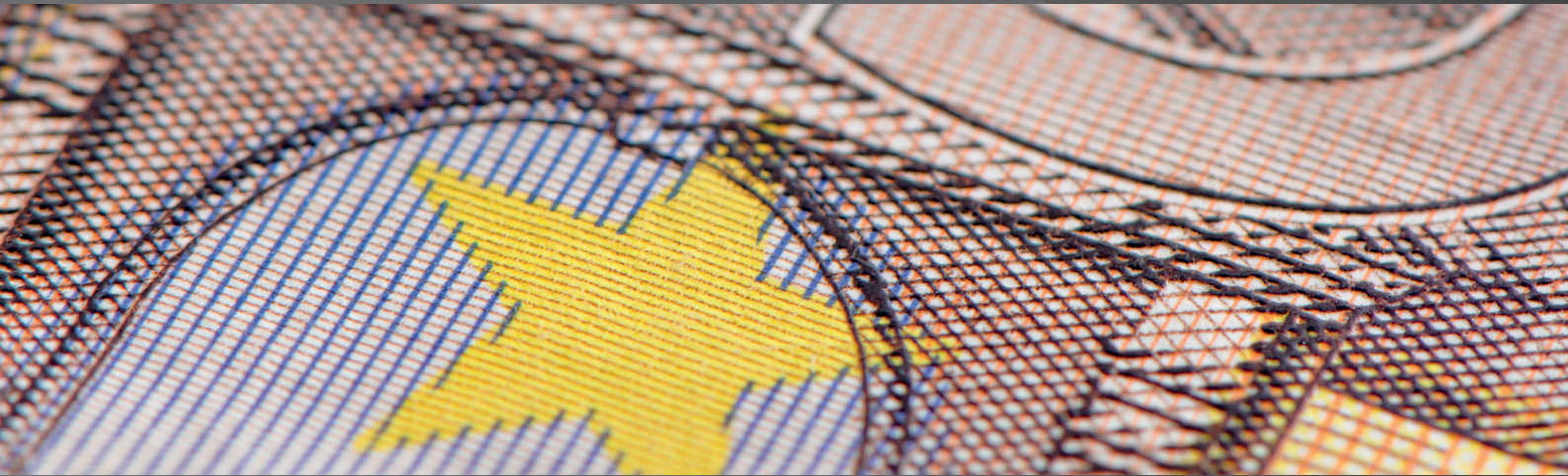


International Comparative Legal Guides



Lending & Secured Finance 2020

A practical cross-border insight into lending and secured finance

Eighth Edition

Featuring contributions from:

Allen & Overy LLP

Anderson Mori & Tomotsune

Asia Pacific Loan Market Association

Astrea

Baker & McKenzie LLP

Bravo da Costa, Saraiva – Sociedade de Advogados

Cadwalader, Wickersham & Taft LLP

Carey

Carey Olsen Jersey LLP

Cleary Gottlieb Steen & Hamilton LLP

Cordero & Cordero Abogados

Criales & Urcullo

Cuatrecasas

Davis Polk & Wardwell LLP

Debevoise & Plimpton LLP

Dechert LLP

Dillon Eustace

Drew & Napier LLC

E & G Economides LLC

Fellner Wratzfeld & Partners

Freshfields Bruckhaus Deringer LLP

Fried, Frank, Harris, Shriver & Jacobson LLP

Holland & Knight

HSBC

Jadek & Pensa

Latham & Watkins LLP

Laurence Khupe Attorneys
(inc. Kelobang Godisang Attorneys)

Law firm Trpenoski

Lee and Li, Attorneys-at-Law

Loan Market Association

Loan Syndications and Trading Association

Loyens & Loeff Luxembourg S.à r.l.

Macesio & Partners LLC

Maples Group

McMillan LLP

Milbank LLP

Morgan, Lewis & Bockius LLP

Morrison & Foerster LLP

Nielsen Nørager Law Firm LLP

O'Melveny & Myers LLP

Orrick, Herrington & Sutcliffe LLP

Pestalozzi Attorneys at Law Ltd

PLMJ Advogados, SP RL

Proskauer Rose LLP

Rodner, Martínez & Asociados

Sardelas Petsa Law Firm

Seward & Kissel LLP

Shearman & Sterling LLP

Skadden, Arps, Slate, Meagher & Flom LLP

SZA Schilling, Zutt & Anschutz
Rechtsanwaltsgesellschaft mbH

TTA – Sociedade de Advogados

Veirano Advogados

Wakefield Quin Limited

Walalangi & Partners
(in association with Nishimura & Asahi)

White & Case LLP

Editorial Chapters

- 1** **Loan Syndications and Trading: An Overview of the Syndicated Loan Market**
Bridget Marsh & Tess Virmani, Loan Syndications and Trading Association
- 7** **Loan Market Association – An Overview**
Nigel Houghton & Hannah Vanstone, Loan Market Association
- 14** **Asia Pacific Loan Market Association – An Overview**
Andrew Ferguson & Rosamund Barker, Asia Pacific Loan Market Association

