorise the transaction, unless the shareholders are given this power under the articles or bye-laws or by way of a Unanimous Shareholder Agreement.

No governmental consents, filings or other formalities are required in connection with giving a guarantee.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Normally net worth, solvency or similar limitations on the amount guaranteed are not regulated by law and would be based on the lender's credit risk requirements. Section 56 of the Companies Act restricts a company or any of its affiliates from giving loan guarantees and other forms of financial assistance:

(i) to its shareholders, directors, officers or employees or to its affiliates or associates for any purpose; or

(ii) to any person for the acquisition of shares in the company or in its affiliate.

A company cannot provide such financial assistance unless it can satisfy, at the time of giving the financial assistance, a dual test, which is as follows:

(i) a liquidity test as contained in Section 56 (2) (a); and

(ii) a solvency test as contained in Section 56 (2) (b).

Under Section 56, the liquidity and solvency tests are used to determine whether circumstances prejudicial to the company exist. Section 56 (2) is set out in full:

> *"(2) Circumstances prejudicial to the company exist in respect of financial assistance mentioned in subsection (1) when there are reasonable grounds for believing that:*
>
> *(a) the company is unable or would, after giving the financial assistance, be unable to pay its liabilities as they become due; or*
>
> *(b) the realizable value of the company's assets, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, would, after giving the financial assistance, be less than the aggregate of the company's liabilities and stated capital of all classes."*

In order to determine whether or not the liquidity test is satisfied, one must form a reasonable opinion, at the time of giving financial assistance, based on the facts of each case to see what the likelihood would be of the security being called upon in the future so as to constitute it a "liability" which must be paid as part of the "liabilities as they become due". Any such liability must be assessed on the basis of the reasonable likelihood of the obligation or security being called upon under the liquidity test. A company fails to satisfy the liquidity test only in cases where there is cogent evidence to demonstrate that the particular transaction will be in breach of the provisions of Section 56 (2) (a).

The realisable value of a company's assets for the purposes of the solvency test must be determined at the time of giving the financial assistance. The valuation methodology will depend on the financial circumstances and prospects of the company. Normally, a company's assets would be valued as if sold on a going concern basis if that would maximise the price. However, a company's assets would be valued as if sold on a piecemeal or break-up basis if the going concern approach was shown to conceal undervalued or redundant assets. "Distress" liquidation values are applicable where there is reason to believe that a company will experience financial difficulty, for example it has experienced years of losses with no chance of a turnaround, or it has major creditors ready to call in the company's financial obligations which the company is unlikely to honour. If it is not reasonably foreseeable at the time of providing the financial assistance that a company is likely to experience financial difficulty in the near future, then the company's assets should be valued on a going concern basis.

The failure by a company to satisfy either the liquidity test or the solvency test or both tests will render the security provided by the company in those circumstances void and unenforceable.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No. There are no exchange control restrictions in Trinidad and Tobago.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

A wide variety of assets (including land, buildings, equipment, inventory, accounts, contract rights, deposit accounts, shares, receivables, etc.) are available as security for loan obligations. Assets used as security are divided into two broad categories: (a) "personal property" which refers to property other than real property (land and buildings); and (b) real property.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Generally, security on a company's assets can be given by a single security agreement, typically equitable charges under a debenture on all its property both present and future. Under this type of security, the charges on certain types of assets (real property, plant and equipment, intellectual property, personal property of all kinds, goodwill, etc.) may be fixed charges and the charges on other types of assets (typically inventory) will be floating charges under which the assets can be disposed of by the charger in the normal course of business without any consent of the secured party.

Legal charges are given by separate charging documents (often collateral to a debenture). It is recommended that there be a specific legal mortgage of real property to be registered in the Protocol of Deeds or the Real Property Register. These types of charges are discussed in greater detail in our responses to question 3.3 below.

A statement of charge which includes certain statutory particulars regarding a security given by a company, together with a copy of the instrument by which the security interest is created, must be registered at the Companies Registry within 30 days after creation of the charge.

Stamp duty is payable on security documents which are principal securities at the rate of 0.4 per cent of the principal amount secured. Security documents given as collateral security for another security document which is stamped as principal security are to be stamped with a fixed duty of TT$25.00.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. Collateral security over real property (land) is given by way of a deed of mortgage to be registered in the Protocol of Deeds (lands held under common law title) or the Real Property Register (lands held under the Real Property Act whereby the title is guaranteed by the State with certain limited exceptions normally involving fraud). The mortgage instrument creates a legal charge on the charged property, priority of which dates from date of registration. Enforcement of the mortgage is effected by (i) appointment of a receiver to collect rents, and (ii) sale of the charged property.

Alternatively, real property together with plant, machinery and equipment thereon may be charged under a debenture as described in our answer to question 3.2 above. The charge under this type of security is a fixed equitable charge and is normally enforced through appointment of a receiver by the secured creditor who in law is the agent of the company and is given, in the security document, a power of attorney containing the normal powers required for sale of the charged assets. No registration is required in the Deeds Registry unless the security includes real property.

Where the security is provided by a company a statement of charge must be registered within 30 days from the date of the creation of the charge. Security documents on real property are subject to stamp duty at the same rates as provided in our response at question 3.2.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. A collateral security over receivables may be effected by (i) an assignment by way of charge, or (ii) an equitable charge by the chargor in favour of the secured party. In either case, it is recommended that the charging document contain a provision requiring the charger to deposit the receivables into a bank account over which the chargee has a charge (see the answer to question 3.5 below) or a right of control over withdrawals.

The assignment is effected by a deed and gives legal title to the receivables to the assignee. Written notice of the assignment must be given to the debtor(s). The assignee takes the receivables subject to all equities arising between the assignor and the debtor(s) at the date of giving notice of the assignment, so notice should be given immediately after the assignment. The deed of assignment need not be registered in the Protocol of Deeds.

An equitable charge on receivables is often contained in a debenture as described in our answer to question 3.2 above. The charge under this type of security is usually a fixed charge by way of mortgage but the charge may be deemed to be only a floating charge unless supported by an obligation of the chargor to deposit the receivables into an account controlled by the chargee. A floating charge is not a very effective security as the right of control over the receivables prior to the floating charge being crystallised into a fixed charge is limited.

Where the security is provided by a company a statement of charge must be registered within 30 days from the date of the creation of the charge. Security documents on receivables are subject to stamp duty at the same rates as provided in our response to question 3.2.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. Collateral security over cash deposited in bank accounts can be created by way of (i) a general charge such as a debenture, or (ii) a specific account charge. Unless a general charge gives the chargee a right of control over the account, it will be deemed a floating charge. Therefore, we recommend that the charge be subject to the condition that withdrawals be permitted only with the prior consent of the chargee.

A specific account charge creating a legal charge on the account is recommended in cases where an account has been established for receiving funds that are to be utilised in payment of the debt, especially where the funds are also being utilised to pay other creditors or persons under a waterfall type arrangement. Under a charge of this type, the chargee will have full control over the account and the disposal of funds deposited therein.

3.6 Can collateral security be taken over shares in companies incorporated in Trinidad and Tobago? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes. Shares in a private company or a public company whose shares are unlisted are in certificated form. Collateral security over shares is normally given by (i) a fixed equitable charge under a debenture, or (ii) by a memorandum of deposit or deed of charge of shares. The charge normally includes dividends, bonuses and all other rights accruing to the shares or the registered shareholder. Such security can also be validly granted under a New York or English law governed document. A shares charge is supported by delivery to the security holder of the share certificates (where the shares are certificated) accompanied by a transfer signed by the registered holder of the shares in the name of the security holder or a nominee as transferee or in blank with authority to complete the transfer in favour of a purchaser of the shares upon enforcement of the charge.

The Articles or bye-laws of private companies often contain restrictions against transfer and provisions giving the directors discretion to refuse to register a transfer of shares without having to show good cause. Therefore, it is recommended that, in such cases, the charge be supported by a special resolution of the company irrevocably waiving these rights in favour of the chargee.

The shares of public companies listed on the Trinidad and Tobago Stock Exchange are usually uncertificated and are held by a central share depository under a single global certificate in trust for the registered shareholders. A charge on uncertificated shares must be supported by a pledge registration form by the registered shareholder whereby the shares are transferred to the pledgee or his nominee as security and the central depository is instructed to place them in a blocked account in favour of the pledgee. The pledgee registration form is usually accompanied by an undated letter of authority from the registered shareholder to the pledgee (i) authorising the pledgee 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 bye-laws. Deeds that are to be registered under the Registration of Deeds Act must be executed (if locally) in the presence of an adult witness who signs his/her name and writes his/her address and occupation and certain legal functionaries (usually an attorney-at-law). Such deeds, if executed abroad, must be executed in the presence of an adult witness who will attend before a Notary Public to swear an affidavit of due execution. There are stipulated formalities in the Registration of Deeds Act for notarisation of the Deed.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Yes. Section 56 1(b) of the Companies Act expressly prohibits a company from giving financial assistance by means of a loan guarantee or otherwise to any person for the purpose of, or in connection with, a purchase of a share issued or to be issued by the company, in the case where circumstances prejudicial to the company exist. This is discussed in detail in our answer to question 2.5 above.

(b) Shares of any company which directly or indirectly owns shares in the company

Yes. The above restriction also applies to provision of financial assistance for the purchase of shares in an affiliate.

(c) Shares in a sister subsidiary

Yes. The above restriction also applies to provision of financial assistance for the purchase of shares in a sister subsidiary.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Trinidad and Tobago recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes. A collateral agent or trustee may hold debt security in trust for the secured parties and enforce the security on their behalf.

The appointment of the collateral agent or trustee is effected by an agency agreement or trust deed which will contain the general powers of the collateral agent/trustee including any restrictions on enforcement of the security, typically a condition requiring approval of a particular majority of the secured parties for this purpose.

5.2 If an agent or trustee is not recognised in Trinidad and Tobago, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

No answer is required for Trinidad and Tobago.

5.3 Assume a loan is made to a company organised under the laws of Trinidad and Tobago and guaranteed by a guarantor organised under the laws of Trinidad and Tobago. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The benefit of the guarantee must be expressly assigned by Lender A to Lender B along with the principal loan contract to which the guarantee relates. The guarantee will normally contain a provision that it shall be binding upon and shall inure to the benefit of and be enforceable by and against the respective successors of each of the parties. It is not necessary, although it may be prudent for Lender A to give notice to the guarantor of the assignment of the guarantee.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Pursuant to section 5 of the Corporation Tax Act Chap. 75:02 ("CTA"), interest payable on loans made to a domestic lender will be classified as taxable profits of the lender and will be subject to corporation tax at the rate of 25 per cent. The domestic lender is solely responsible for payment of corporation tax on its profits.

Pursuant to section 50 of the Income Tax Act Chap. 75:01 ("ITA"), interest payable on a loan made by a non-resident lender to a Trinidad and Tobago resident is deemed to be income arising in Trinidad and Tobago and will be subject to withholding tax at the rate of 15 per cent (or such lower rate as provided in any double taxation treaty between Trinidad and Tobago and the country in which the lender is resident). The borrower or other person paying interest is responsible for deduction and payment of withholding tax to the local Revenue Authority before the interest is remitted to the non-resident payee.

It is normal to include in loan agreements/security documents for loans by overseas lenders a provision for grossing up interest payments so that, after deduction of withholding tax on the grossed up amount, the lender receives a net amount equal to the full amount which he would have received had such payment not been subject to withholding tax.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Under Trinidad and Tobago law there is no provision for tax incentives or other incentives to be provided preferentially to foreign lenders nor any taxes applicable specifically to foreign lenders for the effectiveness or registration of loans, mortgages or other security documents issued by them.

6.3 Will any income of a foreign lender become taxable in Trinidad 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?

The Bankruptcy and Insolvency Act 2007 (BIA) partially came into force on 26th May 2014. BIA stipulates a procedure whereby the court on the petition of a creditor will make a receiving order against a debtor and appoint a licensed trustee of his property. A debtor against whom a receiving order is made is a bankrupt.

Under section 30 (1) an insolvent person may file a notice of intention with the Supervisor of Insolvency stating his intention to make a proposal to creditors under section 26. Under section 55 (1), subject as provided in the BIA, on the filing of a notice of intention no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt.

Pursuant to section 56 of the BIA on the bankruptcy of any debtor no creditor has any remedy against the debtor or the debtor's property or shall commence or continue any action execution or other proceeding for the recovery of a claim provable in bankruptcy until the trustee has been discharged. As provided in the BIA the bankruptcy of a debtor does not prevent a secured creditor from realising or otherwise dealing with his security in the same manner as he would have been entitled to realise or deal with it if section 56 had not been passed, unless the Court orders otherwise.

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?

Pursuant to section 55(2) of the BIA the stay of proceedings does not apply to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realisation before the notice of intention under section 30 was filed from dealing with those assets.

Further, under section 56 (2) of the BIA the bankruptcy of a debtor does not prevent a secured creditor from realising or otherwise dealing with his security in the same manner as he would have been entitled to realise or deal with it if the section had not been passed, unless the Court orders otherwise. Under section 57 a creditor who is affected by the operation of sections 55 or 56 may apply to the court for a declaration that those sections no longer apply to him and the court may make such a declaration subject to any qualifications that it considers proper.

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, the BIA provides for preference periods for unrelated and related parties. Section 84(1) provides that every conveyance or transfer of property or charge made on the property, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving such creditor or any surety or guarantor for the debt due to such creditor a preference over the other creditors is, where it is made, incurred, taken or suffered within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date the insolvent person became bankrupt, both dates included, deemed fraudulent and void as against the trustee in the bankruptcy. Where the conveyance transfer charge payment obligation or judicial proceeding is in favour of a person related to the insolvent person, the period is 1 year.

