United States

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Section 1 – Bank licences

1.1 What licences or approvals do lenders need to have if lending to a borrower in this jurisdiction if a) the lender is a bank or b) the lender is a not a bank?

There are no federal licensing requirements for entities making loans to borrowers located in the United States. However, most states impose some type of licensing requirements for entities making consumer loans, and some states have licensing requirements for entities making commercial loans to borrowers located in such states. The licensing requirements differ considerably from state to state. Generally speaking, US banks are typically exempt from the state consumer and commercial lending licence requirements.

1.2 Are any exemptions available and/or are any techniques typically used to structure around such requirements?

The available exemptions from state licensing requirements vary by state. Some states permit a *de minimis* amount of lending without a licence. For example, California law permits a lender to make up to five commercial loans in a 12-month period without a licence if the loans are incidental to the business of the person relying on the exemption. As noted above, US banks are typically exempt from state lending licensing requirements.

Section 2 – Security interests

2.1 Can security be taken over the following asset classes and what documentation or formalities are required to create, perfect and maintain such security?

a) shares
b) bank accounts
c) receivables
d) contractual rights
e) insurance policies
f) real property
g) plant and machinery
h) intellectual property
i) debt securities
j) future/after acquired property
k) floating charges over all assets

In general, security can be created in all of the asset categories listed above. A security interest is created, or has 'attached', when it is enforceable against the debtor. To be enforceable, a security interest in any form of personal property requires three elements to be fulfilled: (i) the secured party has given value to the debtor; (ii) the debtor has rights in the collateral; and (iii) the debtor has authenticated a security agreement that describes the collateral. Although the first two requirements are mandatory, an oral security agreement may be sufficient if the secured party is in possession of the collateral.

The most common method of perfecting a security interest in personal property is by filing a UCC-1 financing statement in the appropriate filing office (also see question 2.8). This general rule is subject to certain limitations and exceptions. Notably, a financing statement is not effective to perfect a security interest in deposit accounts, letter-of-credit rights or money as original collateral – perfection of such assets may only be obtained by control (as such term is used in the Uniform Commercial Code [UCC]).

With very limited exceptions, security interests in future/after acquired property can be granted if the security agreement so provides. All-asset liens are also common (see 2.3).

The requirements to create a lien on real property are set by local law and vary widely from jurisdiction to jurisdiction, but most localities will at least require an executed, notarised mortgage agreement with a legal description of the land being mortgaged.

2.2 Highlight any issues with securing obligations that may arise in the future.

No significant issues are anticipated.

2.3 Can a universal security agreement be used to grant security over all assets in this jurisdiction?

A security agreement may be used to grant a security interest in essentially all current and future personal property to the extent assignable. However, the UCC requires that the description of the collateral contained in the security agreement (see question 2.1) cannot be overly generic. In other words, a grant clause describing the collateral as "all assets of the debtor" would not be sufficient for attachment – instead, the collateral should be described by its applicable UCC asset category (eg, inventory, equipment, etc) or by another method that reasonably identifies what is described. Commercial tort claims must be identified with specificity and thus future commercial tort claims would require an amendment to the security agreement in order to be subject to the security interest. Additionally, many governmental licences, such as Federal Communications Commission licences, gaming licences and liquor licences, are either not assignable at all or are subject to significant restrictions. With respect to other assets subject to private restrictions on assignment, such as contracts with anti-assignment clauses or equity interests with respect to which a company's organisational documents prohibit or restrict assignment, it may not be possible to obtain a good security interest therein, or the rights obtained by the secured party may be limited.

With respect to personal property for which a separate filing or recordation is required (see question 2.8) it is common for such property to be subject to a separate security agreement or mortgage.

Similarly, as a mortgage or deed of trust covering real property would require a legal description of the real property, separate mortgages or deeds of trust would be required for each property.

2.4 Can security be granted for the benefit of different classes of creditors under the same security agreement and if so, are there any issues that creditors should be aware of in adopting this approach?

The UCC does not require that different classes of creditors receive their respective separate grants of security interests under separate security agreements to be effective. However, it is advisable, and it is market practice in the United States, for each class of creditors to nevertheless obtain a separate security agreement.

If multiple classes of creditors obtain their grants under the same security agreement, there is a risk that a bankruptcy court would treat each creditor as being part of the same class in a Chapter 11 proceeding, despite their intention to be treated as holding separate classes of liens. In addition, having separate security documentation for each lien can have significant practical

advantages – for instance, the ability to amend the documentation of one class of liens without affecting the security interest or perfection of another.