Expert Chapters

- 17** **An Introduction to Legal Risk and Structuring Cross-Border Lending Transactions**
Thomas Mellor & Marcus Marsh, Morgan, Lewis & Bockius LLP
- 22** **Global Trends in Leveraged Lending**
Joshua Thompson & Korey Fevzi, Shearman & Sterling LLP
- 31** **The Continuing Evolution of the Direct Lending Market**
Meyer C. Dworkin, David Hahn, Scott M. Herrig & Sarah Hylton, Davis Polk & Wardwell LLP
- 35** **Commercial Lending 2020**
Bill Satchell & Elizabeth Leckie, Allen & Overy LLP
- 41** **Acquisition Financing in the United States: Continuing as is in 2020?**
Geoffrey R. Peck & Mark S. Wojciechowski, Morrison & Foerster LLP
- 47** **A Comparative Overview of Transatlantic Intercreditor Agreements**
Lauren Hanrahan & Suhrud Mehta, Milbank LLP
- 54** **A Comparison of Key Provisions in U.S. and European Leveraged Loan Agreements**
Sarah M. Ward & Mark L. Darley, Skadden, Arps, Slate, Meagher & Flom LLP
- 70** **The Global Subscription Credit Facility and Fund Finance Markets – Key Trends and Forecasts**
Michael C. Mascia & Wesley A. Misson, Cadwalader, Wickersham & Taft LLP
- 73** **Recent Developments in U.S. Term Loan B**
Denise Ryan & Kyle Lakin, Freshfields Bruckhaus Deringer LLP
- 81** **The Continued Prevalence of European Covenant Lite**
James Chesterman, Jane Summers, Daniel Seale & Karan Chopra, Latham & Watkins LLP
- 85** **An Introduction to Anti-Net Short Provisions in Syndicated Loans**
Todd Koretzky, Allen & Overy LLP
- 88** **Liability Management: Exploring the Practitioner’s Toolbox**
Scott B. Selinger & Ryan T. Rafferty, Debevoise & Plimpton LLP
- 93** **Analysis and Update on the Continuing Evolution of Terms in Private Credit Transactions**
Sandra Lee Montgomery & Michelle L. Iodice, Proskauer Rose LLP
- 102** **Driving Innovation: New Opportunities for Law Firms to Partner with Global Clients in Cross-Border Projects**
Hanno Erwes & Tracy Springer, HSBC
- 109** **Trade Finance on the Blockchain: 2020 Update**
Josias Dewey, Holland & Knight
- 116** **2020: Financing Private Equity Transactions in a New Decade**
Scott M. Zimmerman & Lindsay Flora, Dechert LLP
- 120** **An Overview of Debtor in Possession Financing**
Julian S.H. Chung & Gary L. Kaplan, Fried, Frank, Harris, Shriver & Jacobson LLP
- 124** **Acquisition Finance in Latin America: Navigating Diverse Legal Complexities in the Region**
Sabrena Silver & Anna Andreeva, White & Case LLP
- 132** **Developments in Midstream Oil and Gas Finance in the United States**
Elena Maria Millerman, Christopher Richardson & Ariel Oseasohn, White & Case LLP
- 140** **Countdown to 2021: The End of LIBOR and the Rise of SOFR**
Kalyan (“Kal”) Das & Y. Daphne Coelho-Adam, Seward & Kissel LLP

Expert Chapters Continued

- 145** **Sustainability Finance – Recent Growth and Development**
Jai S. Khanna & José A. Morán, Baker & McKenzie LLP
- 150** **2020 Private Credit Overview and Update: Financing the Middle Market**
Jeff Norton, Sung Pak, John J. Rapisardi & Joseph Zujkowski, O'Melveny & Myers LLP
- 154** **The Section 363 Sale & Acquisition Financing Process: Key Considerations from a Buyer's Perspective**
Lisa M. Schweitzer, Margaret S. Peponis, Katherine R. Reaves & Ashley A. Kerr, Cleary Gottlieb Steen & Hamilton LLP
- 159** **Cross-Border Derivatives for Project Finance in Latin America**
Felicity Caramanna, Credit Agricole Corporate and Investment Bank