Preferential creditors include those to whom are owed:

(i) wages and salaries, commissions or compensation of any employee for services rendered during the 6 months immediately preceding the bankruptcy;

(ii) contributions payable by the bankrupt, as an employer, pursuant to the National Insurance Act, the Widows and Orphans Pension Act and a Pension Fund Plan;

(iii) all taxes including land tax or income tax assessed on the bankrupt and not exceeding in total one year's assessment; and

(iv) arrears of rent for a period of 3 months prior to bankruptcy and not exceeding the realisation by the trustee from the property on the premises under lease.

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?

Bankruptcy proceedings under the BIA are not applicable to financial institutions under the Financial Institutions Act 2008 (the "FIA") or insurance companies. The FIA and the Insurance Act, Chap. 84:01 (as amended by Act No. 3 of 2009) govern the winding up of banks and financial institutions and insurance companies respectively. Those acts expressly provide for the application of

the winding up provisions under the Companies Act to the winding up of those entities subject to the provisions of the said acts. The Co-operative Societies Act Chap. 81:03 governs the winding up of credit unions and specifically excludes the Companies Act. Further, the Companies Act does not govern the winding up of statutory corporations.

Pursuant to the Central Bank Act Chap. 79:02 (as amended by the Central Bank (Amendment) Act No. 18 of 2011 (the Amendment Act) the Central Bank of Trinidad and Tobago (the Bank) is provided with special emergency powers (including the power of appointment of a person to act as a receiver or manager with regard to financial institutions, insurance companies and societies registered under the Co-operative Societies Act) where the Bank is of the opinion *inter alia* that the financial system of Trinidad and Tobago is in danger of disruption, substantial damage, injury or impairment.

The constitutional validity of the Amendment Act has been challenged in the Trinidad and Tobago Courts. In one action it was decided that the Amendment Act was unconstitutional in its entirety, while in another it was held that the Amendment Act was only partially unconstitutional. Both decisions are subject to appeal to the Court of Appeal of Trinidad and Tobago which has not yet given a ruling.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

A creditor is entitled to seize the assets of a debtor through enforcement of (1) any security held for the debt, and (2) a judgment obtained against the debtor for recovery of the debt. Enforcement of a security is normally effected by sale of the charged asset or, in the case where the security is a general charge such as a debenture by appointment of a receiver, proceedings for enforcement of a judgment usually require the creditor to make a further application to the court for an appropriate order except that a writ of execution against goods and chattels of the debtor may be taken out by the creditor without further order.

Insolvency proceedings against a company are normally instituted in court for an order that the company be wound up and for appointment of a liquidator. The winding up is conducted by the court.

The Companies Act also provides for a company to be wound up voluntarily under the supervision of its creditors. The company will pass a special resolution for voluntary winding up. A meeting of creditors must be summoned for the day or the day following the day on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed. Notices of the meeting of creditors shall be sent by post to the creditors simultaneously with the sending of the notices of the meeting of the company.

The meeting of creditors shall be advertised once in the Gazette and once in at least one daily newspaper printed and circulating in Trinidad and Tobago. The directors of the company shall: (i) cause a full statement of the position of the company's affairs together with a list of its creditors and the estimated amount of their claims to be laid before the meeting of creditors; and (ii) appoint one of their number to preside at the meeting. The director so appointed shall attend and preside at the meeting of creditors. The liquidator will normally be appointed by the creditors at their meeting but in the absence of an appointment the company may appoint the liquidator.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Trinidad and Tobago?

Yes, it is.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Trinidad and Tobago?

Yes, it is.

10 Other Matters

10.1 Are there any eligibility requirements inTrinidad 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 money must be licensed by the Central Bank of Trinidad and Tobago under the 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.

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Ukraine

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Ukraine?

As the Ukrainian economy is currently severely affected by the ongoing conflict, one may expect the downfall of the amount of lending transactions on the market. The market is currently dominated by a number of commodity-based export credit facilities.

Considering the economic problems arising in connection with the ongoing conflict, as well as aiming to regulate the foreign currency exchange market and prevent capital outflow from Ukraine, the National Bank of Ukraine has adopted a number of resolutions imposing restrictions on foreign exchange transactions and introducing additional anti-crisis measures in the implementation of some currency transactions.

Such restrictions include, among others, the following:

- mandatory sale of 75% of foreign currency proceeds received from abroad by legal entities (except banks);
- a restriction on cross-border payment of dividends to foreign investors; and
- a restriction on early repayment under loan agreements between Ukrainian borrowers and foreign creditors (subject to certain exceptions).

In February 2015 the Ukrainian Parliament adopted a number of laws as a part of an austerity strategy to secure IMF loans. The international creditor announced a new $17.5 billion lifeline for Ukraine which raises the total bailout to $40 billion.

1.2 What are some significant lending transactions that have taken place in Ukraine in recent years?

One of the most significant transactions in 2013-2014 was a USD 750.0 million syndicated loan provided to the Government of Ukraine by Sberbank CIB, part of Sberbank of Russia. Other major transactions included:

- a EUR 416 million loan to DTEK from a group of banks, coordinated by ING Bank N.V.;
- a USD 500 million syndicated pre-export finance facility to Donetsksteel extended by ING Bank N.V., PJSC ING Bank Ukraine, Unicredit Bank AG, PJSC Ukrsotsbank, VTB Bank (France) S.A., VTB Bank (Deutschland) AG, Raiffeisen Bank International AG, PJSC Raiffeisen Bank Aval, and East-West United Bank S.A.;
- a USD 500 million revolving pre-export finance facility to the major Ukrainian iron-ore producer Ferrexpo as the arranger, agent, and security agent with Deutsche Bank AG; and
- a USD 375 million pre-export financing to DTEK from a syndicate of banks including Raiffeisen Bank International AG, Gazprombank Open JSC, Erste Group Bank AG and UniCredit Bank Austria AG, coordinated by Deutsche Bank AG.

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, corporate guarantees are often used to secure lending transactions in Ukraine. Under Ukrainian law, guarantees can only be granted by banks or other financial institutions. Entities other than banks or financial institutions can grant suretyships. A suretyship under Ukrainian law is an accessory undertaking to the underlying obligation.

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 Ukrainian Law a director is required to act in the best interests of the company, in good faith, reasonably and within his/her authority. Also, the director cannot represent the company in transactions which benefit him/her personally or for the benefit of a third party if that third party is represented by him/her.

According to Ukrainian court practice, a security agreement may be held invalid on the ground that it does not constitute a "profitable" transaction for the guaranteeing/securing company, lacks economic sense and therefore contradicts requirements of Ukrainian law. The issue of commercial benefit to the company may also be taken into account if the guarantee is challenged in the course of bankruptcy proceedings as described under question 8.2 below.

2.3 Is lack of corporate power an issue?

Corporate approvals should be obtained if specifically required by the charter of the guaranteeing company or by law (see question 2.4 below for specific corporate approvals for joint-stock companies). Failure to obtain such approvals may result in challenging and invalidation of the respective transaction.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Governmental consent (provided by the Ministry of Finance with respect to long-term or cross-border obligations or by the State Property Fund of Ukraine in all other cases) is required if the guaranteeing company and/or enterprise (except for banks) is owned 50 or more percent by the Ukrainian state.

Corporate approvals for joint-stock companies:

The shareholders' approval is required for "major" transactions (i.e. the market value of a particular asset or service that is the subject matter of a particular transaction exceeding 25% of the total value of the guarantor's assets). The approval of the supervisory board is required if (a) the value of a "major" transaction amounts to 10 to 25% of the total value of the guarantor's assets, and/or (b) the transaction is qualified as an "interested party" transaction.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no specific limitations on the amount of a guarantee. The solvency considerations may be taken into account if the guarantee is challenged in the course of bankruptcy proceedings as described under question 8.2 below.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There is currently a number of currency control issues related to the enforcement of a guarantee issued by a Ukrainian resident guarantor to a non-resident lender. In particular, purchase of foreign currency and its transfer abroad by a Ukrainian guarantor for the performance of its obligations under a suretyship securing the obligations under a loan provided by an IFI or under participation of an ECA is prohibited until 3 June 2015. The same prohibition applies to any payments based on an individual licence issued by the National Bank of Ukraine. Such individual licence is generally required for cross-border payments by Ukrainian guarantors to foreign lenders/creditors with the exception of suretyships granted in connection with loans provided to Ukrainian borrowers based on loan agreement registered by the National Bank of Ukraine.

Ukrainian law also prohibits a Ukrainian resident guarantor from purchasing foreign currency for the performance of its obligations under a suretyship securing the obligations of a non-resident debtor. Obligations under such suretyship may be fulfilled only by the guaranteeing company's own hard currency funds, which have neither been purchased nor borrowed by the company.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Various types of collateral are available in Ukraine, including mortgage over immovable assets (including land, buildings and/or construction in progress), pledge over movable assets (including equipment, plant, machinery), pledge of securities, pledge of participation interest, receivables, funds in bank accounts and pledge of rights under a contract.

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?

Separate agreements are usually used in relation to each type of assets as their pledge is subject to different perfection requirements. General security agreement can be used in case of pledge of assets registered as a so-called "integral property complex", which usually consists of land/buildings, equipment, machinery, etc.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Mortgages may be established over real estate and property rights thereto, construction in progress and property rights thereto, lease rights to real estate and ships and aircrafts (the regime of real estate assets extends to these objects). Mortgage of land lease rights is subject to prior consent of the landlord, which may be difficult to obtain if the land is leased from a local authority (i.e., a local council) as is often the case. Mortgage over real property is subject to notarisation and state registration with the State Register of Proprietary Rights to Immovable Property.

Pledges over other types of assets are made in writing. A registration of pledge of any assets other than immovable assets with the State Registry of Encumbrances over Movable Property is not mandatory; however, it is recommended as it gives the pledge effect and validity in relation to third parties. Pledge of securities is registered with the company's securities registrar and/or the custodian who maintains the securities account of the pledgor.

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 over receivables can be taken by way of pledge of present or future rights under a contract. The debtors should be notified of the pledge. Unless otherwise stated in the pledge agreement, if the rights are the right to receive payments, such payments must be transferred by the pledgor to the pledgee on receipt.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Collateral security over cash deposited in bank accounts is taken by way of pledge of the pledgor's property rights over the bank account and not the money itself. The bank in which the money is held is usually also a party to this agreement. The pledgor may not be restricted from using the money. However, the bank may withdraw money on behalf of the pledgee (on the basis of an account service agreement that directly stipulates such a possibility).

3.6 Can collateral security be taken over shares in companies incorporated in Ukraine? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Collateral security over shares in a LLC is taken by way of pledge of participatory interest. However, as there are a number of corporate law-related issues that may constitute an obstacle to enforcement

of such pledge, the pledge of participatory interest cannot be considered as an effective security instrument. It is recommended that a conditional sale/assignment agreement on the participatory interest is also entered in order to ease the enforcement process.

Security can also be taken over shares in a JSC and is registered with the company's securities registrar and/or the custodian who maintains the securities account of the pledger. This is done to prohibit any unauthorised transfer of shares, as once the security is registered, the shares are "blocked". If applicable, any right of first refusal held by the other shareholders must be waived when the pledge is enforced.

Security over shares can be granted under a New York or English law governed document if agreed by parties to the transaction. Enforcement of such security, however, will be carried out under Ukrainian law. It is therefore advisable to include the respective mandatory provisions on enforcement into the foreign law governed pledge agreement. It is also established market practice that security over Ukrainian-based assets is taken by way of a Ukrainian law governed pledge.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over inventory is created by pledge of goods in circulation or processing. The pledged inventory can be identified by providing a description of their general characteristics in the pledge agreement, as well as their locations at which they are deemed pledged.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, this is possible.

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?

Fees related to the signing of the agreement

For pledge agreements – if the agreement is to be notarised, then the parties must pay a state duty in the amount of 0.01% of the value of the pledged property up to a maximum of EUR 35, as well as a notarial fee, which will vary.

For mortgage agreements: state duty – up to 0.01% of the value of the mortgaged property and notary fees (negotiable).

Fees related to the blocking of shares in case of pledge of shares in a JSC

These costs will depend on the custodian's/registrar's internal rates.

Fees related to registration of the agreement

Fees related to registering the pledge with the State Register of Encumbrances over Movables Property – approximately EUR 1.50.

Fees related to registering the mortgage with the State Register of Proprietary Rights to Immovable Property – approximately EUR 1.50.

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 of the mortgage with the State Register of Proprietary Rights to Immovable Property is carried out by the notary simultaneously with the execution and notarisation of the mortgage agreement. The data in the State Register are updated on the same day.

The registration of the pledge with the State Register of Encumbrances over Movables Property is carried out on the day of filing the application for registration by the pledgee.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No regulatory consents are usually required with respect to the creation of security in Ukraine except for certain limitations applicable to some types of security. For example, only banks can act as mortgagees with respect to Ukrainian agricultural land. Also, state-owned assets which are prohibited from being privatised, objects of cultural heritage and rights to use state-owned or municipal land are prohibited from being mortgaged.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Special attention should be paid to the amount of the secured obligation in each collateral document. For example, if a suretyship is granted to secure a revolving credit facility, such suretyship is deemed terminated under Ukrainian law upon increase of an amount of underlying secured obligations without a prior surety provider's consent resulting in the increase of amount of the surety provider's liability.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Notarisation is mandatory only for mortgage agreements. Both parties should provide to the notary respective documents confirming their authority to sign and execute the agreement, as well as corporate approvals (if necessary).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

There are currently no such prohibitions or restrictions.

Specific corporate approvals may be required for JSCs if a transaction qualifies as an interested party transaction (i.e. transaction for the benefit of a company's officers or affiliates) (please refer to question 2.4 above).