2.5 Can security trustee or security agent structures be used in this jurisdiction to secure obligations that are owed to fluctuating creditor classes?
Yes. In syndicated loan agreements or indentures it is common for a collateral agent, indenture trustee or other representative to receive the grant of security interests on behalf of the secured parties, which secured parties would include current and future lenders and bondholders/noteholders under such loan agreement or indenture.

2.6 Briefly outline any issues to consider when transferring loans and accompanying security interests between lenders.
In the case of both loans and bonds/notes, typically the collateral agent or other representative is the secured party of record on behalf of all secured parties from time to time (see question 2.5) and there are generally no special issues to consider for transferees or purchasers of the loans or bonds/notes. In transactions where there is a single or very few secured parties and the security interest is granted directly to the secured parties rather than a common representative then additional steps may be required to ensure that the transferee obtains the full benefits of the security interest.

2.7 Can security be granted by third parties? Are there any rights of contribution, subrogation or similar that might arise as a result of granting/enforcing third party security that ought to be/can be waived?
Yes. It is possible for a person or entity to secure the debt of a third party without securing its own guarantee of such debt. However, this is a weaker structure than a typical secured guarantee and hence less common in the market. As described below (see question 3.1) there are considerations applicable to the ability to provide guarantees that are also generally applicable to the ability to provide security interests for the debt of another person.

2.8 Briefly outline the registration requirements, if any, applicable to security interests created in this jurisdiction, including considerations such as the timing, expense and the consequences of non-registration.
In general, the creation of a security interest in personal property or real property that is enforceable against the parties to the transaction does not require registration with any governmental authority. However, in order to make the security interest perfected, or enforceable against third parties (including other creditors of the debtor's and/or a potential bankruptcy trustee in the event the debtor becomes insolvent), additional action is generally required. The methods of perfection differ depending on the type of collateral at issue, but the most common methods requiring registration are described below.

A UCC-1 financing statement is the predominant method to perfect a security interest in personal property. The financing statement lists the debtor's name, address and jurisdiction of organisation, as well as the secured party's name and address, and contains a description of the collateral covered. The financing statement is filed at the office of the secretary of state in the jurisdiction where the debtor is located – with respect to debtors that are registered organisations (most corporations, limited liability companies and limited partnerships) organised under the law of any US state this is the jurisdiction of organisation of the debtor. Special rules apply to foreign entities and other special types of debtors. These filings are generally quick and inexpensive.

Inconsistent case law leaves the question of precisely what registrations are required for perfection of security interests in intellectual property somewhat unsettled. Accordingly, in most cases secured parties will both file a UCC-1 financing statement and will record their interest in the US Copyright Office (USCO) or US Patent and Trademark Office (USPTO), as applicable. Typically a short form security agreement covering only the intellectual property would be recorded in the appropriate federal filing office. Such filings with the USCO or USPTO require payment of filing fees and, in the case of copyright registrations, it can take several months to receive evidence of recordation.

There are also special registration requirements for other special types of collateral. Among the most common are: (i) perfection of a security interest in aircraft and related assets, which requires a filing with the Federal Aviation Administration in Oklahoma City and often an international filing pursuant to the Cape Town Convention; (ii) a security interest in most ships and other vessels, which requires recordation of a ship mortgage under federal law (similarly, a security interest in rail cars and other rolling stock will also require a filing under federal law); and (iii) contracts where the counterparty is a governmental entity, which may require additional filings to be valid and/or perfected.

With respect to real property, in order to obtain priority over subsequent secured parties, it is generally sufficient to record the mortgage in the public real estate records of the county in which the property is located.

2.9 Briefly outline any regulatory or similar consents that are required to create security (other than board/shareholder approvals).
Generally none, but special rules may be applicable to certain regulated industries or certain collateral either in order create or perfect the security interest or to enforce such security interest.

Section 3 – Guarantees

3.1 Briefly explain the downstream, upstream and cross-stream guarantees available, with reference to any particular restrictions or limitations.
The ability to incur or guarantee debt and/or grant a security interest in personal or real property in the United States is generally not limited by financial assistance laws of the type seen in many European jurisdictions.