Q&A Chapters

- 163** **Angola**
Bravo da Costa, Saraiva – Sociedade de Advogados / PLMJ: João Bravo da Costa & Joana Marques dos Reis
- 170** **Austria**
Fellner Wratzfeld & Partners: Markus Fellner & Florian Kranebitter
- 181** **Belgium**
Astrea: Dieter Veestraeten
- 188** **Bermuda**
Wakefield Quin Limited: Erik L. Gotfredsen & Jemima Fearnside
- 196** **Bolivia**
Criales & Urcullo: Andrea Mariah Urcullo Pereira & Daniel Mariaca Álvarez
- 203** **Botswana**
Laurence Khupe Attorneys (inc. Kelobang Godisang Attorneys): Wandipa T. Kelobang, Monica Gamu Makhala & Baboloki Mathware
- 210** **Brazil**
Veirano Advogados: Lior Pinsky, Ana Carolina Barretto & Amanda Leal
- 218** **British Virgin Islands**
Maples Group: Michael Gagie & Matthew Gilbert
- 226** **Canada**
McMillan LLP: Jeff Rogers & Don Waters
- 236** **Cayman Islands**
Maples Group: Tina Meigh & Lucy Sleep
- 244** **Chile**
Carey: Diego Peralta, Fernando Noriega & Diego Lasagna
- 252** **Costa Rica**
Cordero & Cordero Abogados: Hernán Cordero Maduro & Ricardo Cordero B.
- 260** **Croatia**
Macesic & Partners LLC: Ivana Manovelo
- 268** **Cyprus**
E & G Economides LLC: George Economides & Virginia Adamidou
- 277** **Denmark**
Nielsen Nørgaard Law Firm LLP: Thomas Melchior Fischer & Brian Jørgensen
- 285** **England**
Allen & Overy LLP: Oleg Khomenko & Jane Glancy
- 295** **France**
Orrick Herrington & Sutcliffe LLP: Emmanuel Ringeval
- 306** **Germany**
SZA Schilling, Zutt & Anschutz Rechtsanwalts-gesellschaft mbH: Dr. Dietrich F. R. Stiller, Dr. Andreas Herr & Dr. Michael Maxim Cohen
- 315** **Greece**
Sardelas Petsa Law Firm: Konstantina (Nantia) Kalogiannidi & Vasiliki Liappi
- 323** **Indonesia**
Walalangi & Partners (in association with Nishimura & Asahi): Hans Adiputra Kurniawan, Anggarara C. Pratiwi Hamami & Ophelia Novka Kusuma Asri
- 330** **Ireland**
Dillon Eustace: Conor Keaveny, Jamie Ensor & Richard Lacken
- 340** **Italy**
Allen & Overy Studio Legale Associato: Stefano Sennhauser & Alessandra Pirozzolo
- 349** **Japan**
Anderson Mori & Tomotsune: Taro Awataguchi & Yuki Kohmaru
- 358** **Jersey**
Carey Olsen Jersey LLP: Robin Smith & Laura McConnell
- 368** **Luxembourg**
Loyens & Loeff Luxembourg S.à r.l.: Antoine Fortier Grethen
- 376** **Mozambique**
TTA – Sociedade de Advogados / PLMJ: Gonçalo dos Reis Martins & Nuno Morgado Pereira
- 384** **Netherlands**
Freshfields Bruckhaus Deringer LLP: Mandeep Lotay & Tim Elkerbout
- 392** **North Macedonia**
Law firm Trpenoski: Natasha Trpenoska Trenevaska & Bojana Paneva
- 398** **Portugal**
PLMJ Advogados, SP RL: Gonçalo dos Reis Martins

Q&A Chapters Continued

- 405** **Russia**
Morgan, Lewis & Bockius LLP: Grigory Marinichev & Alexey Chertov
- 414** **Singapore**
Drew & Napier LLC: Pauline Chong, Renu Menon, Blossom Hing & Ong Ken Loon
- 424** **Slovenia**
Jadek & Pensa: Andraž Jadek & Žiga Urankar
- 434** **South Africa**
Allen & Overy (South Africa) LLP: Lionel Shawe
- 444** **Spain**
Cuatrecasas: Héctor Bros & Manuel Follía
- 455** **Sweden**
White & Case LLP: Carl Hugo Parment & Magnus Wennerhorn
- 462** **Switzerland**
Pestalozzi Attorneys at Law Ltd: Oliver Widmer & Urs Klöti
- 471** **Taiwan**
Lee and Li, Attorneys-at-Law: Hsin-Lan Hsu & Odin Hsu
- 480** **United Arab Emirates**
Morgan, Lewis & Bockius LLP: Victoria Mesquita Wlazlo & Tomisin Mosuro
- 495** **USA**
Morgan, Lewis & Bockius LLP: Thomas Mellor & Rick Eisenbiegler
- 507** **Venezuela**
Rodner, Martínez & Asociados: Jaime Martínez Estévez

Russia

Morgan, Lewis & Bockius LLP



Grigory Marinichev



Alexey Chertov

1 Overview

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

The Russian lending market has been under mounting pressure from US and EU sanctions in recent years. The major deals involving state-owned banks and companies have been non-public and denominated in Russian rubles, euros or, sometimes, in other currencies.

The prepayment finance market has further increased its share and, in terms of amount and volume of transactions, has significantly surpassed the market of “traditional” pre-export finance and other “classical” trade finance structures. There have been a number of large prepayment finance deals involving major producers of oil, copper, coal, aluminium, gas, gold, fluorspar, magnesia and other commodities which demonstrate the recent market trend of prepayment structures expanding well beyond the oil market. In view of the growing trade between Russia and Asia, the prepayment finance market is also expanding to Asia.

There is a new trend to structure cross-border gold prepayment through a direct gold supply arrangement between an international bank and a Russian producer, although traditionally such deals have been structured through licensed Russian banks.

An increasing number of lending transactions are governed by Russian law. Federal Law No. 486-FZ, dated 31 December 2017, “On syndicate facility (loan) and on amendments to certain legislative acts of the Russian Federation” (the “Syndication Law”) contains detailed regulations of syndication lending and the role of lenders, facility agents and arrangers. Some Russian state banks tend to structure Russian law syndicated lending in accordance with the Syndication Law.

In 2019, the liberalisation of the currency control regulations continued. One of the significant changes was the gradual abolishment of the repatriation requirements for ruble earnings under foreign trade agreements between residents and non-residents.

The launch of the Project Finance Factory (a project finance mechanism for investment projects in Russia’s priority industries) administered by VEB.RF, a Russian state corporation, led to increased popularity of project financing in Russia. In order to qualify for financing by the Project Finance Factory, a project should comply with the following criteria: (1) the project value shall not be less than RUB 3 billion; (2) the tenor shall not exceed 20 years; and (3) the sponsor’s equity investment shall not be less than 20%.