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Ukraine 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 parallel debt is not yet recognised or widely used in Ukraine. Under Ukrainian law collateral security must be granted in favour of the respective creditors.

5.2 If an agent or trustee is not recognised in Ukraine, 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 following structures are commonly used in Ukraine:

- lending to an SPV structure, whereby security is granted by the borrower to the SPV, which distributes to the borrower the funds borrowed from the lenders;
- a joint and several structure, whereby security is granted to only one party, which acts as a joint and several creditor with other lenders; and
- proportional distribution of collateral security among the lenders, whereby each lender is granted with a separate collateral security object.

5.3 Assume a loan is made to a company organised under the laws of Ukraine and guaranteed by a guarantor organised under the laws of Ukraine. 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?

First of all, cross-border loans from foreign lenders to Ukrainian borrowers are subject to registration with the National Bank of Ukraine. Transfer of such loan to another lender should also be registered with the National Bank of Ukraine. Changes to the existing guarantee agreements should also be made in order to make the guarantee enforceable by the new lender.

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 by Ukrainian resident companies on loans made to foreign lenders is subject to withholding tax. The general withholding tax rate applicable to different types of Ukrainian sourced income is 15% (unless more favourable rates are provided for by an applicable double tax treaty). In order to benefit from any applicable relief, non-residents should provide the Ukrainian taxpayer with an annual residency certificate as issued by the tax authorities of their country of residence.

Thin capitalisation rules apply to Ukrainian taxpayers whose debts to non-resident related parties exceed their equity 3.5 times (more than 10 times for financial institutions and leasing companies). The interest expense deduction for these taxpayers is limited to 50% of earnings before interest, taxes, depreciation and amortisation. Non-deductible interest can be carried forward indefinitely, but with an annual reduction of 5% of the residual amount.

(b) Taxation of proceeds of a claim under a guarantee received by a non-resident is not specifically regulated in the Ukrainian Tax Code. Payments related to the principal amount of obligation should not be subject to Ukrainian withholding tax. Any other payments, which can be attributable as interest, would be subject to withholding text as described under (a) above.

Proceeds of enforcing security could be subject to Ukrainian withholding tax in case of private sale of the collateral by the pledgee/mortgagee to a third party.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives for foreign lenders. Please refer to question 6.1 above on taxes applicable to foreign lenders in respect of interest payable on loans and proceeds of enforcing security.

6.3 Will any income of a foreign lender become taxable in Ukraine solely because of a loan to or guarantee and/or grant of security from a company in Ukraine?

A foreign lender is not subject to Ukrainian corporate income tax unless withholding tax applies (please refer to question 6.1 above) or unless a permanent establishment of such foreign lender is created in Ukraine.

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 on costs incurred by foreign lenders in relation to taking security in Ukraine.

Cross-border loans from foreign lenders to Ukrainian borrowers are subject to registration with the National Bank of Ukraine prior to the disbursement of any funds. This registration is free of charge.

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.

Please refer to question 6.1 above on thin capitalisation rules.

7 Judicial Enforcement

7.1 Will the courts in Ukraine recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Ukraine enforce a contract that has a foreign governing law?

Ukrainian courts should generally recognise and enforce a contract that has a foreign governing law, if an agreement involves a foreign

element, i.e. at least one of the parties to an agreement is a foreign party.

However, mortgages over real estate assets located in Ukraine should be governed by Ukrainian law. Ukrainian courts have exclusive jurisdiction over the matters involving real estate, including enforcement of mortgages.

7.2 Will the courts in Ukraine recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Foreign court judgments will be recognised and enforced in Ukraine based only on the respective multilateral/bilateral international treaties or in the absence of such treaty on the basis of the principle of reciprocity whose existence is presumed by the domestic rules of civil procedure.

As there are no international treaties governing issues of recognition and enforcement of court judgments in civil and commercial matters between Ukraine and the USA and/or the United Kingdom respectively, New York and/or English court judgments are enforceable in Ukraine on the basis of the reciprocity principle only.

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 Ukraine, 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 Ukraine against the assets of the company?

The court proceedings in a court of first instance may take approximately 4-6 months. Proceedings in a court of appeal may take 6-8 months. Timing of enforcement of a court judgment may vary depending on the assets being enforced.

The approximate timing of the proceedings in the court of first instance on recognition and enforcement of foreign court judgments is 4-8 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 Ukrainian law, a collateral can be enforced either through out-of-court settlement (if so provided for by the agreement), a notary writ or court judgment. In practice, out-of-court enforcement is impossible without the cooperation of the pledgor. Therefore the most reliable method of enforcement is through a court judgment. Typically, collateral is sold by public auction; however, the security agreement can permit the transfer of the collateral into the ownership of the pledgor, or the sale of the collateral by the pledgor to a third party.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Ukraine or (b) foreclosure on collateral security?

There are no special restrictions as foreign lenders enjoy the same procedural rights as Ukrainian parties.

7.6 Do the bankruptcy, reorganisation or similar laws in Ukraine provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

A moratorium on enforcement of creditors' claims is imposed by the court in the pre-trial rehabilitation procedure of the debtor, which can be initiated by the debtor or any creditor prior to the commencement of the debtor's declaration of bankruptcy in court. Upon the court's approval of the debtor's rehabilitation plan, the court will impose a moratorium prohibiting satisfaction of creditors' claims during the debtor's rehabilitation, which cannot last longer than 12 months.

The court may also impose a moratorium on enforcement of the claims of the debtor's creditors that arose before the date of the initiation of the bankruptcy proceedings.

The moratorium applies to all creditors' claims that arose before the date of approval of the debtor's rehabilitation plan or the initiation of the bankruptcy proceedings, including enforcement of collateral security.

7.7 Will the courts in Ukraine recognise and enforce an arbitral award given against the company without re-examination of the merits?

A foreign arbitral award will be recognised and enforced in Ukraine without retrial or examination of the merits of the case, subject to the exceptions set forth by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and Code of Civil Procedure of Ukraine. In addition to the exceptions set forth by the New York Convention, according to the Code of Civil Procedure of Ukraine, the recognition and enforcement of foreign arbitral award can be refused in Ukraine if (i) the Ukrainian court has an exclusive jurisdiction over the case, (ii) the Ukrainian court has rendered its judgment in respect of a dispute between the same parties, regarding the same subject, and on the same grounds and such judgment has become effective, (iii) the Ukrainian court is in the process of consideration of the same case between the same parties and on the same grounds, and (iv) the term for submission of motion for recognition and enforcement of a foreign arbitral award in Ukraine as such term is defined by respective international treaty and Code of Civil Procedure of Ukraine is missed. According to the general rule, the motion for recognition and enforcement of a foreign arbitral award should be submitted to competent Ukrainian court within a 3-year period after such arbitral award has become effective.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

As mentioned under question 7.6 above, if a court imposes a moratorium on enforcement of the claims of the debtor's creditors that arose before the date of the initiation of the bankruptcy proceedings, the lender may not be able to enforce the collateral security for the duration of the moratorium.

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 Insolvency Law, a transaction entered into by the debtor one year prior to or after the commencement of the bankruptcy

proceedings may be challenged by the bankruptcy administrator or by any of the competitive creditors and invalidated by the court, if:

- the debtor alienated its assets, assumed obligations or refused its claims without compensation;
- the debtor has fulfilled its obligations prior to the due date;
- prior to commencement of the bankruptcy proceedings, the debtor entered into the agreement that led to its insolvency;
- the debtor paid to its creditor or accepted any property/assets as a set-off of payment obligations of its contractor when the debtor's assets became insufficient to satisfy the creditors' claims;
- the debtor alienated or acquired property at a price that was lower or higher, respectively, than the market price, provided that the debtor's assets were insufficient for the satisfaction of the creditors' claims at that time; or
- the debtor pledged its property to secure the fulfilment of the pecuniary claims.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Yes, certain categories of debtors are excluded from bankruptcy proceedings based on the Insolvency Law and certain other Ukrainian legislation. For example, state enterprises included in the list approved by the Law of Ukraine "On the list of state-owned objects which cannot be privatised", certain municipal enterprises in cases established by law, some mining companies, etc.

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 proceedings other than court proceedings are available, and security should also be enforced through court proceedings.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Ukraine?

The parties may generally submit their disputes to a foreign jurisdiction if one of them is a non-Ukrainian party. Ukrainian courts should generally recognise and enforce this submission if it does not violate the exclusive jurisdiction of Ukrainian courts (see the example under question 7.1 above on exclusive jurisdiction over matters involving real estate, including enforcement of mortgages).

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Ukraine?

The concept of waiver of sovereign immunity is not developed under Ukrainian law.

10 Other Matters

10.1 Are there any eligibility requirements in Ukraine 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 Ukraine need to be licensed or authorised in Ukraine or in their jurisdiction of incorporation?

There are no specific requirements for foreign lenders or agents/ security agents involved in loan transactions with Ukrainian companies.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Ukraine?

As new anti-crisis measures and further restrictions on foreign exchange transactions are imposed by the Ukrainian Government and the National Bank of Ukraine, it is recommended to pay close attention to proper structuring of lending transactions with Ukrainian companies.

Foreign lenders should take into consideration the requirement to register a loan agreement with the National Bank of Ukraine prior to the disbursement of any funds as well as the maximum interest rate limitations with respect to such loans, which is as follows:

(i) for fixed interest rate loans: with maturities less than 1 year – 9.8% *per annum*; with maturities from 1 to 3 years – 10% *per annum*; and with maturities over 3 years – 11% *per annum*; and

(ii) for floating interest rate loans: LIBOR for three-monthly USD deposits plus 750 basis points.

For the purposes of calculation of the maximum interest rate, the National Bank of Ukraine reviews "total borrowing costs" which represent the "nominal" interest rate under the loan agreement increased to take into account any and all commissions/fees, default interest and "other charges" (which may include any payments other than the repayment of principal) that may be payable by the borrower pursuant to the loan agreement.

The restriction on early repayment under loan agreements between Ukrainian borrowers and foreign creditors (subject to certain exceptions), which is currently in force until 3 June 2015, should also be taken into consideration.

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CMS Reich-Rohrwig Hainz Kyiv is one of the Ukrainian branches of CMS, the leading European legal and tax services organisation. CMS has entered the Ukrainian market as one of the first internationally active law firms and is now among the most respected legal advisors in Ukraine. Our legal experts, who can draw on years of experience in foreign countries and have handled many cross-border projects, know the particularities of the local market and the needs of their clients well and also entertain good relations with local economic players and relevant authorities. Our legal advice fulfils international standards, living up to the expectations of international investors.

CMS Reich-Rohrwig Hainz Kyiv is a full-service law firm and deals with all issues related to banking and international finance. We deliver quality and integrity to our clients and put an expert network at their disposal, thus creating a considerable competitive edge for them. Moreover, the international presence of CMS offers fast access to expert knowledge and comprehensive cross-border legal services in mandates covering several countries.

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in the USA?

The corporate lending markets in the United States are broad and deep. Market trends are often associated with certain segments of the lending markets, and market segmentation in the United States is based on a number of factors. These factors include: the size of the borrower (from so-called "large-cap" borrowers, to those in the "middle-market" to "small-cap"); the credit profile of the borrower (from investment-grade to below investment-grade or "leveraged"); the type of lender (banks, *versus* non-bank lenders, such as hedge funds, finance companies and insurance companies); the number of holders of the debt (from syndicated loans, to "club" and bilateral facilities); whether the loan is secured, and the relative positions of the lenders *vis-à-vis* one another (from senior unsecured, to senior secured, mezzanine and second-lien loans); the basis on which the loan is made and repayment is (hopefully) assured (from a company's general credit rating, to cash flow loans, to asset-based loans); and the purpose of the loans (from acquisition finance, asset finance, to general working capital loans, to the development of specific projects). While there are trends within each of these market segments, there are also some broad trends which impact multiple segments. For example:

Rising Interest Rates. After keeping interest rates low for many years and engaging in its historic bond buying programme, in 2014 the Federal Reserve indicated it would reverse both measures. The Federal Reserve had kept interest rates low in an effort to strengthen economic growth and curb unemployment by making it cheaper for companies to borrow. This environment contributed to a borrower-friendly market: lower rates and higher leverage levels, with lenders and loan investors seeing lower yields and weaker covenants and structures. Improving economic conditions, including robust job growth throughout 2014, led the Federal Reserve to gradually "taper" its bond buying programme starting in late 2013 and conclude the bond buying programme in October 2014. Furthermore, the Federal Reserve indicated it would start raising short-term interest rates sometime in 2015 if economic growth continued. These moves suggest a gradual decline of the "easy-money" conditions of the past few years.

Certain Trends in Loan Documentation. As mentioned above, trends are often identified with market segments. What is trending in one corner of the market may not necessarily be trending in another corner. One of the most vibrant and innovative segments of the loan markets in the US is the fast-paced leveraged loan market. "What is market" on a variety of pricing, structural and other points, including leverage levels, spreads, baskets and intercreditor issues changes from month-to-month. Drivers of these changes include the demands of determined and resourceful borrowers and sponsors, the ebb and flow of the demand for leveraged loans, ambitions to command greater market share, due regard for credit risk and the other factors described below. Some broader trends in the market in recent years can be identified.

Convergence. The same investors often invest in leveraged loans and high-yield bonds. All-in pricing on leveraged loans is generally lower than high-yield bonds. Leveraged loans typically have more restrictive covenants than high-yield bonds (although the gap is narrowing) and are generally secured, so recoveries on leveraged loans after default are generally 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, over the years many leveraged loans have taken on more bond-like characteristics, thus blurring the traditional distinctions.