There are generally no restrictions on the ability of a parent company to provide a downstream guarantee of the obligations of its subsidiaries. Both upstream and cross-stream guarantees are also widely used, but whether or not this is permissible may depend on the type of entity, the jurisdiction of organisation, whether or not the guarantor entity is wholly owned by the parent debtor and whether the organisational documents of the guarantor contain any restrictions on the ability to so guarantee the debt. Even where none of the foregoing capacity issues are present, upstream and cross-stream guarantees are nevertheless subject to certain potential vulnerabilities, including the possibility that the guarantee could be invalidated as a "fraudulent conveyance" (see question 5.2).

3.2 What regulatory or other consents are required to grant downstream, upstream and cross-stream guarantees (other than board/shareholder approvals)?
Generally none.

3.3 Briefly outline any enforceability concerns associated with the granting of downstream, upstream and cross-stream guarantees that lenders should be aware of (eg any exchange controls or similar obstacles).
Generally none, other than those outlined in question 3.1.

Section 4 – Enforcement

4.1 Do the local courts generally recognise and enforce foreign-law governed contracts?
If the chosen law has a reasonable relationship with the transaction then, generally, yes; so long as the terms of the contract would not violate any public policy of such state.

4.2 Will the local courts generally recognise and enforce a foreign judgment that is given against a domestic company in foreign courts (particularly the New York or English courts) without re-examining the merits of the decision?
Generally, yes. Many, though not all, states have statutes that provide for the recognition of foreign money judgments that satisfy the requirements of such recognition statutes.

4.3 Will the local courts recognise and enforce an arbitral award given against the company without re-examining the merits of the decision?
The United States acceded to the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which generally provides for recognition of foreign arbitral awards, subject to two reservations. First, the United States need only recognise arbitral awards made in another state that has ratified the New York Convention. Second, the New York Convention only applies to those transactions considered commercial under US law. As in the case of foreign judgments, an arbitral award will not be enforced by a US court if contrary to public policy.

4.4 When enforcing security, what factors significantly impact the time such enforcement takes and the value of the proceeds received from such enforcement? For example, are there any statutory requirements such as (a) holding a public auction; (b) court involvement; or (c) obtaining regulatory consents?
A lender seeking to enforce the loan, guarantees of the loan and/or the security interest securing such obligations must comply with any legal requirements under applicable law, primarily Article 9 of the UCC for personal property and applicable real property law for real property, and any enforceable terms of the underlying loan documentation. The UCC provides debtors with various protections that cannot be waived by the debtor in the security agreement or elsewhere prior to default.

Subject to certain exceptions, enforcement of a security interest will require notice to the debtor, any guarantor and certain other secured parties. Under the UCC, various forms of non-judicial remedies may be available depending on the type of collateral, including a public sale of the collateral, a private sale of the collateral, retention of the collateral in full or partial satisfaction of the debt (with the acquiescence of the debtor), direct collection of amounts payable by account debtors or other persons obligated on the collateral, or taking physical possession of the collateral if such possession can be accomplished without breaching the peace.

A public or private sale of collateral must be conducted in a commercially reasonable manner. A secured party may also exercise its contractual rights under any control agreement, such as a deposit or securities account control agreement. Judicial foreclosure is also available, but would rarely be a secured party's first choice with respect to personal property. With respect to real property, judicial foreclosure is the usual method, although some states permit non-judicial foreclosure as a remedy.

4.5 Are there any restrictions that apply specifically to foreign lenders when taking enforcement action?
Generally none, although it may be necessary to qualify to do business in a state before a lender can avail itself of the courts of that state.

Section 5 – Bankruptcy and insolvency proceedings

5.1 Briefly, outline the main bankruptcy/insolvency processes in this jurisdiction, including any control or influence that creditors can exert on the process, the timeframes usually involved and any mandatory filing requirements.
The US Bankruptcy Code is the federal statutory regime applicable to corporate debtors in all jurisdictions in the United States. Chapter 7 of the Bankruptcy Code governs liquidations, and Chapter 11 of the Bankruptcy Code governs reorganisations.

In most Chapter 7 cases, the business ceases operations upon the bankruptcy filing. Promptly after the debtor's filing, the bankruptcy court will appoint a trustee tasked with marshalling the debtor's property and administering the estate. The trustee will seek to liquidate the debtor's assets and distribute the proceeds to creditors in order of statutory priority.