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

Significant public finance transactions in 2018–2019 include, among others:

- a EUR 11.4 billion project financing for the construction of the Amur Gas Processing Plant by 22 banks from Europe, Asia and Russia, including the China Development Bank, Gazprombank, Sberbank of Russia and VEB.RF;
- a USD 2 billion syndicated financing of Baikal Mining Company by Sberbank of Russia, Gazprombank and VEB.RF;
- a RUB 6.3 billion financing of PJSC KuibyshevAzot by VEB.RF and Gazprombank;
- a USD 1.055 billion five-year pre-export financing of SUEK arranged by a group of 18 international and domestic lenders;
- a USD 725 million and EUR 650 million dual-currency pre-export financing of Uralkali;
- a USD 820 million three-year financing of EuroChem Group AG organised by a syndicate of banks including UniCredit Bank AG, London Branch, as the facility agent;
- an approximately USD 907 million (EUR 720 million and USD 120 million) dual-currency loan refinancing of Siberian Anthracite with Commerzbank, Credit Suisse, ING, Industrial & Commercial Bank of China, Intesa Sanpaolo, Sberbank, Société Générale and UniCredit as the mandated lead arrangers;
- a USD 300 million syndicated loan to refinance Eurobonds for Nordgold arranged by ING, Raiffeisenbank, Raiffeisenbank Bank International, Rosbank, Société Générale and UniCredit;
- a USD 250 million syndicated pre-export financing of Russian Copper Company provided by more than 10 banks with Natixis as the co-ordinating mandated lead arranger; and
- a USD 100 million refined gold prepayment for GV Gold arranged by Société Générale.

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, there are no restrictions on provision of guarantees or sureties by a Russian company in favour of members of its

group. If a guarantee or surety constitutes a “major” (i.e., a transaction amounting to 25% or more of the company’s assets) or an “interested party” transaction, it may be subject to certain corporate consents, approvals or notification 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?

Any transaction, including a guarantee or surety, may be challenged by a company and, in certain cases, by its shareholders or members of the board if such transaction is entered into to the detriment of the company, and the counterparty was aware of such circumstances.

Also, a director of a Russian company shall generally act reasonably and in good faith and in the best interest of the company. If such obligations are breached, the directors may be sued for losses caused to the company.

In case of insolvency of a company, a guarantee or surety may be challenged if such transaction is aimed at a violation of creditors’ rights or constitutes a preferential transaction. Directors and controlling persons of a company may be subject to “subsidiary (secondary) liability” if the insolvency occurred as a result of their actions.

2.3 Is lack of corporate power an issue?

Subject to certain exceptions, Russian companies can enter into any lawful transaction. However, the powers of a CEO may be limited by the company’s articles of association. The articles of association may also contemplate that two CEOs shall act jointly or severally (in the latter case, the powers may be divided between them). In certain cases, a guarantee or surety may require consent of (notification to) the shareholders (participants) or the board of directors if it constitutes a “major” or an “interested party” transaction.

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

Generally, no governmental consents or filings are required in respect of guarantees or sureties. A company issuing a guarantee has an obligation to publish this fact and the material terms of a guarantee in the Uniform State Register of Information on the Activity of Legal Entities (*Fedresurs*) (for more information, please refer to question 3.9).

As described in question 2.3, a guarantee or surety may require consent of the shareholders (participants) or the board of directors if it constitutes a “major” or “interested party” transaction for the company or, in other cases, is stipulated by the company’s charter.

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

Generally, there are no such limitations. However, if the value of the transaction exceeds certain thresholds (such as 25% of the company’s assets), this may be taken into consideration if the company’s transaction is contested in the course of the company’s insolvency.

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

There are generally no such obstacles other than insolvency of a company. In order for a company to make certain payments to a foreign lender in a foreign currency under a guarantee or surety, the company may be required to file with a Russian authorised bank certain documents (including the relevant guarantee or surety) in order to record the agreement for currency control purposes. Such filing is required to be made as a condition to a payment transfer rather than to the entry into the underlying transaction, and such requirement is of an administrative nature and does not restrict or affect the company’s obligation to make payments under the guarantee or surety.

3 Collateral Security

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

Russian law allows using various types of collateral, including a pledge of immovable property (mortgage), pledge of equipment (or other movable property), pledge of rights under bank accounts, pledge of goods in turnover, pledge over shares and participatory interest and pledge over receivables.

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

Russian law generally allows extending a pledge to “all assets” of a company. The respective pledge agreement shall be made in written form. However, it is unlikely that a pledge created by such a pledge agreement would automatically extend to certain types of assets, such as rights under bank accounts, immovable assets (mortgage), participatory interests in limited liability companies or shares in joint stock companies, since pledges over such assets are subject to registration/notarisation or other specific formalities.

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

Security over immovable property (land, buildings, etc.) can be taken by way of mortgage. The mortgage agreement shall be made in written form. The mortgage shall be registered with the Unified State Register of Immovable Property (“Единый государственный реестр недвижимости”). Security over machinery and equipment is usually taken by entering into a pledge of movables. The pledge of machinery and equipment can be recorded with the register of notices on pledges maintained by the notaries (for more information, please refer to question 3.9).

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 is usually taken by way of a pledge. The debtor shall be notified about the pledge of receivables. The consent of the debtor is generally not required unless otherwise

provided by the underlying contract. The pledge over receivables can be recorded with the register of notices on pledges maintained by the notaries (for more information, please refer to question 3.9).