The Rising and Receding Tide of Covenant-Lite. When demand for leveraged loans is high (and borrowers have more leverage in negotiations) the trend is toward "looser" bond covenants, otherwise known as "covenant-lite". In covenant-lite loans, the borrower generally pays a premium 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 such as the incurrence of liens or debt, the making of acquisitions or restricted payments, etc.). Covenant-lite loans are viewed as having a greater risk of 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. Covenant-lite loans were popular before the financial crisis, dried up during the crisis and its aftermath, and have made a comeback in recent years.

The Rising Power of Equity Sponsors. Equity sponsors originate much of the work in the highly competitive and lucrative leveraged acquisition finance market and increasingly exercise their market power. "SunGard" provisions continue to be standard in commitment papers. 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. More recently, some of the most prominent equity sponsors require loan arrangers to use the sponsor's form of commitment letter so the sponsor can more easily compare the proposals of different

financing sources; some sponsors also even prepare initial drafts of loan documentation based on sponsor-friendly forms. But perhaps no development is more controversial than sponsors using their market power to "designate" acceptable counsel for arrangers and lenders, freezing out lawyers and law firms that appear to be "getting in the way of getting a deal done".

The Borrower's Desire for Flexibility: Unrestricted Subsidiaries, Equity Cures, Builder Baskets, and Incremental Facilities. All equity sponsors and borrowers desire flexibility in their financing documents. This comes in many forms. The "unrestricted subsidiary" concept is consistent with features seen in bond indentures and this feature has become much more common in leveraged loan documentation. 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. A trade-off is that 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). "Equity cures" have become common fare. An equity cure allows a borrower's shareholders to make an additional equity investment in the borrower to cure breaches of its financial covenants. 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 sometimes for equity distributions and repayment of subordinated debt (subject to leverage governors). Non-committed incremental facilities are also now common fare, permitting in some cases an uncapped amount of additional debt, so long as certain *pro forma* leverage ratios are satisfied.

The Regulatory Environment: Pushing the Needle in the Opposite Direction? While the Federal Reserve kept interest rates low to boost economic activity, other federal regulators with a mandate to protect the US economy from excessive risk-taking associated with the financial crisis have helped push the needle in the opposite direction by increasing the cost of making loans. For example, the "Guidance on Leveraged Lending" issued by federal regulators, and which became effective in May 2013, applies to all federally-supervised financial institutions 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 increase lending costs as lenders re-evaluate their internal policies and programs and tighten their underwriting standards. This already has had an effect, for example, by decreasing the issuance of covenant-lite loans in 2014. "Risk retention rules" and the "Volcker Rule" could seriously impact CLO managers and banks that structure, warehouse and make markets in CLOs. The final Volcker Rule was released on December 10, 2013, and will limit certain investing and trading operations of banking entities. In addition, banking entities engaged in permitted fund activities and permitted trading will be required to create extensive compliance programs and meet new reporting requirements. Although the Federal Reserve extended the Volcker compliance period to July 2017, the new reporting requirements became effective in June 2014.

Sanctions and Anti-Corruption Laws. Federal regulators recently increased their enforcement of sanctions, anti-terrorism and anti-corruption laws, meting out record fines. In addition to being more strident in their due diligence of borrowers, lenders are requiring stronger provisions in loan agreements to try and address these issues (and to demonstrate to regulators that they are doing the same). These provisions typically require the borrower and its affiliates to comply with sanctions regulations enacted by the US and other applicable authorities, to not use any borrowed proceeds in restricted countries or in doing business with restricted entities, and to comply with and have policies to comply with anti-bribery laws. Borrowers sometimes attempt to negotiate these provisions, including by adding materiality or knowledge qualifiers, with some limited success.

FATCA. In an effort to fill the government tax coffers, the Foreign Account Tax Compliance Act ("FATCA"), which became effective July 1, 2014, is a major revamp of the US withholding tax regime. FATCA imposes a 30% gross withholding tax on certain amounts, including interest and, by January 1, 2017 at the earliest, principal, paid by US borrowers to a foreign lender unless that lender (i) enters into an agreement with the IRS to identify and report specified information with respect to its US account holders and investors, or (ii) is resident in a jurisdiction that has entered into an intergovernmental agreement (an "IGA") with the United States pursuant to which the non-US government agrees to report similar information. This sweeping law could have a significant impact on loan payments and receipts and have prompted loan parties to manage FATCA risk (express allocation of risk set forth in loan documentation, operation of gross-up clauses, etc.). In the US loan market, for example, loan agreements now typically contain provisions whereby any FATCA withholding is exempt from a borrower gross-up obligation, and a borrower may request information from a lender to determine whether such lender is in compliance with FATCA.

The Courts: Pay Attention to UCC Filings! A recent case in the United States Court of Appeals for the Second Circuit concerning perfection of security interests under the Uniform Commercial Code ("UCC") attracted much attention. In *The Official Committee of Unsecured Creditors of Motor Liquidation Company v. JP Morgan Chase Bank,* JP Morgan mistakenly filed a UCC termination statement for the collateral securing a term loan. The Second Circuit held that because JPMorgan authorised the filing of the mistaken termination statement, the filing was effective and JPMorgan's security interest under a $1.5 billion term loan was no longer perfected, regardless of what JPMorgan subjectively wanted to accomplish. This decision emphasised the importance of paying close attention to UCC financing statement filings.

Bankruptcy Reform. In December 2014, the American Bankruptcy Institute released its long-awaited report recommending changes to the US bankruptcy code. The recommendations mostly targeted the rights of secured creditors, including among other things, changes to valuation for adequate protection and qualification for DIP financing. The recommendations have generated much commentary in the lending community and financial press and, despite the "blue-ribbon" luminaries on the panel, mixed reviews. Many loan market participants feel the overall effect of the revisions would be to materially reduce secured loan recoveries in a default. The debate over the proposed reforms will likely continue.

Innovations in the Loan Markets. Given the depth and breadth in the loan markets in the US, many loan market innovations originate or are further developed here (consider, for example, the development of a sophisticated secondary trading market, certain mezzanine and second-lien structures, the securitisation of loans and CLOs). Some recent innovations include the following:

The Unitranche Facility. 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 typically enter into a so-called "agreement among lenders" ("AAL") 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 AAL may impact voting issues in ways not visible to the borrower). The use of these facilities has so far been restricted to the middle-market, and lenders of unitranche loans are typically finance companies and hedge funds (and not banks). 2014 saw increased complexity in unitranche financing structures and the terms of AALs, and borrowers and their equity sponsors have had some success in seeking disclosure of terms of AALs, especially with respect to voting.

Litigation Finance. While more commonplace in countries such as Australia, the business of litigation finance has gained traction in the United States and is poised for growth. A common type of litigation finance occurs when a third party investor provides funds to a plaintiff (or plaintiff's attorney) in exchange for a contractual commitment to receive a share of the award or settlement (or contingency fee) resulting from litigation. Such financing is typically limited recourse, and the investor is only repaid if plaintiff (or plaintiff's attorney) wins an award, though investors can realise significant returns, usually a multiple of their initial investment. Litigation finance has its share of critics, including those who characterise such finance as "turning the court system into a stock exchange". Other legal observers argue litigation finance helps to "level the playing field" when parties in litigation have unequal financial or bargaining positions. In recent years, established financial institutions and new investment firms have raised hundreds of millions of dollars to invest in litigation finance and the US market will likely see an increase in this form of financing in the future.

Peer-to-Peer Lending. Peer-to-peer ("P2P") lending is a form of financing that allows lenders and borrowers to bypass traditional brick-and-mortar lenders by connecting through online platforms. While many believe P2P lending will not enter the corporate lending markets in the foreseeable future, P2P lending already reaches other asset classes such as residential and commercial real estate and car loans, with corporate lending perhaps not far behind. In light of the recent strong growth of P2P lending, federal and state regulatory regimes within which it operates continue to evolve and it has garnered attention from the SEC. Critics believe P2P platforms will have to overcome fraud issues as the platforms become more prominent in the lending markets. In any event, this innovative source of financing has attracted attention from Wall Street and will continue to evolve.

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 publicly 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*: Mueller Water Products, Inc. (November 25, 2014); and Halyard Health, Inc. (October 31, 2014); *Equity Cures*: Sportsman's Warehouse, Inc. (December 3, 2014); and Regency Gas Services LP (November 25, 2014); *Builder Baskets*: Mattress Holding Corp. (October 20, 2014); and Texas Competitive Electric Holdings Company LLC (May 5, 2014); *Unrestricted Subsidiaries*: Albany Molecular Research, Inc. (October 24, 2014); and Verifone, Inc. (July 8, 2014); and *Incremental Facilities*: Universal Corporation (December 30, 2014); and Albany Molecular Research, Inc. (October 24, 2014).

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

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.

Under relevant corporate law, if a guarantee or similar transaction is structured in such a way that it would be tantamount to a distribution of equity by a company while the company is insolvent (or is rendered insolvent), or would impair the company's capital, the transaction may be improper under the corporate law and could result in director liability. See also question 2.3 below for a general discussion of corporate power issues.

2.3 Is lack of corporate power an issue?

Entity power to enter into a guarantee is generally governed by the corporation (or equivalent) law in the state in which the company is organised, as well as the company's charter and bylaws (or equivalent documentation).

For corporations, the corporation law of most states provides a broad range of permitted business activities, so few activities are considered to be *ultra vires* or beyond the power of a corporation (note that certain special purpose or regulated entities, such as banks, insurance companies, and utility companies, may be subject to additional statutes which impact corporate power). In a lending context, however, many state corporation statutes limit the power of subsidiaries to guarantee the indebtedness of a corporate parent or a sister company, and a guarantee may be *ultra vires* if not in furtherance of the guarantor's purposes, requiring analysis of the purpose of the guarantee and the benefit to the guarantor. If the benefit to the guarantor is intangible or not readily apparent, this may provide additional concern. Many corporate power statutes, however, provide safe harbours for certain types of guarantees, irrespective of corporate benefit, including if the guarantor and the borrower are part of the same wholly owned corporate family, or if the guarantee is approved by a specified shareholder vote, for the guarantor entity. For limited liability companies, state statutes are usually more generous, with a limited liability company generally able to engage in any type of legal activity, including entering into guarantees, unless the charter provides otherwise.

In lending transactions in the US, the analysis that a company has the corporate or other requisite power to enter into a guarantee is often provided in a legal opinion provided by the guarantor's internal or external counsel (though these opinions will typically assume away the tough factual issues, such as the level of corporate benefit).

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

In addition to having "corporate power" (or equivalent power for other types of entities) to enter into a guarantee, the guarantee must be properly authorised, which generally means that the procedural rules of the corporation, as set forth in its charter or by-laws, must be followed and that the stockholders or the governing board take the proper measures to authorise the transaction. These procedures are customary and also typically covered in a legal opinion provided by the guarantor's counsel.

One situation that requires special attention in a guarantee context is when a guarantor is providing an upstream or cross-stream guarantee, and the guarantor has minority shareholders. In this context, often the consent of the minority shareholders would be required in order for the guarantee to be provided in order to address fiduciary duty concerns.

Generally, no governmental consents, filings or other formalities are required in connection with guarantees (though, as noted above, certain special purpose companies and regulated entities may be subject to additional requirements).

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Yes, please see question 2.2.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Generally, no. Though there are a few other issues worth mentioning that do not relate to "enforcement" *per se*. For example, there may be withholding tax issues if the payment is to a foreign lender (please see question 6.1).

Also, there may be adverse US tax consequences for a US borrower resulting from the involvement of any foreign subsidiary guaranteeing the debt of a US borrower. Under US tax rules, such a guarantee could be construed to result in a "deemed dividend" from the foreign subsidiary to the US parent in the full amount of the guaranteed debt, and this deemed dividend would generally be subject to US tax. The same result could apply if collateral at the foreign subsidiary is used to secure the loan to the US parent, or if the US parent pledges more than 66% of the stock of a first-tier foreign subsidiary. These types of tax issues are important to consider when structuring a transaction with credit support from foreign subsidiaries of US companies. There are many ways to address these types of issues, including having the loans made directly to the foreign subsidiary.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

A wide variety of assets (including land, buildings, equipment, inventory, accounts, contract rights, investment property, deposit accounts, commercial tort claims, etc.) are available for use as security for loan obligations with many of the most common types of collateral described more fully below. Assets used as security are often divided into two broad categories: (a) "personal property" which generally refers to property other than real property (land and buildings); and (b) real property.

The Uniform Commercial Code ("UCC") provides a well-developed and predictable framework for providing security interests in a wide variety of personal property assets. The UCC is a state law statute rather than a federal one, but the UCC has been adopted by all 50 states in the US and the District of Columbia, with only a few non-uniform amendments of significance.

Under the UCC, when a security interest "attaches", it becomes enforceable as a matter of contract by the lender against the borrower. "Attachment" typically occurs when credit is extended to the borrower, the borrower has ownership or other rights in the collateral in which to grant a security interest, and the borrower signs and delivers to the lender a written security agreement describing the collateral.

After attachment, the security interest must be "perfected" by the lender in order for the lender's security interest to have priority over the rights of an unsecured creditor who later uses judicial process to obtain lien on the collateral. Since a federal bankruptcy trustee has the same status as a state law judicial lien creditor under US 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?

This is not applicable; please see question 5.1.