In a Chapter 11 case, the debtor may continue operations and manage its own affairs as "debtor in possession" in the ordinary course of business. In limited cases the bankruptcy court may instead appoint a trustee to take control of the debtor's assets and estate. An official committee of unsecured creditors (creditors committee) will be appointed to act as a fiduciary for all unsecured creditors.

The ultimate goal of a Chapter 11 case is the confirmation of a Chapter 11 plan that governs the treatment of claims and interests and the reorganisation of the debtor. The plan, typically proposed by the debtor, separates the various claims against the estate into classes, and the plan must provide the same treatment for all claims within the same class. Each class will vote to accept or reject the plan, unless the class is unimpaired (in which case the class is deemed to accept the plan) or the class receives no value (in which case the class is deemed to reject the plan). A class is deemed to be impaired if its legal, equitable or contractual rights are altered under the plan. An impaired class accepts the plan if at least two-thirds, by value of claims, and more than one half, by number of creditors in the class, accept the plan, in each case, measured based upon those who vote.

The plan is confirmed by the bankruptcy court if all statutory conditions are met. Among the requirements for a bankruptcy court to confirm a plan is that each impaired class of creditors votes to accept the plan, or the standards for cram down of a dissenting class are met. The requirement for cram down of a class of unsecured creditors is that the plan complies with the absolute priority rule (in that no class that is junior to the dissenting class of unsecured creditors [such as equity] receives any value unless the dissenting class is paid in full). Accordingly, a group of impaired creditors may vote, or threaten to vote, to reject a plan as leverage to obtain more favourable treatment, but their leverage is limited by the cram down procedures that can be used against both secured or unsecured creditors.

The time needed to resolve a bankruptcy proceeding may vary significantly depending on the size of the debtor, the number of claimants and the diversity of interests among stakeholders.

5.2 Are there any preference, fraudulent conveyance, clawback, hardening periods or similar issues or preferential creditor rights that lenders should be aware of?
The debtor or its bankruptcy trustee possesses broad powers to set aside certain pre-bankruptcy transfers to third parties of the debtor's assets. The rules and their exceptions are numerous, but the following are the most significant concerns for secured lenders.

Of particular importance are the trustee's powers to recover fraudulent transfers, by which it can nullify or recover pre-petition transfers (i) (a) made by the debtor when it was insolvent, or as a result of which it became insolvent and (b) for less than reasonably equivalent value; or, (ii) made by the debtor with the intent to delay, hinder or defraud its creditors. The trustee may also void transfers that could be set aside under state fraudulent transfer laws.

The bankruptcy trustee also has the ability to void security interests which are unperfected as of the commencement of the insolvency case, rendering the unperfected creditor as effectively equal in bankruptcy to a general unsecured creditor who had not yet reduced its claim against the debtor to judgment.

Additionally, if the debtor makes a transfer to a creditor on account of an existing debt within 90 days (or within one year, in the case of a creditor that is an insider) of filing for bankruptcy, then that transfer may be voided.

The rule is broad enough to capture non-monetary transfers, such as perfection of an existing security interest.

5.3 Do bankruptcy/insolvency processes provide for any kind of stay/moratorium on enforcement of lender claims? If so, does the stay/moratorium apply to the enforcement of security interests?
Yes. The commencement of insolvency proceedings will result in an automatic stay of the following actions against the debtor and its property: (i) commencement or continuation of collection activities; (ii) enforcement of pre-petition claims or judgments; (iii) repossession or sale of collateral; (iv) exercise of rights of setoff; and (v) enforcement of security interests.

A lender may, under certain circumstances, obtain relief from the automatic stay from the bankruptcy court.

Section 6 – Your jurisdiction

6.1 In no more than 200 words, outline any cross-border financing trends specific to your jurisdiction.
The loan market in the United States continues to offer attractive terms to borrowers, both foreign and domestic. Interest rates have remained low, and covenants have remained on the borrower-friendly side of the spectrum. As a result, non-US borrowers have continued to look to the US markets for their financing needs, and certain deals that in the past may have been financed by European banks instead have been financed with covenant-lite Term Loan B financings marketed in the United States.

For lenders, proper structuring of cross-border financings is important in order to ensure an adequate guarantee and collateral package and to address the fact that many non-US jurisdictions do not have a Chapter 11-like bankruptcy regime. Accordingly, some of the flexibility afforded in loan documents to US borrowers whose subsidiaries and assets are (primarily) in the United States may need to be modified in cross-border financings depending on the jurisdictions of organisation of the borrower and its subsidiaries.

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