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

Security over cash deposited in bank accounts is usually taken by way of a pledge of rights under bank accounts. The Russian Supreme Court has supported a view that a pledge of rights under a bank account is possible only in respect of specific pledge accounts (“защитные счета”), which means that there is a substantial risk that a pledge of rights in respect of an ordinary bank account may be unenforceable. It is impossible to bypass this rule by changing the status of an ordinary bank account to the specific pledge accounts. A new pledge account must be opened for this purpose. A pledge of rights under a bank account is created from the moment the respective account bank is notified about the pledge. However, if the account bank is the pledgee, the pledge will be created from the date of the pledge agreement.

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

Russian law makes a distinction between shares in joint stock companies and participatory interests in limited liability companies. Both can serve as collateral and both are in a non-documentary form.

In respect of the participatory interests, a pledgor must obtain the prior consent of a majority of participants in the limited liability company if the pledge is made in favour of a third party. A participatory interest pledge agreement must be made in written form and notarised. A pledge of participatory interest is deemed to be created from the moment of its registration in the Unified State Register of Legal Entities.

In contrast with a participation interest pledge, notarisation of a share pledge is possible but not mandatory. No consent of other shareholders is required. A share pledge must be registered with the shareholders’ register or a depository.

Pledges of participatory interests and shares are usually governed by Russian law. New York and English law may also be used to govern local pledges, but these are rarely seen because enforcement of such pledges may be more complicated in practice.

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

Russian law recognises the pledge of inventory (pledge of goods in turnover). The subject matter of a pledge of goods in turnover can be determined by specifying the generic features of the goods and their location (e.g., goods in certain premises). The pledge over inventory can be recorded with the register of notices on pledges maintained by the notaries (for more information, please refer to question 3.9).

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, both options are possible as long as the required corporate consents (if any) are obtained.

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?

Any pledge agreement shall be made in written form. Notarisation of a pledge of participatory agreement is mandatory, while notarisation of pledges of other types of assets is possible but, as a rule, not mandatory. However, out-of-court enforcement of the pledged assets by way of notarial endorsement is only possible if the agreement is notarised.

A mortgage shall be registered with the Unified State Register of Immovable Property and take effect from the date of such registration. Similarly, a pledge over participatory interest shall be registered with the Unified State Register of Legal Entities and take effect from the date of such registration.

The amount of notary fees depends on the amount of the secured obligation and whether the notarisation is mandatory. If the notarisation is mandatory, the amount of the notary fee cannot exceed RUB 150,000. If the notarisation is not mandatory, this amount cannot exceed RUB 500,000.

Pledges of most assets (other than immovable property, participatory interests, trade marks, patents, rights under bank accounts and pledges of other assets, transfers of rights in respect of which are subject to mandatory registration) can be recorded with the register of notices on pledges maintained by the notaries. Such notification is not mandatory and is not required for the validity of a pledge. However, the notification makes the pledge public and third persons are deemed notified about such pledge. This is particularly important in case of a dispute in respect of the priority of pledges. The fees in connection with registration of such notices are nominal (RUB 600 per notice).

The fees for registration of mortgage by legal entities in the Unified State Register of Immovable Property are RUB 4,000.

A company issuing a guarantee or proving pledge over its movable assets must record this fact and the material terms of a guarantee (pledge agreement) in the Uniform State Register of Information on the Activity of Legal Entities (*Fedresurs*). Failure to publish such information does not affect the validity of a guarantee but constitutes an administrative offence. From 1 April 2020, the creditors will also be entitled (but not obliged) to publish the same information about suretyships provided to them.

No stamp duties are payable as a matter of Russian law.

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 statutory term for registration of a mortgage is up to five business days, but in practice it sometimes takes longer.

Notarisation of a participatory interest pledge and registration of the respective pledge in the Unified State Register of Legal Entities usually takes five to 10 days. Foreign pledgors and

pledgees must collect and submit to the notary a set of notarised and apostilled corporate and other documents, which often take some additional time.

Notices regarding pledges of movable property are submitted by the notaries and can be done within one or two hours.

Registration and notary fees are described in more detail in question 3.9.

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

Regulatory or similar consents are generally not required with respect to creation of security. A conservative interpretation of antimonopoly and foreign investments laws may purport to treat the security arrangement itself or certain covenants within it as the creditor obtaining “control” over the relevant debtor. However, as a matter of market practice, no consents of antimonopoly or other authorities are usually obtained with respect to the creation of security; depending on the situation, the creditors may consider applying for an antimonopoly clearance or at least for official guidelines at the enforcement stage.

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

Russian law previously required having a detailed description of the secured obligations, which created complications in instances when collateral secured the revolving facilities. At the moment, Russian law is far more flexible in respect of the requirement to describe the secured obligations, and expressly provides that the pledge may secure future obligations, so in our view the previous priority concerns in respect of a security relating to revolving facilities is less likely to be an issue.

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

Please refer to question 3.9 in respect of the pledge agreements/mortgage agreements. Execution of contracts by means of electronic communication is allowed as long as such execution makes it possible to determine that the document has been signed by the relevant party.

Russian law does not set out any specific requirements in respect of execution of deeds.

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 restrictions (including 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 shares of the company, shares of any company which directly or indirectly owns shares in the

company or shares in a sister subsidiary) such as those which exist in Germany and certain other jurisdictions do not exist in Russia. However, such guarantee or security may in certain cases require corporate consent. Please refer to question 2.4 for further details.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will your jurisdiction 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?