5.3 Assume a loan is made to a company organised under the laws of the USA and guaranteed by a guarantor organised under the laws of the USA. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

In a syndicated lending transaction that includes a lender acting in an agency capacity, a guarantor typically would provide a guaranty to the agent "for the benefit of the lenders under the loan agreement" (or some similar formulation). As such, it should not be necessary for a guarantor to sign the transfer (assignment) documentation in order to be bound, though the contractual language should be carefully reviewed for specific requirements. In the case of a bilateral loan, the contractual terms should also be closely reviewed, though it is advisable to obtain the guarantor's consent to such assignment in any event.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

There is no US federal income tax withholding from payments of interest or principal to US lenders, provided certain documentation requirements are complied with. With respect to the payment of interest to foreign lenders (other than such payments to a US branch of a foreign lender that is engaged in business in the US), the general rule is that a withholding rate of 30% is applied to the gross amount of payments constituting interest and other income (but, subject to the discussion of FATCA below, not to principal). The US has in place bilateral treaties with many jurisdictions, which reduce or entirely eliminate this withholding tax for qualifying foreign lenders. A listing of these treaties is available at http://www.irs.gov/Businesses/International-Businesses/United-States-Income-Tax-Treaties---A-to-Z. Such withholding taxes may also be avoided if the requirements of the so-called "Portfolio Interest Exemption" are satisfied. This exception is generally not available to banks, but could be available to non-bank lenders such as hedge funds. Note that under FATCA (mentioned in question 1.1), foreign lenders generally will be required to identify and report directly to the US Internal Revenue Service information about accounts in such institutions that are held by US taxpayers. The failure to comply with FATCA would result in withholding as discussed above even for treaty-resident lenders, which would then be required to file a refund claim pursuant to the applicable bilateral tax treaty to recoup any amounts withheld. Generally, the proceeds of a claim under a guarantee or the proceeds of enforcing security are taxed in a manner similar to payments made directly by the borrower.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders?

The US federal government has generally provided few incentives targeted to foreign lenders (as there has not been a policy focus on promoting foreign loans into the United States), though please refer to the bilateral tax treaties and Portfolio Interest Exemption referred to in question 6.1.

6.3 Will any income of a foreign lender become taxable in the USA solely because of a loan to or guarantee and/or grant of security from a company in the USA?

In general, a foreign lender, with no presence or activities in the US, does not become subject to US federal income taxation on its net income solely as a result of loaning to, or receiving a guarantee or grant of security from, a borrower or guarantor in the US. However, income derived specifically from a loan made to a US borrower (i.e., interest and other income) would be subject to gross-basis US taxation, typically at a rate of 30%, unless a treaty specified a lower

rate, or the Portfolio Interest Exemption applied (please see question 6.1). Moreover, if a foreign lender has a presence or activities in the United States (for instance, employees or agents working out of, or a lending office located in, the US), the foreign lender could be viewed as being engaged in a trade or business in the US, and if so would be subject to net-basis US taxation on any income deemed "effectively connected" with that trade or business.

6.4 What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration? Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

With regard to mortgages and other security documents, there are generally no taxes or other costs applicable to foreign lenders that would not also be applicable to lenders in the US (please see question 3.10 for a general summary of such costs).

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

If a corporation is "thinly capitalised" and certain other factors are present, the US tax authorities may assert that instruments described as debt actually constitute equity for US tax purposes. The effect of such re-characterisation would be that payments on the instrument would not be deductible to the borrower for US federal income tax purposes and could be subject to withholding in a manner different than interest payments (for instance, because the Portfolio Interest Exemption would not be available). Moreover, even if treated as debt, US tax rules may deny a deduction (in whole or in part) for payments of interest by a thinly-capitalised borrower (i.e., a borrower with a debt to equity ratio in excess of 1.5 to 1) to a "related party" that is exempt from US federal income tax on the interest, taking into account any treaty-based reductions in tax rate. If the lenders are organised in a jurisdiction other than that of the borrower, this should not impact the thin capitalisation analysis itself, but, as mentioned above, may impact the withholding rate as well as any relevant "gross-up".

7 Judicial Enforcement

7.1 Will the courts in the USA recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in the USA enforce a contract that has a foreign governing law?

Generally, yes, so long as the choice of law bears a "reasonable relation" to the transaction and application of the foreign governing law would not be contrary to the public policy of the forum state.

On a related note, in connection with a choice of *New York* law as a governing law, a New York statute allows for New York law to be chosen by parties to a contract and, with certain exceptions, such choice of law will be given effect by New York courts if the transaction exceeds $250,000 in value, regardless of whether the choice of New York law bears any reasonable relationship to the transaction. (The choice of New York as a forum is subject to additional requirements under the statute.) California has a similar statute.

7.2 Will the courts in the USA recognise and enforce a judgment given against a company by English courts (a "foreign judgment") without re-examination of the merits of the case?

In most instances, yes. Despite the strong commercial ties between the United States and the United Kingdom, there is no international treaty on reciprocal recognition and enforcement of court judgments (attempts to come to terms on a bilateral treaty in 1981 broke down over the negotiation of the final text). Nevertheless, the Uniform Foreign Country Money Judgments Recognition Act has been adopted by most states (including New York) and sets out basic rules of enforceability in connection with the enforcement of judgments between states in the United States, with "foreign-country" judgments treated in a similar manner as the judgment of a sister state. Generally, if a judgment is obtained in accordance with procedures compatible with United States due process principles, it will be recognised under the Uniform Act. There are many examples of English judgments having been enforced in New York courts.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in the USA, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in USA against the assets of the company?

In New York, a court could rule almost immediately, perhaps within 3 to 6 months or less, with enforcement against assets of the company in New York beginning as soon as the judgment was entered (unless the defendant obtained a stay of enforcement). However, in practice, particularly if an opposing party appears and raises procedural or other issues, matters could take materially longer, up to a year or more.

Enforcement of a foreign judgment is generally pursued in New York by having the foreign judgment "confirmed", with time frames similar to those mentioned above.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

In a non-bankruptcy context, the timing and restrictions that apply to enforcement of collateral can vary significantly, depending on the type of collateral and relevant state law that applies. The UCC provides a great deal of flexibility in the rules governing disposition of personal property collateral (see question 3.1). The UCC generally permits either "private" or "public" sale, with the only real limitation on the power to sell that the secured party must "act in good faith" and in a "commercially reasonable manner". Under the UCC, after the sale, the secured party generally may pursue the debtor for amounts that remain unpaid (the "deficiency"). The requirements with respect to real property collateral will vary significantly from state to state (and note in particular that in California, there may be limitations with respect the ability of a creditor to collect on a deficiency if the creditor is secured with real property collateral). With respect to regulated entities (including certain energy and communications companies) enforcement may require regulatory approval.

In a bankruptcy context, enforcement would be restricted by the automatic stay (please see question 8.1).

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in the USA or (b) foreclosure on collateral security?

For the most part, distinctions will not be made between foreign and domestic creditors in such proceedings. However, there are certain issues a foreign lender would need to consider in connection with such activities. For example, generally a foreign creditor will need to be authorised to do business in New York before availing itself as a plaintiff of the New York courts. In addition, foreign creditors may be subject to federal or state limitations on or disclosure requirements for the direct or indirect foreign ownership of certain specific types of companies or collateral, including in the energy, communications and natural resources areas.

7.6 Do the bankruptcy, reorganisation or similar laws in the USA provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, please see question 8.1.

7.7 Will the courts in the USA recognise and enforce an arbitral award given against the company without re-examination of the merits?

The United States is party to the New York Convention. As set forth in the Convention, the Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states, subject to certain limitations and/or potential challenges. Note, however, that loan agreements under New York law generally do not include arbitration clauses.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In the US, a bankruptcy proceeding may be initiated by either the company (debtor) itself or by its creditors. Once the proceeding is commenced, the relevant statutes in the United States (the "Bankruptcy Code") provide that an "automatic stay" immediately occurs. This automatic stay is effectively a court order that prevents creditors from taking any actions against the debtor or its property, including enforcement actions against collateral. A creditor that violates the automatic stay could face severe penalties, including actual damages caused to the debtor and other creditors, as well as having its enforcement action declared void (punitive damages are typically limited to individual, rather than corporate debtors).

There are, however, a number of protections for a secured creditor who has properly perfected its liens and such liens are not subject to avoidance. First and foremost, upon a liquidation of a debtor, a secured creditor is paid its claim (up to the value of its collateral) prior to the payment of general unsecured creditors or, alternatively, it may receive its collateral back in satisfaction of its secured claim. Also, in the case of a reorganisation of a debtor, cash collateral cannot be used by the debtor without specific authorisation from the bankruptcy court or consent of the secured party, and in other circumstances the Bankruptcy Code mandates that a secured party's interest in its collateral be "adequately protected".

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In short, yes. A lender's security interest could be voided as a "preferential transfer" if it is provided to the lender within 90 days before a bankruptcy filing (or one year if the lender is an "insider," or related party of the debtor) and as a result of the transfer the lender receives more than it would have otherwise received in the liquidation of the debtor. There are a number of exceptions to this rule, including where there has been a substantially contemporaneous exchange for new value. Please also see the discussion of "fraudulent transfers" in question 2.2.

There are certain claims that may have priority even over a properly perfected security interest, including tax liens, mechanics lines, and certain costs associated with the bankruptcy itself.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

There are a number of entities that are either excluded from the Bankruptcy Code or for which special provisions of the Bankruptcy Code or other special legislation apply, including banks, insurance companies, commodity brokers, stockbrokers and government entities and municipalities. Municipalities and government-owned entities (but not states themselves) are eligible for relief under Chapter 9 of the Bankruptcy Code.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes. The UCC allows for so-called "self-help" remedies without first commencing a court proceeding. Note that the relevant provisions of a security agreement and governing law should be considered before exercising these types of remedies. These remedies typically can only be used so long as no "breach of the peace" would occur. Subject to the above, the market generally accepts these types of remedies for collateral, such as bank accounts and certificated securities.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of the USA?

Generally, yes.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of the USA?

Yes. The Foreign Sovereign Immunities Act ("FSIA") codifies the law of sovereign immunity in the US. The FSIA allows for such immunity to be waived, and generally upholds waivers, with some limitations (for example, non-commercial property of a sovereign cannot be attached). Certain organisations also receive

immunity under authority separate from the FSIA: the International Organizations Immunity Act covers immunity for certain institutions like the IMF, the OECD and the African Union. One issue in connection with the enforcement of such waivers is whether a borrower actually had the immunity to waive when it provided a waiver. Such scenarios arise in the context of the nationalisation of a company. In such a case, a company may not have had any immunity to waive (since it was not previously owned by the state) when it entered into the loan, so any waiver provided prior to being taken over by a state may be considered void. For this reason, New York law-governed loan agreements often include a representation that a loan represents a "commercial act", which excludes the transaction from protection under relevant immunity statutes, whether or not such immunity was in fact effectively waived.

10 Other Matters

10.1 Are there any eligibility requirements in the USA for lenders to a company (for instance, that the lender must be a bank) or for the agent or security agent? Do lenders to a company in the USA need to be licensed or authorised in the USA or in their jurisdiction of incorporation?

In the US, a lender is not required to be a bank (indeed, many lenders are non-banks). A lender should be aware of any relevant state lending licensing laws which may require a lender to be licensed. These licensing laws are much more stringent in the consumer lending area than in the commercial or corporate lending area, though in any event are typically easier to obtain than a "banking licence". In some cases, one needs to be "in the business of making loans" in order for the licensing statute to be given effect (for example, the New York lender licensing law indicates those lenders who engage in "isolated, incidental or occasional transactions" are not "in the business of making loans" and therefore not covered for purposes of the statute). Non-compliance with a licence statute could have a material impact on the lender, from not being able to access a state's court system to having a loan be determined to be unenforceable. Whether an agent on a lending transaction would also need to be licensed will depend on the wording of each state's particular statute.

Note there are often contractual restrictions in New York law-governed loan documentation that require a lender be a certain type of organisation that is in the business of making loans. The rationale for this is many-fold, from securities law concerns to the preference of the borrower to only deal with sophisticated financial institutions should the loan be sold.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in the USA?

The material considerations to be considered in connection with a financing in the US will vary depending on the type of financing and the parties involved, and a discussion with counsel is encouraged before entering into any financing in the US. However, the above questions address many of the main material issues that arise.

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Morgan Lewis

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Uzbekistan

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Uzbekistan?

The attraction of foreign loans for the purpose of their refinancing has become a trend for commercial banks in Uzbekistan. The role of commercial banks as the only available sources of financing is being diminished in the market by the active participation of other credit institutions, such as lease companies.

After successful implementation of the first project finance in Uzbekistan, the Uzbek market was placed on the global map for project financing, and it is expected that Uzbekistan will have a number of large project financings coming in the future. Overall, the market has shifted from a one lender-one borrower structure and we are seeing more projects beginning with multiple lenders.

1.2 What are some significant lending transactions that have taken place in Uzbekistan in recent years?

The largest foreign investments and loans attracted to Uzbekistan have been directed toward fuel-energy sector and transport and communication sector. The most representative of them is the Surgil Project, an integrated gas-to-petrochemicals project, which is one of the largest multi-sourced financings ever raised globally. For this project, senior lenders have extended around USD 2.5 billion. Another recent lending project involved the granting of a loan by the Asian Development Bank in the amount of USD 500 million for the construction of individual houses in rural areas. We would also mention a loan by the China Development Bank in the amount of USD 100 million to Uzbektelecom, the state-owned telecoms company, for acquiring telecoms equipment.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Under Uzbek law, a company, being a member of one corporate group, can guarantee borrowings of another member(s) of the group. The issue of provision of financial assistance to a related party, particularly by a daughter company to its parent company, is not relevant under Uzbek law.

It should be noted that certain corporate approvals may be required for the provision of corporate guarantees.

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 absence of benefit (consideration) for provision of guarantee may be an issue in bankruptcy proceedings, where the court administrator may challenge such guarantee as causing damage to the creditors of the company.