Russian law does not currently recognise the trustee relationship, which is common in English law. The Russian Civil Code contains provisions allowing creditors to enter into a pledge management agreement and appoint a “pledge manager” to act on behalf of several creditors in connection with the pledge. The pledge management agreement may contemplate payment of a fee to the pledge manager. The pledge manager shall act in the best interest of the creditors. The proceeds received by the pledge manager in connection with the pledge become the common property of the creditors unless the pledge management agreement provides otherwise.

The Syndication Law introduced the role of a facility agent referred to as the “facility manager”. The functions of the facility manager can be carried out by a credit organisation, VEB.RF, a foreign bank or an international finance organisation.

Facility managers shall run the register of the syndicate participants and record all amounts granted to the borrower. Facility managers shall act on behalf of lenders in their relationship with the borrower, including in actions such as collecting funds under the facility, including interest amounts and other payments, and providing relevant documents and information to lenders and security arrangers.

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

Please refer to the answer to question 5.1.

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. 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?

Rights under loan agreements and guarantees governed by Russian law are usually transferred by way of assignment. The consent of the debtor is not required unless otherwise provided by the loan agreement or guarantee. If consent is required by the loan agreement or guarantee but is not obtained, the assignment would still be valid but the initial creditor would be liable for breach of contract.

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

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

Interest payable on loans made by Russian lenders (lenders incorporated in Russia and foreign lenders which have permanent establishment in Russia) is generally subject to Russian income tax at a rate of 20%. The same rate applies to a foreign lender receiving its income from interest on loans at a source in Russia. In this case, taxable income is withheld by the borrower.

Proceeds under a guarantee are subject to the same rules as taxable income under loan agreements.

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?

The general approach under Russian law is that foreign lenders are subject to the same rules as Russian lenders. However, international tax treaties provide certain specific tax exemptions or reductions. In order to enjoy such exemptions or reductions, the foreign lender must provide the borrower with the tax residence certificate issued by the relevant competent tax authority in that lender's jurisdiction of residence confirming that the lender is a tax resident in such tax jurisdiction for the purposes of the relevant tax treaty. Such certificates are usually provided before the first payment of interest under the loan and thereafter annually until the full repayment of the loan.

In accordance with recent changes to the Tax Code, a borrower is not required to obtain a tax certificate from a foreign lender in order to apply the relevant international tax treaty if the tax residency of such lender can be verified via reliable public sources (e.g., the lender is included in the Banker's Almanac or the International Bank Identifier Code Directory).

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

Please refer to questions 6.1 and 6.2.

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.?

Notarisation of loan agreements and guarantees is not mandatory in Russia. No registration of loan agreements or guarantees is required in Russia. Notarial and other fees applicable to security are described in question 3.9.

6.5 Are there any adverse consequences for 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 loan from a foreign entity can be considered as "controlled

indebtedness" if such loan is provided or secured by a foreign entity (or a Russian entity controlled by such foreign entity).

If the amount of such "controlled indebtedness" exceeds the amount of a borrower's own equity by more than three times, the interest paid on such loan can only be considered as expenses subject to certain limits. The remaining interest is considered as dividends paid to a foreign entity and is subject to 15% taxation (unless an international treaty allows specific tax exemptions or reductions).

7 Judicial Enforcement

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

Russian courts should generally recognise (and enforce) foreign governing law, provided that (i) there is a "foreign element" in the transaction (e.g., one of the parties is a foreign entity or the subject matter of the contract relates to foreign assets), and (ii) such laws do not conflict with Russian public policy or specific mandatory rules ("*нормы непосредственного применения*") of the laws of the Russian Federation. The concepts of public policy and specific mandatory rules are not defined in the laws of the Russian Federation and, therefore, are open to interpretation by Russian courts.

If there is no "foreign element" in the transaction, the parties can still choose foreign governing law, but the Russian courts would then not apply such foreign law to the extent that it contradicts mandatory provisions of Russian law (which are rather extensive).

Furthermore, a Russian court will apply foreign law as the law of the contract only, provided that such Russian court has properly established the content of the relevant foreign law in relation to the issues considered by it. If a Russian court is not in a position to establish the content of foreign law within a reasonable period, it is entitled to apply the laws of the Russian Federation. In any event, the laws of the Russian Federation will apply as to the matters of evidence and procedure.

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

Judgments of foreign courts may be enforced in the Russian Federation only if there is a treaty between the Russian Federation and the relevant foreign jurisdiction on the mutual recognition and enforcement of court judgments or, in the absence of such a treaty, on the basis of reciprocity. As of today, no such treaty is currently in force and no formal legal procedures for reciprocal enforcement of court judgments exist between the Russian Federation and England or the Russian Federation and the United States, which means that the risk that judgment of an English or a New York court could not be recognised and enforced in Russia is substantial.

We are aware of some cases in which judgments of foreign courts were successfully recognised and enforced in Russia (the claimant usually provided evidence, including an expert opinion, that, under similar circumstances, a judgment of a Russian court would be enforceable in the respective foreign jurisdiction), but we are also aware of a number of cases in which enforcement of foreign court judgments was denied by Russian 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 your jurisdiction, 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 your jurisdiction against the assets of the company?

In general, a claim under a loan would normally be enforced in Russia upon a court judgment.

- a) Obtaining a final and binding judgment of the arbitrazh (commercial) court of first instance usually takes three to four months. The proceeding at the court of appeal usually takes from two to three months. Enforcement of a Russian court judgment should normally be completed within two months from the day of the commencement of the enforcement proceedings, although sometimes it takes much longer due to various delays.
- b) Enforcement of a foreign judgment should technically be completed within one month, but may in practice take several months.

A bad-faith debtor may substantially delay the court or enforcement proceedings by means of raising various objections in respect of the substance of foreign law as well as various procedural objections.

Under Russian law, it is also possible to collect debt through an out-of-court procedure under a notary's executory endorsement made on a copy of the loan agreement. An out-of-court order of debt collection may be exercised when a loan agreement specifically provides for such enforcement option. The lender must notify the borrower at least 14 days prior to the intended collection of debt. In the absence of established court practice, it is unclear whether the out-of-court procedure can also be used by foreign banks.

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 in respect of most types of pledged assets is possible both in court and out of court. In most cases, out-of-court enforcement of the pledged assets requires notarial endorsement and such endorsement is only allowed if the pledge agreement is notarised. The creditor would also be able to select an out-of-court enforcement when it has actual possession over the pledged assets (e.g., the lender also acts as a depository for the shares pledged to it or as the account bank where the rights under such bank account are pledged to it).

Out-of-court enforcement may be exercised by the following methods: private auction; retention; and private sale without an auction. Out-of-court enforcement and the particular method of enforcement shall be provided by the pledge agreement. The methods of the court enforcement are public auction, retention, and private sale without an auction. Acquisition of shares and participatory interests in certain companies through an enforcement procedure may require certain antimonopoly and similar consents.

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

Foreign creditors should generally be treated in the same way as Russian creditors in terms of filings of suits and enforcement of the collateral security. All documents filed to the Russian arbitrazh (commercial) courts must be in Russian; any documentation in any other language must be translated into Russian, notarised and apostilled, unless originally written in Russian.

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

There is a general moratorium on enforcement of lender monetary claims since the introduction of the supervision procedure (the first insolvency stage). Creditors are not entitled to enforce collateral security during the supervision procedure. During the financial rehabilitation and external management procedures (further insolvency stages), secured creditors are generally entitled to enforce their security.

If a secured creditor opts for enforcement of security during the financial rehabilitation or external management procedure, it must file an application to the court. Enforcement is possible only if there is a risk of loss or substantial devaluation of the security. If the debtor proves that enforcement of the security will make restoration of the debtor's solvency impossible, the court can reject the creditor's enforcement application. In such case, a secured creditor obtains full voting rights at the creditors' meetings during that bankruptcy stage. Unless enforced during the previous stages, the collateral security should generally be sold during the final bankruptcy stage (liquidation).

During bankruptcy proceedings, the company's pledged property can only be sold at an auction, and any provisions in the security documents concerning the out-of-court enforcement of a pledge do not apply.

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

A foreign arbitral award needs to be recognised and enforced in Russia, and the creditor must obtain an executory writ for the execution of an arbitral award. The decisions of international arbitration tribunals are generally enforceable in Russia subject to compliance with the provisions of the 1958 New York Convention and the requirements of Russian procedural legislation. The process of recognising and enforcing a foreign arbitral award must be made without re-examining in substance or re-litigating the underlying dispute. In practice, however, due to the absence of clearly established practice in this regard, Russian courts sometimes refuse to enforce foreign arbitral awards without substantiating such a decision with a sufficient legal explanation.

8 Bankruptcy Proceedings

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

Please refer to question 7.6.

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 proceeds obtained from the sale of pledged property are applied as follows:

- a) 80% (in the event of the pledge securing a loan agreement) or 70% (in all other cases) of the proceeds (in an amount not exceeding the aggregate amount of principal and interest) is allocated to satisfy the claim of the relevant secured creditor;
- b) 15% (in the event of the pledge securing a loan agreement) or 20% (in all other cases) is allocated to satisfy "first priority" and "second priority" claims if the unencumbered property of the company is insufficient to satisfy these claims; and
- c) the remaining amounts are allocated to the cost of court and bankruptcy proceedings.

Russian insolvency laws provide that certain transactions qualifying as "suspicious" or "preferential" may be contested in the course of insolvency.

"Suspicious" transactions are those entered into (1) with the intention to infringe creditors' rights within the three-year period preceding the commencement of the insolvency proceedings, or (2) at an undervalue within one year preceding the commencement of the insolvency proceedings.

A so-called "preferential transaction" is a transaction entered into with a creditor or another person that results or may result in the preferential satisfaction of a claim of one of the creditors in comparison to claims of other creditors.

Preferential transactions may be challenged if they are entered into within the one-month period preceding the initiation of insolvency proceedings. However, the hardening period is extended to six months if a preferential transaction is entered into with a person who was aware of the debtor's inability to meet its obligations or in which the amount of the debtor's obligations exceeded the value of the debtor's assets. A related party is automatically deemed to have such knowledge.

The concept of preferential transactions captures prepayment under the existing agreements, set-offs, transfer of the debtors' property, granting security for an existing debt and other arrangements which can be frequently seen in the course of a debt restructuring. Therefore, the risk of challenge in insolvency should be carefully considered by the creditors prior to agreeing to any restructuring arrangement with a company.

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

According to the Russian Civil Code, certain entities such as political parties, religious organisations, public enterprises and most state corporations are excluded from bankruptcy proceedings. Liquidation of such entities is usually subject to the Civil Code and special 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?