Moreover, Uzbek law sets a general requirement that, in case insolvency of a company is caused by a member of that company or its owner, who has a right to give mandatory instructions to the company, such member shall bear subsidiary liability for the debts of the company, where the assets of the company are insufficient to satisfy the claims of the company's creditors. Insolvency of the company shall be considered caused by the actions of the member of the company only in situations when this member used his right to give mandatory instructions to the company to take certain actions, knowing that such actions will cause the insolvency of the company.

2.3 Is lack of corporate power an issue?

Legal entities acquire legal capacity from the date of their registration and in accordance with the purposes of their activities set in their constitutive documents. Hence, a company may enter into any lawful transaction, as long as it is not prohibited by its charter. For a company to be able to enter into certain transactions, such as transactions with related parties or 'large transactions' (transactions the total value of which exceed 25% of the company's assets for private companies and 15% for public), the company shall be required to receive approval of its relevant governing bodies. Failure to obtain such approvals may lead to the transactions being challenged under the questions as being concluded *ultra vires*.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Uzbek law does not impose approvals other than those mentioned in question 2.3. However, if the guarantee is given in favour of a foreign entity/person and implies the transfer of hard currency abroad, the guarantor shall comply with the foreign exchange regulations of Uzbekistan. Please see question 2.6 below.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Uzbek law does not impose any requirements pertaining to net worth, solvency or limitations in the amount of the guarantee for the guarantee to be valid. Such matters are considered by the company internally. Please note, however, that these factors can be determinative when the guarantees are challenged by the court administrator, as discussed in question 2.2.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Foreign currency operations are strictly regulated in Uzbekistan. Though legally it is not required, in practice for the guarantor to transfer hard currency abroad under the guarantee, the servicing bank of the guarantor shall be informed on the existence of the guarantee. It is preferred for the guarantee to include the servicing bank as a party to make the enforcement process less complicated.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

In accordance with Uzbek law, the performance of obligations may be secured by penalty, pledge of movable and immovable assets, participation interests (shares) and proprietary rights, retention of the obligor's property, surety, guarantee, advance or any other way established by legislation or contract.

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?

Uzbek law permits the conclusion of a mixed contract, in which there are elements of different contracts. Hence, it is possible to provide in one general agreement a pledge of different types of assets. However, it should be noted that in relation to a pledge agreement of certain types of assets and proprietary rights, Uzbek law provides certain requirements, such as form of the contract and its perfection, e.g. state registration or notary certification. For example, an agreement on a pledge of vehicles shall be executed on registered high-security forms and be subject to notary certification. Mortgage agreements, in addition to notary certification, are subject to state registration.

It should be separately noted that, under Uzbek law, pledge agreements shall include a description of the pledged property and an assessment; hence, a general description of the object of the pledge, such as "all property and proprietary rights of the pledgor" is not permitted.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Collateral can be provided by the pledge of movable and immovable property. Under Uzbek law, land is owned by the state and may not be pledged. However, Uzbek legislation permits the pledging of rights over land, unless such pledge is expressly prohibited by a contract or law. As stated in question 3.2, a pledge agreement for certain types of assets, such as immovable property, vehicles etc., shall be subject to certain requirements; failure to comply with such will invalidate the pledge agreement.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Receivables can be provided as a security by way of pledge of rights under contracts. It should be noted that only property rights can be pledged. Inalienable rights, such as claims to compensate for damages caused to health and life, alimonies claims etc., cannot be pledged.

Pledge over receivables is done by means of the conclusion of a pledge agreement in a simple written form, unless the main contract, obligations of which are secured, is not subject to notary certification itself. Under Uzbek law it is not required to notify the debtors of the pledgor of the pledge of claim rights.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

There are two possible ways for taking security over money deposited in bank accounts. The simplest way is to separate the money under question from the remaining monetary funds of the pledgor. This can be done by placing the money in a separate block account, which shall not be operated by the pledgor without the consent of the pledgee.

The other option is to take security of the rights over present and future funds in the bank accounts of the pledgor. This way the pledgor will be able to manage its bank account and dispose freely with the money in these accounts until there is a default. It should be noted that rights to control and manage bank accounts and to determine priority of making payments as such may not be pledged.

In either of these options it is recommended to introduce the servicing bank of the pledgor as a party to the pledge agreement to facilitate the enforcement process, when applicable.

3.6 Can collateral security be taken over shares in companies incorporated in Uzbekistan? 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?

Uzbek law provides for two types of shares. One is shares in public companies; and this share is considered securities. Shares are also issued in uncertified form. The other is shares in other forms of commercial entities, such as limited liability companies and these are referred to as 'participating interest'.

Both shares and participating interests can be pledged. To pledge shares the parties shall enter into a written contract, which is subject to registration with a registrar (depository) within two business days after the conclusion of the pledge agreement. Uzbek law does not impose any registration requirements for pledge of participating interest. These pledge agreements can be made in simple written form unless the main contract, the performance of obligation of which is secured, was not notary certified itself. In this case, the pledge agreement shall be notary certified as well.

Theoretically, pledges over shares and participating interests can be granted to a pledgee which is a foreign entity, under a New York or English law-governed document. It should be noted, however, that under Uzbek law, regardless of the choice of parties as to the governing law, mandatory provisions of Uzbek law governing such relations shall apply. Hence, to facilitate enforceability of the security, in practice such pledge agreements are governed by Uzbek law.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over inventory can be taken by way of pledge of goods in circulation; unlike in other types of pledge agreement, contract of pledge of goods in circulation does not require indication of the price of the pledge goods. However, the pledge contract shall define the amount, below which the value of the goods in circulation cannot fall. Decrease of the value of the pledged goods in circulation is permitted in proportion to the performed part of the secured obligation, unless otherwise provided in the contract.

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 Uzbek law, the rights of the mortgagee over a secured obligation and the mortgage agreement may be certified by a mortgage bond, which is a security paper. Uzbek law provides for cases when a mortgage bond cannot be issued. One such case is when the object of mortgage is an entire enterprise or there are lease rights over it. Issuance and the subsequent deals with the mortgage bond or rights over it are subject to state registration.

Mortgage bonds can be pledged under the pledge agreement by way of transferring the mortgage bond to another person (pledgee of the mortgage bond) in order to secure obligations of the initial mortgage bond holder under a loan agreement or another obligation arising between this person and the pledgee of the mortgage bond or any lawful owner of the mortgage bond.

Uzbek law does not provide for granting a security interest over pledge rights under agreements on the pledging of movable property.

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 Uzbekistan the state fees for notary certification of security deals are set by the Cabinet of Ministers of Uzbekistan.

The public notary levies the state fees for notarisation of security deals. The amount of the state fee depends on the security agreement. For example, the state fee for notary certification of the mortgage agreement will be calculated based on the total value of the object of mortgage. The average fee for such types of transactions is 0.1% of the value of the object of mortgage. The state fee for notary certification of pledge agreements of foreign and local light vehicles younger than a year old is five minimum monthly salaries for each horse-power except for pledge agreements with licensed credit organisations. It should be noted that, under Uzbek law, pledge agreements with vehicles are subject to a stamp duty of 10% of the minimal monthly salary set in the Republic of Uzbekistan.

The state cadastre does not levy fees for registration of mortgage agreements. As for the fees of the registrar of pledges over shares, the amount of the fee is set in a contract concluded between the registrar and the applicant.

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?

Depending on the complexity of the security transaction, the review by the public notary and notary certification of the agreement may be lengthy. One should take into consideration the time required for preparation of the documents requested by the public notary, particularly if one of the parties to the contract is a foreign entity.

Generally, registration of the security transaction with the relevant state authorities, however, is done within one business day.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

The general rule is that the owner of the property is free to create encumbrance over its property, for example, by entering into a security agreement without the consent of any other party.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Security of the borrowings under a revolving credit facility follows the general procedure. In practice, commercial banks view the entire amount made available to the borrower as the debt of the borrower and, hence, request security over this entire amount.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

If the pledge agreement does not require notary certification, then this pledge agreement can be executed by a simple signing of the document by the relevant authorised representatives of the parties. In cases when the pledge agreement require notary certification, then the signing of the pledge agreement shall be done in front of the public notary. The public notary may request documents confirming the authority of the signatories.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

There are no special prohibitions or restrictions in granting such security. The company shall, however, receive corporate approvals from its governing bodies when the security is either a related-party transaction or a 'large transaction'. Please see question 2.3.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Uzbekistan 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?

Uzbek law does not recognise the role of a security trustee or agent in enforcing the security and applying the proceeds from such enforcement to the claims of all the lenders. Under Uzbek law, the holder of security can only be the creditor, i.e. a party to whom the debt is owed by the debtor.

5.2 If an agent or trustee is not recognised in Uzbekistan, 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, loan documents are drafted in a conventional manner implying one lender-one borrower relations. However, the need to achieve the mentioned effect exists in project financing. In recent project financing, parallel debt and joint and several creditor structures are being used or are being considered to be used in Uzbekistan. Either of these structures attempt to allow the security agent/trustee to enforce claims on behalf of all the lenders without each individual lender enforcing its security separately. Since these structures are novel to the Uzbek legal environment and neither is free from legal concerns, it is difficult to assess how these will be enforced in practice in the future, and how the Uzbek courts view these structures in case there are disputes over enforcement of security.

5.3 Assume a loan is made to a company organised under the laws of Uzbekistan and guaranteed by a guarantor organised under the laws of Uzbekistan. 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 that both the loan agreement and the guarantee are governed by Uzbek law and assuming that both Lender A and Lender B are foreign entities, transfer of the loan agreement shall be made by way of the conclusion of an addendum to the loan agreement, introducing a new Lender B. Such loan agreement shall then be submitted for notification purposes to the borrower's bank for subsequent registration with the Central Bank of Uzbekistan.

However, Uzbek law does not expressly require receipt of the consent of the guarantor for such transfer; there is a provision in Uzbek law that states that the guarantee may be terminated if the secured obligation is changed without the consent of the guarantor in such a way that it leads to unfavourable consequences for the guarantor. To avoid the risk of a potential dispute as to whether a change of lenders is also a change of the secured obligation which is unfavourable to the guarantor, in practice the lenders request the borrower to obtain the consent of the guarantor and amend the guarantee to indicate Lender B as the lender secured by the guarantee. Such amendment of the guarantee shall also be presented to the servicing bank of the guarantor for notification purposes.

The need for possible corporate approvals of all the parties involved shall also be taken into consideration.

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 Uzbek law, interest payable on loans are subject to withholding tax, except for interests paid by local banks and leasing companies to foreign financial institutions. As for the proceeds of a claim under a guarantee or the proceeds of enforcing security, these are treated the same way as payments received for the underlining obligations, e.g. the principal amount is not taxable, but the interest is subject to withholding tax at a rate of 10%.

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 mentioned in question 6.1, interest paid by local banks and leasing companies to foreign financial institutions are exempt from withholding tax. Other than that, there are no other incentives and/or preferences applicable to foreign lenders.

There are no taxes applicable to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration.

6.3 Will any income of a foreign lender become taxable in Uzbekistan solely because of a loan to or guarantee and/or grant of security from a company in Uzbekistan?

Under Uzbek law, interest payable on loans, profit received from guarantee or enforcement of security is subject to withholding tax, except for interests paid by local banks and leasing companies to foreign financial institutions.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Please see question 3.9.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

There are no such legally adverse consequences. The borrower shall, however, consider foreign currency conversion for the purposes of re-payment, if it does not have its own stable hard currency proceeds.

7 Judicial Enforcement

7.1 Will the courts in Uzbekistan recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Uzbekistan enforce a contract that has a foreign governing law?

Uzbek courts will recognise and enforce parties' choice of a foreign law as the governing law, provided one of the parties is a foreign entity or individual, or there is a so-called 'foreign element' in their relations.

7.2 Will the courts in Uzbekistan 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?

Since Uzbekistan and the USA and/or the UK have not signed any international bilateral/multilateral agreements on the recognition of judgments of the state courts of these states, judgments of such courts will not be recognised and enforced in Uzbekistan.

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 Uzbekistan, 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 Uzbekistan against the assets of the company?

If both parties to a loan agreement are legal entities, such disputes shall be adjudicated by an economic court of Uzbekistan. The term for filing a lawsuit and obtaining a judgment depends on the complexity of the case. Cases in the first instances are adjudicated within a period of one to three months. Cases in the second and third instances are reviewed within one month from submitting an appeal application.

Enforcement of judgments depends mostly on the creditworthiness of the debtor and the presence of liquid assets. Thus, in practice, enforcement can take from one month up to several years.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There are, indeed. Uzbek law provides for enforcement of security through either court proceedings or out-of-court proceedings. The out-of-court proceedings shall either be stipulated in the security agreement or in a separate notary certified agreement concluded between the pledgor and the pledgee upon occurrence of the default triggering enforcement of security. Out-of-court proceedings are not permitted in situations when: (i) conclusion of the pledge agreement required the consent of a third party; (ii) the object of security has certain historical, art and other cultural value to society; and/or (iii) the pledgor is absent and it is not possible to identify its location. It should be noted that, due to the absence of an extended regulatory environment for the out-of-court proceedings as well as a relatively easy way to challenge an agreement on out-of-court proceedings, in practice the majority of security enforcement is conducted through courts.

Under Uzbek law, enforcement of security shall be conducted only through public auction (sale). Direct possession of the object of security by the pledgee is not permitted. It should be noted that the debtor may apply to the court for deferral of sale of the security for a term of up to one year. Moreover, the court has a right to refuse enforcement of security in case the debtor's default is extremely negligible and the amount of the pledgee's claim as a result of such breach is evidently disproportionate to the value of the object of security.

It should be separately noted that the starting price of the security to be sold at public auction is set by the court if the enforcement is not through court and by the agreement of the pledgee, and the enforcement was not conducted through out-of-court proceedings.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Uzbekistan or (b) foreclosure on collateral security?

The restrictions listed in question 7.4 apply to all creditors, regardless of whether these are foreign or local lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in Uzbekistan provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Upon announcement of liquidation proceedings by the court, enforcement of security can be done only by the court administrator. It should be noted that, under Uzbek law, proceeds received from sale of security do not comprise the liquidation estate of the company and shall be transferred to the secured lender in the amount of their claim.

7.7 Will the courts in Uzbekistan recognise and enforce an arbitral award given against the company without re-examination of the merits?

When an arbitral award is given in accordance with the provisions of the New York Convention on Recognition and Enforcement of Foreign Awards, such arbitral award shall be recognised and enforced in Uzbekistan without re-examination of its 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?

Please 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?

In case when all assets of a company are secured and proceeds from the sale of these assets are equal or less than the amount of the claims of the secured lenders, the claims of the secured lenders are satisfied only after compensation of court expenses, expenses related to payment of remuneration fees of the court administrator, the current utility bills and insurance of the property of the company as well as satisfaction of claims arising after the initiation of bankruptcy proceedings and personal injury claims.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

State unitary enterprises and entities funded exclusively by the state budget funds, as well as political parties and religious organisations, are excluded from the scope of the Law of Uzbekistan "On bankruptcy". It should also be noted that individuals cannot be declared bankrupt unless they are sole entrepreneurs.

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?

When a company is undergoing bankruptcy proceedings, there are no other processes available to the relevant creditors.

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 Uzbekistan?

Parties' submission to a foreign jurisdiction is legally binding and enforceable under Uzbek law, provided one of the parties to a dispute is a foreign entity or individual, or there is a so-called 'foreign element' in their relations.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Uzbekistan?

According to Uzbek law, the state acts in civil relations on an equal basis with other participants of such relations, i.e. it shall not use its sovereign immunity. However, the state is free to expressly waiver its immunity and such waiver shall be recognised and enforced.

10 Other Matters

10.1 Are there any eligibility requirements in Uzbekistan 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 Uzbekistan need to be licensed or authorised in Uzbekistan or in their jurisdiction of incorporation?

There are no eligibility requirements applicable to foreign lenders. They do not need to have any legal presence in Uzbekistan to be able to lend money to Uzbek companies.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Uzbekistan?

When considering the loan structure, lenders shall consider the strict currency control regulations applicable in Uzbekistan, including assignment of foreign proceeds, opening off-shore accounts by the borrower, etc.

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Venezuela

Rodner, Martínez & Asociados

Jaime Martínez Estévez

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Venezuela?

Domestic lending activities are to a large extent determined by compulsory lending mandated by law and regulations for the housing, tourism, agriculture and industrial sectors of the economy. International lending has been practically reduced to the financing of Government projects and, particularly, further development of the Orinoco heavy oil basin, which are not subject to the foreign exchange restrictions.

1.2 What are some significant lending transactions that have taken place in Venezuela in recent years?

Major recent lending transactions include those involving Petrowarao S.A. (US$ 420 MM, Perenco) Petrocabimas (US$ 620 MM, Suelopetrol), Petrozamora (US$ 1,000 MM, Gazprombank), Petroquiri-quire (US$ 1,200 MM, Repsol), Petrolera Sinovensa S.A. (US$ 4,015 MM, China Development Bank Corporation), Petroboscán S.A. (US$ 2,000 MM, Chevron Boscan Finance B.V.), PDVSA Petróleo S.A. (US$ 1,000 MM, Credit Suisse A.G.), Petróleos de Venezuela S.A., Petro Junín S.A. and Petrobicentenario S.A. (US$ 1,742 MM, ENI Investments Plc.) and Republic of Venezuela (Siderúrgica Nacional C.A. project, €446 MM, Banco Bilbao Vizcaya Argentaria S.A.).

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

There are no particular legal restrictions for intercompany loans. However, tax provisions on presumed dividends and transfer pricing could be applicable.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

No, absent a conflict with the corporate charter or an insolvency situation.

2.3 Is lack of corporate power an issue?

Definitely. If there is no capacity to issue the consent, the act would not be valid (Article 1141 of the Civil Code and Articles 243 and 270 of the Commercial Code).

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental consent or filing is required. Shareholder approval would be necessary if the respective charter and by-laws establish that the power to guarantee third party obligations rests on the shareholders.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

None, except that the enforceability of the guarantee could be set aside if given while insolvent (Article 946 of the Commercial Code).

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There has been exchange control in effect since 2003. Conversion of local currency into foreign currency ordinarily requires a governmental authorisation (from CENCOEX or the Central Bank). A new system, named SIMADI, was created on February 10, 2015, for the free conversion of local currency into foreign currency. The efficiency of the system to satisfy local demand is still uncertain. There is no prohibition of Venezuelan companies holding foreign currency assets abroad. If the guarantor has foreign currency funds abroad, it can make the payment in foreign currency without authorisations. Government-controlled entities require Central Bank authorisation to hold foreign currency abroad.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Security interest can be created over tangible and intangible assets, including real estate, chattel property, inventory, a business establishment, credit rights, intellectual property rights, shares and other securities.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Depending on the type of collateral, the security interest document will vary. Some security interest can be created by way of a mortgage (e.g. real estate, chattel property) and others pursuant to a pledge (e.g. shares, account receivables). Some require governmental authorisation and special filings. A single security interest document can cover different types of collateral and forms of encumbrance (mortgage, pledge without transfer of possession). Registrations of the same security interest document may be done in registries of various municipal jurisdictions.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

A real estate mortgage may cover the land and the plant (governed by the Civil Code, Article 1877), and the machinery and equipment may be covered by a chattel mortgage (governed by the Chattel Mortgage and Pledge Without Transfer of Possession Act). The mortgage document must be registered in the registry with jurisdiction over the location of the assets.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security interest may be taken over receivables by way of a pledge. The pledge agreement must be executed before a notary or filed with a notary (so it is dated). Notice must be given to the debtors (notice of transfer as security interest, Article 1550 of the Civil Code).

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A pledge agreement can be entered into in connection with the rights associated with a bank or brokerage account. Notice must be given to the bank or brokerage entity holding the account.

3.6 Can collateral security be taken over shares in companies incorporated in Venezuela? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Shares of a Venezuelan corporation may be pledged. In addition to executing a pledge agreement, a transfer as security interest note should be inscribed in the shareholders registry book of the corporation. Share certificates are commonly issued (Article 293 of the Commercial Code). However, the transfer of the rights of a shareholder is done by a note in the shareholders' registry book (Article 296 of the Commercial Code). The agreement must be governed by Venezuelan law (Articles 20 and 27 of the International Private Law Act).

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security interest can be taken over inventory by way of a chattel mortgage (Article 30 of the Chattel Mortgage and Pledge Without Transfer of Possession Act) or pursuant to an arrangement with an authorised general warehouse and delivery of warehouse certificates (in accordance with the General Deposit Warehouses Act).

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A security interest can be granted to several creditors and for different transactions. However, if different creditors are receiving a security interest with respect to different transactions, ranking of the security interest and inter-creditors agreements may be necessary.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The notarisation charges for documents creating security interest are not calculated based on the type or value of the assets but rather on the particulars of the document (e.g. number of pages). Registrations of security interests, however, generate fees which are calculated based on the value assigned to the security interest. The registration fees will be calculated pursuant to a progressive rate of up to 0.40% (Article 84 of the Public Registry and Notary Act).

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

When authorisations are required, the procedure may be a lengthy one. Registration of complex transactions may also require extra time. When the assets are located in different jurisdictions, the security interest document may need to be registered in all of the registries with jurisdiction over the different locations, which may prove to be a long process.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Chattel mortgages and pledges without transfer of possession can only be created in favour of qualified secured creditors, including foreign banks authorised by the Superintendency of Banks (Article 19 of the Chattel Mortgage and Pledge Without Transfer of Possession Act). To request such an authorisation, a draft of the security interest document must be presented.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There is no problem in creating a security interest with respects to a revolving credit facility. Priority of mortgages will be set by the date of registration.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Mortgage documents must be registered. Registration must be done in the registry office with jurisdiction given by the location or the type

of asset. Pledges are to be executed before a notary or a counterpart of the pledge agreement must be filed with a notary soon after.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Guarantees and security interest can be provided to support financing for the acquisition of shares, except that there is a prohibition of making loans or giving security interest for the acquisition of its own shares. The prohibition originates from the provision regarding Treasury shares, which establishes that the company cannot purchase its own shares but with amounts corresponding to retained earnings (Article 263 of the Commercial Code). A more evolved and far reaching provision is found in the Securities Market Act of 2010 (Article 45).

(b) Shares of any company which directly or indirectly owns shares in the company

Case law has expanded the above mentioned prohibition to preclude transactions that pretend to bypass the prohibition by using interposed persons.

(c) Shares in a sister subsidiary

The comment for (b) above applies here as well.

5 Syndicated Lending/Agency/Trustee/ Transfers

5.1 Will Venezuela recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

A security agent could be created, empowering such agent to act on behalf of all the secured lenders. However, the secured interest must be created in favour of the secured lenders. The security agent may also serve as payment agent and be authorised to receive payments and to make distributions of such payments among the secured lenders.

5.2 If an agent or trustee is not recognised in Venezuela, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable. See the answers above.

5.3 Assume a loan is made to a company organised under the laws of Venezuela and guaranteed by a guarantor organised under the laws of Venezuela. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Notice must be given to the debtor and the guarantor if an assignment of a loan takes place (Article 1550 of the Civil Code and 150 of the Commercial Code). The transaction documents may establish additional conditions for the transferability of a loan.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest payments are subject to withholding tax when made to foreign lenders (Article 9 (3) of Decree 1808 of 1997). Interest payments to local banks are not subject to withholding (Article 10 of Decree 1808). Guarantee and proceeds of enforcing a security interest are not subject to withholding, unless deemed allocated to the payment of interest.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Currently, there are no tax incentives for foreign lenders. From time to time, exonerations are given to induce the financing of projects in certain economic sectors. Interests on loans made by foreign financial institutions are taxed at the rate of 4.95% (Article 52 of the Income Tax Act). Other rates may apply because of tax treaties. The stamp taxes and fees that are to be paid for the documentation of a loan or a security interest are the same for local and foreign lenders.

6.3 Will any income of a foreign lender become taxable in Venezuela solely because of a loan to or guarantee and/or grant of security from a company in Venezuela?

Income originated from loans made to Venezuelan borrowers is subject to Venezuelan income tax at the rate of 4.95% (Article 52 of the Income Tax Act). The borrower is to withhold the tax when making the interest payments. If the guarantor or the owner of the security interest is a Venezuelan corporation, no Venezuelan tax will apply to the loan because solely of such circumstance.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are no significant costs associated with the execution of documentation related to a loan, guarantee or security interest, except that the registration of the security interest will entail the payment of registration fees based on a progressive tariff of up to 0.4% of the value of the security interest (Article 84 of the Public Registry and Notary Act).

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are none.

7 Judicial Enforcement

7.1 Will the courts in Venezuela recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Venezuela enforce a contract that has a foreign governing law?

Venezuelan courts will recognise a foreign governing law if selected to be the governing law of a contract (Article 29 of the International Private Law Act). Venezuelan courts will enforce such a contract in Venezuela. However, there may be some exceptions for national interest contracts (Article 151 of the Constitution).

7.2 Will the courts in Venezuela recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Passing of a foreign judgment requires a procedure before the Supreme Court (*exequatur*), which excludes the examination of the merits (Articles 53 of the International Private Law Act and 850 of the Civil Procedure Code). Venezuela is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Venezuela, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Venezuela against the assets of the company?

A procedure for collection of amounts due may take approximately up to 2 years, depending on the defences and appeals that the defendant raises during the court procedures. An *exequatur* procedure, for the passing of a foreign judgment, may take between 1 and 2 years and the enforcement against assets of the defendant in Venezuela may take between 6 months and 1 year.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Venezuelan enforcement procedures will require a public auction (Articles 550 to 584 of the Civil Procedure Code). Notices to the Attorney General's Office will be required, if there is a risk of interruption of a public service (Article 99 of the Attorney General Organic Act). The existing exchange control is one of the major obstacles to effectively realise the proceeds of the security interest being enforced.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Venezuela or (b) foreclosure on collateral security?

This is not applicable. In non-commercial matters litigations the foreign plaintiff may be required to post a bond (Articles 36 of the Civil Code and 1102 of the Commercial Code).

7.6 Do the bankruptcy, reorganisation or similar laws in Venezuela provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

If the debtor has a positive network but has liquidity problems, it may apply for a moratorium (Article 898 of the Commercial Code). While in moratorium or in a bankruptcy procedure, the enforcement of rights against the debtor would be suspended, except that the suspension would not apply to the enforcement of security interest (Articles 905, 942 and 964 of the Commercial Code).

7.7 Will the courts in Venezuela recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. Venezuela is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The secured lender would be limited in its ability to collect from the bankruptcy assets, other than the collateral, if the collateral is not sufficient to satisfy its claims (Article 1047 of the Commercial Code). If the collateral is not sufficient to satisfy the debt, the bankruptcy effects will apply to the remaining debt, including that interest stop accruing on the bankruptcy declaration date (Articles 943 and 944 of the Commercial Code).

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

There are debts that are preferred by law (privileged creditors, Article 1867 of the Civil Code), even above the preference corresponding to secured creditors. Security interest granted during the so-called suspicious period may be set aside. A suspicious period may be of up to 2 years and 10 days (Articles 936 and 945 of the Commercial Code). The suspicious period begins 10 days prior to the date on which the court establishes that the insolvency commenced. Payments on unmatured debt or in kind made during the suspicious period may be annulled (Article 945 of the Commercial Code).

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Banks, insurance companies and brokerage houses are excluded from bankruptcy and subject to a similar procedure carried by the Superintendency of the Banking Sector Institutions (Articles 243, 250 and 260 of the Banking Sector Institutions Act), the Superintendency of Insurance (Articles 99, 102 and 108 of the Insurance Activity Act) or the National Securities Superintendency (Article 21 of the Securities Market Act), respectively.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No (Articles 1844 of the Civil Code and 542 of the Commercial Code), except for retention rights (Articles 122 and 148 of the Commercial Code) and the collection of credits given as collateral (Article 538 of the Commercial Code).

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Venezuela?

Yes, provided that it is a commercial transaction and the exception of the national interest contract (Article 151 of the Constitution) does not apply.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Venezuela?

Yes, subject to the same conditions mentioned in question 9.1.

10 Other Matters

10.1 Are there any eligibility requirements in Venezuela for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Venezuela need to be licensed or authorised in Venezuela or in their jurisdiction of incorporation?

There are no eligibility requirements for lenders. However, the nature of the lender may be relevant for the purposes of determining the applicable tax regime (e.g. the 4.95% tax rate applies to foreign financial institutions). There is no need for the lenders to be licensed or authorised to do business in Venezuela. They do not need to be a licensed bank in the jurisdiction of incorporation.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Venezuela?

Special considerations must be given to the existing exchange control.

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Rodner, Martínez & Asociados is a Venezuelan law firm specialised in international finance, banking and investments in Venezuela. For over thirty years, it has represented major international banks, export credit agencies and multilateral entities in project, commercial and export financing transactions, being local counsel for the largest and most complex transactions and investments in Venezuela, including the setting and operation of Venezuelan branches of foreign banks. Its expertise in securities law has been sought for the discussion of the 1998 Capitals Market Act and the issue of regulations by the former National Securities Commission and for the design and implementation of new products for the domestic market. It has been consistently ranked as a Banking and Finance leading firm by Chambers and Partners, IFLR 1000 and Latin Lawyer.

Zambia

Nchima Nchito SC

Nchito and Nchito

Ngosa Mulenga Simachela

1 Overview

1.1 What are the main trends/significant developments in the lending markets in Zambia?

On 2nd April 2012, the Central Bank (the Bank of Zambia) introduced a policy rate to influence monetary and credit conditions in the economy. This rate allows the Central Bank to signal an increase or decrease in the price of credit in the country. Following this reform, the standard practice of quoting the price of loans and similar credit products by all commercial banks and financial institutions is the BOZ Policy Rate plus a margin. The margin is set by commercial banks on the basis of their risk premium assessments. This enables borrowers understand the basis upon which lenders price credit products. The policy rate for February 2015 is 9.75%. With effect from 1st March 2015, the policy rate will be increased by 50 basis points to 10.25%.

1.2 What are some significant lending transactions that have taken place in Zambia in recent years?

In May 2011, the Zambia National Building Society was able to source $98 million for the redevelopment of Society House, a multi-storey building located in the Central Business District of Lusaka that was gutted by fire in 1997. This funding was provided by the National Pension Scheme Authority. This transaction signalled the dawn of the implementation of a key piece of legislation, namely, the Private Public Partnership Act of 2009.

On 13th September 2012, Zambia issued its inaugural ten-year bond issue in the sum of $750 million. This was done to secure resources for the government's infrastructure development programmes. On its first day of trading it became Sub-Saharan Africa's most successful bond launch with bids worth more than 15 times the amount on offer. This was a vote of confidence in the country's economy.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, it can.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

There are none. The security may be enforced against the guaranteeing company in accordance with the provisions of the guarantee.

2.3 Is lack of corporate power an issue?

No. According to section 22 of the Companies Act, once a company is incorporated, it has all the powers of a natural person. It can do anything as long as there is no restriction in its articles of association.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

None are required for the issuance of guarantees.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no such limitations imposed on the amount of a guarantee but it is prudent that lenders consider the means and worth of the company giving the guarantee.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Externalisation of monies on private external debt is monitored by the Bank of Zambia. The law provides that an external debt must be registered with the Central Bank and all outflows which include payment of principal and interest are monitored.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Any asset can be used to secure lending obligations. Of interest, local law recognises growing crops and stock-in trade as security for lending obligations.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

A general security agreement can take the form of a floating charge of all present and future assets of a company. Under a floating charge, the borrower is at liberty to deal with its assets; in the normal course of business it crystallises on the happening of a specified event such as default on the loan. A company can also create a fixed charge in relation to specific assets and this restricts dealings with the assets without the permission of the holder of the charge. It does not require a specific event to crystallise.

A floating charge is done by way of debenture which the company executes. The document is then registered at the Companies registry within 21 days of creation. If it affects land, it must also be registered at the Lands and Deeds Registry within 30 days. A fixed charge is created in the same way. Filing fees are payable on both types of charges.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes it can. Collateral over land is taken by way of a mortgage. A mortgage is prepared and executed by the borrower and then registered at the Lands and Deeds Registry. This is after the lender has taken the necessary precautions such as verification of the title and location of the property. Collateral security over plant, machinery and equipment can be taken by way of a fixed charge which can also be registered on the Miscellaneous Registry at the Lands and Deeds Registry.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, security can be taken over receivables. This can be done under a floating charge as described in question 3.2 above. There is no legal requirement for debtors to be notified of the security since security documents such as charges are to be registered, the public and anyone dealing with the company is taken to have constructive notice.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes it can. Cash deposited in bank accounts can be taken as security as part of a floating charge, as described in question 3.2 above.

3.6 Can collateral security be taken over shares in companies incorporated in Zambia? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, collateral security can be taken over shares in companies incorporated in Zambia. Shares are personal property and can be pledged. A shareholder in Zambia will typically be issued with a share certificate which is evidence of his title to the shares. According to section 69 of the Companies Act, a company can issue share warrants with respect to fully paid-up shares which will state that the bearer of the warrant is entitled to the shares specified therein, and presentation of such share warrants is evidence of ownership of those shares.

For companies on the Lusaka Stock Exchange, shares can be held in an electronic format at the central share depository. The position of the law in Zambia is that parties to a contract are free to choose what law will govern their agreement and as such it can validly be granted under a New York or English law-governed document.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes such security can be taken. This can be done by way of a floating charge as explained in question 3.2 above.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes it can do so in both circumstances.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Registration fees are to be paid to the Lands and Deeds Registry and the Companies Registry when the documents need to be lodged there. The registration is 1% of the amount secured with a ceiling of 4,000 kwacha (which is the equivalent of US$690) at the Lands and Deeds Registry, whilst the ceiling at the Companies Registry is 2,000 kwacha (equivalent to US$345).

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

As explained above, the registration fees are only 1% and the amount is capped unlike most jurisdictions. The timelines for registration vary from 7 to 21 days.

3.11 Are any regulatory or similar consent required with respect to the creation of security?

There are no consents required.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Priority of securities is determined by the date of creation and/or registration of the security document. The type of borrowings secured is not material. The Companies Act also spells out preferential debtors such as taxes and rates.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Generally there are none, save to note that security documents are typically executed under seal.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Yes, there are. Section 82 of the Companies Act generally prohibits a company from giving financial assistance directly to a person acquiring or proposing to acquire any shares in that company or any of its subsidiaries unless the financial assistance relates to the acquisition of shares in the company or its holding company and the giving of the assistance is an incidental part of some larger purpose of the company and the assistance is given in good faith in the interest of the company.

(b) Shares of any company which directly or indirectly owns shares in the company

Section 83 of the Companies Act allows a private company to give financial assistance for the acquisition of shares in its holding company as long as the holding company is not a company incorporated outside Zambia or a public company.

(c) Shares in a sister subsidiary

There are no prohibitions in the Companies Act.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Zambia recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes. Security agents are often used for this purpose.

5.2 If an agent or trustee is not recognised in Zambia, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

5.3 Assume a loan is made to a company organised under the laws of Zambia and guaranteed by a guarantor organised under the laws of Zambia. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

There are none as long as the loan is properly assigned and the registrations at the Companies Registry and Deeds Registry are varied to reflect this. The enforceability will be as if Lender B had made the initial disbursement.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

There is a requirement to withhold tax from interest payable to domestic or foreign lenders. This will include the interest component of enforcing the guarantee.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no incentives available, save for the double taxation treaties with various countries pursuant to which taxes payable by foreign entities in Zambia are reduced.

6.3 Will any income of a foreign lender become taxable in Zambia solely because of a loan to or guarantee and/or grant of security from a company in Zambia?

Yes, all income and/or profits earned within the Republic of Zambia are taxable. A foreign lender will typically earn interest as his profit on the transaction and this is taxable.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

These costs have been outlined in question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

There are no adverse consequences.

7 Judicial Enforcement

7.1 Will the courts in Zambia recognise a governing law in a contract that is the law of another jurisdiction (a “foreign governing law”)? Will courts in Zambia enforce a contract that has a foreign governing law?

The Courts in Zambia will recognise the law of another jurisdiction as the governing law of a contract. Its enforcement may depend on particular circumstances as the Supreme Court of Zambia has held that the host state may claim jurisdiction depending on the facts in any given case, but there is a general rule that an action brought in defiance of an agreement to submit to a foreign jurisdiction will be stayed.

7.2 Will the courts in Zambia recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

In order for a foreign judgment to be enforced it must be registered under the Foreign Judgment (Reciprocal Enforcement) Act. The registration procedure does not re-examine the merits of the case but the process must be commenced done within six years of the judgment.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Zambia, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Zambia against the assets of the company?

In the situation described in (a) above, an action can be commenced immediately when the default occurs. Once the court process is served on the defaulting company, the lender can obtain a default judgment where there is no defence in fourteen (14) days. A copy of the judgment must be delivered to the company and execution can take place seven days after service of the document.

In the situation described in (b) above, the person in whose favour the judgment is will apply for registration of the same. This does not require notice to be given to the judgment debtor. Upon receipt of this application, the judge, at his discretion, will appoint a time for the judgment debtor to apply to set aside the registration. If no application is made within the time given, the judgment may be executed. The time frame is typically 14 to 42 days.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There is a legal requirement for holders of security to obtain the best market price for any assets sold to enforce a security. It does not have to be an auction but where the sale of an asset is challenged, the holder of the security must show that he did obtain the best price possible in the circumstances. There are no regulatory consents required.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Zambia or (b) foreclosure on collateral security?

There no restrictions on foreign lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes. In a mortgage action, the court will give the mortgagor time ranging between 30 to 60 days to settle all amounts due, failing which the mortgagee will be at liberty to dispose of the property to realise all amounts due.

7.7 Will the courts in Zambia recognise and enforce an arbitral award given against the company without re-examination of the merits?

The courts will recognise and enforce an arbitral award under the New York Convention. The merits will not be examined but recognition may be refused on the grounds that it deals with a dispute not capable of being settled by arbitration under local law or its recognition would be against public policy.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Bankruptcy proceedings in respect of companies are called liquidations or winding-up proceedings. When a company is placed under liquidation, no court proceedings may be brought against it without the permission of the court. This will affect the lender's right to sue for amounts due to it. Appointment of a liquidator crystallises all floating charges over the company's assets. The liquidator or receiver will pay out of assets of a company all amounts outstanding in order of priority, which priority is determined by the date of registration of the security. Depending on the ranking of its security and the assets available, a lender may not recover all amounts due to it. A lender over a fixed charge will have recourse to the specific charged asset to recover amounts outstanding.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes, section 346 (1) and (2) of the Companies Act provides that in the event of insolvency, costs of the insolvency, taxes, statutory deductions and employee benefits shall take priority.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Any company that is incorporated under the Companies Act can be liquidated. Generally, those entities that are created by statute cannot be wound up under the Companies Act.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes. The agreement between the parties may provide that the creditor appoints a receiver/manager over the assets of a company. The agreement may also provide that when an event of default occurs the lender may seize the assets, particularly in fixed charges without recourse to court. A mortgagee under a legal mortgage is also entitled to exercise the power of sale in the mortgage deed without recourse to court.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Zambia?

Yes it is, as the party's freedom of contract is given pre-eminence.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Zambia?

Yes, it is.

10 Other Matters

10.1 Are there any eligibility requirements in Zambia for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Zambia need to be licensed or authorised in Zambia or in their jurisdiction of incorporation?

If the lender operates outside Zambia there are no local eligibility requirements. Subject to compliance with the laws of its jurisdiction, a foreign lender does not need to be licensed or authorised in order to lend to a company in Zambia. It is important to note that the foreign lender cannot establish a representative office in Zambia unless it obtains a licence from the Central Bank to do so. If it has operations in Zambia it will have to be licensed under the Banking and Financial Services Act as a financial institution or under the Money-Lenders Act.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Zambia?

Foreign lenders must comply with the local law on remittance of foreign exchange out of the country and ensure that the borrowers have registered the foreign loan with the Bank of Zambia.

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Nchito and Nchito is a full-service law firm based in Lusaka, the capital city of Zambia. It was formerly part of MNB Legal Practitioners (a firm formed in 1999 through an amalgamation of three law firms that existed previously) and acquired its current name on 1st October 2011 when MNB restructured and the Lusaka and Kitwe offices became separate firms.

The firm is engaged in providing services in diverse areas of the law covering conveyancing, commercial transactions, civil and criminal litigation – including debt collection and enforcement of securities, insolvency, company secretarial work, arbitration, banking securities, corporate finance and related work. The major focus of the firm's litigation is Commercial- and Employment-related litigation.

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