During bankruptcy proceedings, the assets of the company can be enforced only within the insolvency proceedings. Any provisions in the security documents concerning the out-of-court enforcement of a pledge do not apply.

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 your jurisdiction?

Submission by parties of a contract to a jurisdiction of a foreign court should generally be binding and enforceable if at least one party is a foreign entity and the subject matter of the contract is not subject to the exclusive jurisdiction of Russian courts.

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

The judicial immunity of a state or another sovereign entity consists of three elements: (a) immunity from legal proceedings (i.e., immunity from being subject to the jurisdiction of courts and arbitral tribunals); (b) immunity from interim measures; and (c) immunity from enforcement. A sovereign entity can waive the immunity under an international treaty by giving a written consent or by application to the court. The waiver of immunity is binding and enforceable in Russia.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank versus a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

Russian law provides different legal regimes with respect to loan agreements and facility agreements. Only banks (including foreign ones) may enter into a facility agreement, while loan agreements may be made by any legal entity.

In order to carry on business, all banks incorporated in Russia must receive the Central Bank of Russia's licence. No licence is required to be obtained by a foreign bank to make a loan to a Russian company.

In terms of a cross-border transaction, it should be noted that:

- a) the borrowings under a foreign currency loan can be credited to a Russian borrower's foreign account with a bank located in: (1) the Eurasian Economic Union; (2) a foreign state which participates in the automatic exchange of financial information with the Russian Federation

under the Multilateral Agreement on Automatic Exchange of Financial Information dated 29 October 2014 (the Multilateral Agreement); or (3) a foreign state which is a party to any other international treaty stipulating for automatic exchange of financial information with the Russian Federation, provided that: (i) a lender is (a) an agent of a foreign government, (b) located in the Eurasian Economic Union, (c) located in a foreign state which participates in the Mutual Agreement, or (d) located in a foreign state which is a party to any other international treaty stipulating for automatic exchange of financial information with the Russian Federation; and (ii) the maturity of a loan exceeds two years; and

- b) a Russian company, for the purposes of effecting certain payments to a non-resident, shall have an individual contract number assigned to the respective contract by an authorised bank.

11 Other Matters

11.1 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

One of the most important considerations which should be addressed at the financing stage is the need to obtain a pledge or mortgage from a Russian company as collateral, which is beneficial not only because it entitles a creditor to receive satisfaction of its claim from the proceeds of the sale of the pledged or mortgaged property, but also because the status of a secured creditor gives a creditor substantial comfort during insolvency proceedings.

Further considerations which must be taken into account are the requirement to obtain corporate consents and, in respect of state-owned companies, the procurement regulations.

Given the unpredictability of potential new sanctions, foreign lenders must be particularly cautious when entering into contracts with Russian counterparties. In particular, it is recommended to make sure that a lender will be able to terminate the contracts unilaterally without excessive losses if new sanctions make it illegal for the lender to perform the contract.



Grigory Marinichev represents international lenders and borrowers in prepayment finance, structured finance, syndicated lending, debt restructuring transactions, and insolvency issues. Grigory advises clients in the metals, mining, telecommunications, oil and gas, and power generation industries on a range of financial transactions, from syndicated and bilateral credit facilities, refinancing, and bond issues to export financing, loans, and loan restructurings. He also represents and advises project sponsors, export credit agencies, and multilateral financial institutions.

Prior to joining Morgan Lewis, Grigory was a partner and head of the Russian banking and finance practice of another international law firm, resident in Moscow.

Grigory holds a top-tier individual ranking in *Chambers and Partners* global rankings for Banking and Finance and is highly ranked for Restructuring and Insolvency; is recognised as a "leading individual" for Banking and Finance and Restructuring and Insolvency by *The Legal 500 EMEA*; is recommended for Banking and Finance and International Arbitration by *Pravo.ru-300*; and is recognised as a "highly regarded" lawyer for Banking, Restructuring and Insolvency, Structured Finance and Securitization by *IFLR 1000*.

Morgan, Lewis & Bockius LLP

Legend Business Center

Tsvetnoy Bulvar, 2

Moscow, 127051

Russia

Tel: +7 495 212 2420

Email: grigory.marinichev@morganlewis.com

URL: www.morganlewis.com



Alexey Chertov advises clients on banking, finance, restructuring, and insolvency matters. He represents international lenders and borrowers in connection with secured and unsecured lending, structured finance, syndicated lending, export financing, restructuring, and insolvency issues. Alexey has experience in prepayment financing and other types of trade financings, in particular in the oil and gas and metals and mining sectors.

Alexey is recommended for Banking and Finance by *The Legal 500 EMEA*; recognised as a Rising Star for Banking and Restructuring and Insolvency by *IFLR 1000*; and recommended for Banking and Finance and International Arbitration by *Pravo.ru-300*.

Morgan, Lewis & Bockius LLP

Legend Business Center

Tsvetnoy Bulvar, 2

Moscow, 127051

Russia

Tel: +7 495 212 2504

Email: alexey.chertov@morganlewis.com

URL: www.morganlewis.com

Founded in 1873, Morgan Lewis offers more than 2,200 lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists in 31 offices* across North America, Asia, Europe, and the Middle East. The firm provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labour and employment legal services to clients of all sizes, from globally established industry leaders to just-conceived startups. *Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

www.morganlewis.com

Morgan Lewis

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Recovery & Insolvency
Corporate Tax
Cybersecurity
Data Protection
Derivatives

Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Financial Services Disputes
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control

Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms