United Kingdom

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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?
No licences or approvals are generally required, irrespective of whether or not the lender is a bank. However, activities involving residential real estate and consumer lending (where the borrower is an individual, a sole trader, a partnership with no more than three partners or an unincorporated association) are subject to regulatory regimes.

1.2 Are any exemptions available and/or are any techniques typically used to structure around such requirements?
Depending on the nature of the arrangement, various exemptions are available for consumer lending activities.

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

Security can be taken over all the above asset classes. To create security, the security agreement needs to be in the form of a deed. Other formalities may apply, depending on the type of security taken and the assets secured. To ensure it is created properly, a floating charge will typically be drafted to cover all the assets of the chargor and by reference to certain provisions of the Insolvency Act 1986.

In England and Wales, the main perfection requirement is registration of the security at the appropriate registries (see section 2.8). Where security is taken over bank accounts, receivables, contractual rights and insurance policies, notice of the creation of that security is typically given to the relevant third party. It is desirable to receive an acknowledgement of the notice from the third party. Where security is taken over shares, share certificates evidencing ownership and stock transfer forms executed in blank will typically be delivered to the secured party to enable an effective transfer of the shares on enforcement. Where security is taken over real property, it is common for the title deeds or land certificates relating to the real property to be delivered to the secured party.

2.2 Highlight any issues with securing obligations that may arise in the future.
A security agreement can secure future obligations, provided those obligations are identifiable at the time of entering into the original security arrangements and it can be established that it was the contractual intention of the parties for the security to cover both the original and future indebtedness. If the original contractual effect was only to create security to cover indebtedness within particular parameters, and the future obligations are outside those parameters, those future obligations will not be secured by the original security.

If the security is an all-monies security, it will secure all indebtedness owed to a bank from time to time. As the parties' contractual intention at the outset was for the security to cover all indebtedness, any future obligations will be secured.

2.3 Can a universal security agreement be used to grant security over all assets in this jurisdiction?
Yes. The security agreement will identify the types of assets secured and may include a floating charge over all the assets of the chargor.

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?
Yes, although subordination provisions determining priority between the different classes of creditors would need to be set out either in the security agreement or, more commonly, a separate intercreditor/subordination agreement.

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.

2.6 Briefly outline any issues to consider when transferring loans and accompanying security interests between lenders.
There are no particular issues in respect of English obligors and English law-governed agreements. The loan agreement will usually set out the loan transfer procedures, which may include a requirement to obtain consent. Issues may arise if there are foreign parties incorporated in a jurisdiction which does not recognise the concept of a security trust or if security is not held by a security trustee or agent.

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. Rights of subrogation arise automatically under English law where a third party discharges the debt of another entity. In those circumstances, that third party will be subrogated to the claims of the creditor whose debt is discharged. Generally, rights of subrogation are regulated contractually by waiving the right, typically until all the underlying debt is discharged.

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.
Subject to limited exceptions, security interests created by a company registered in England and Wales are required to be registered at Companies House within 21 days of the day after the date the security is created. In addition, certain types of assets may be registrable on specialist registers, for example for real property, ships, aircraft and intellectual property.

Registration requires the completion of appropriate forms and payment of a small fee. The consequences of failing to register the security agreement at Companies House within 21 days are that the relevant charge will be void against a liquidator, administrator or creditor of the company and the debt secured by that security becomes immediately repayable.

2.9 Briefly outline any regulatory or similar consents that are required to create security (other than board/shareholder approvals).
None, except that regulated entities may be subject to restrictions relating to the solvency of the entity and the maintenance of adequate capital.

Section 3 – Guarantees

3.1 Briefly explain the downstream, upstream and cross-stream guarantees available, with reference to any particular restrictions or limitations.
An English limited liability company may provide downstream, upstream and cross-stream guarantees, subject to the company having the power to give guarantees and the directors being authorised to exercise that power and satisfying corporate benefit requirements. Many of the duties of directors were codified under the Companies Act 2006. In particular, section 172 of the Companies Act 2006 provides that directors have a duty to promote the success of the company for the benefit of its members as a whole.

As corporate benefit may be difficult to establish, it is common for upstream and cross-stream guarantees to be approved by a unanimous shareholder resolution of the company. In certain limited circumstances, the prohibition on financial assistance may apply.

3.2 What regulatory or other consents are required to grant downstream, upstream and cross-stream guarantees (other than board/shareholder approvals)?
None, except that regulated entities may be subject to restrictions relating to the solvency of the entity and the maintenance of adequate capital.

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).
None, except for: (a) capacity and authorisation issues; (b) corporate benefit issues (see section 3.1); (c) insolvency issues (see section 5.2); and (d) the limited prohibition on financial assistance. In addition, if amendments to the underlying obligation to which the guarantee relates are being considered, thought should be given as to whether the amendments are within the general scope of what was contemplated under the original guarantee.

Section 4 – Enforcement

4.1 Do the local courts generally recognise and enforce foreign-law governed contracts?
Subject to certain exceptions, an English court will generally recognise and enforce a foreign law governed contract provided the relevant foreign law is pleaded and proved as fact in accordance with English procedural and evidential rules.

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?
It depends on the jurisdiction rendering the foreign judgment. If the judgment is rendered by a court in a country which: (a) is a party to the relevant European regulations or conventions, the judgment will be enforced in the English courts in accordance with the terms of that regulation or convention; (b) is not party to the relevant European regulations or conventions but has a bilateral treaty governing recognition and enforcement of judgments between that country and England or is covered by a relevant English statute, the judgment will be recognised and enforced in England in accordance with the terms of that treaty or statute; or (c) is not party to the relevant European regulations or conventions and there is no bilateral treaty or relevant statute in place governing recognition and enforcement of judgments between that country and England, fresh proceedings will need to be issued in England with the judgment forming the basis of the claim. Summary judgment is usually obtainable and the judgment may be enforced as a judgment of the English court, subject to it being final and for a definite sum of money. The court will refuse to give judgment where the original court lacked jurisdiction according to English conflict of law rules, was obtained by fraud, is contrary to public policy or natural justice, is in respect of taxes or penalties or is an award of multiple damages.

4.3 Will the local courts recognise and enforce an arbitral award given against the company without re-examining the merits of the decision?
If the seat of the arbitration is situated in a New York Convention country, an arbitral award should be recognised and enforced provided the company does not challenge enforcement and the English courts do not refuse enforcement, in each case on the grounds set out in the New York Convention (or the UK Arbitration Act 1996, where the seat is in the UK).

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?
Generally, a secured party is not required to hold a public auction, seek prior court approval or obtain regulatory consent to enforce its security although some methods of enforcement, including the obtaining of a charging order over securities or property, require an order of the court.

4.5 Are there any restrictions that apply specifically to foreign lenders when taking enforcement action?
No.

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.
There are four main insolvency regimes for companies in England and Wales.

(a) Administration
Administration is a rescue procedure for companies that are, or are likely to become, insolvent. The most significant feature is that it imposes a moratorium on legal proceedings and enforcement actions (see section 5.3).

There are three routes into administration: (a) court order; (b) out-of-court by notice filed by the holder of a qualifying floating charge; or (c) out-of-court by notice filed by the company or its directors. The primary objective is to rescue the company. If that is not reasonably practicable, the objectives are to achieve a better result for creditors than on liquidation (going concern sale) or if that is not possible, to realise property for secured or preferential creditors (asset sale) provided it does not unnecessarily harm the interests of the creditors of the company as a whole.

The administrator is entitled to apply to the court for the termination of the administration which occurs automatically after one year, unless an extension is agreed by the consent of the creditors (only possible once) or court order.

(b) Liquidation
Liquidation is a termination procedure and, once completed, the company is dissolved. A liquidator is appointed to take control of the company, to

collect and realise its assets and distribute realisations to satisfy, as far as possible, the company's liabilities.

The three types of procedure are:

(i) members' voluntary liquidation – only available to solvent companies and initiated by shareholders passing a resolution to wind-up the company and appoint a liquidator. The directors must make a declaration of solvency stating the company will be able to pay its debts in full within a maximum of 12 months following the commencement of the winding up; and

(ii) creditors' voluntary liquidation – initiated by the shareholders passing a winding-up resolution. The company is likely to either already be insolvent or the directors are unwilling to make a statutory declaration of solvency.

(c) Company voluntary arrangement (CVA)
A CVA enables an insolvent company to put a proposal to its creditors for a composition of its debts. A key advantage is the ability to bind dissenting minority creditors and those creditors who do not participate in the CVA approval process; although no proposal may alter the rights of secured or preferential creditors without their individual consent.

(d) Receivership
Receivership is an enforcement right for individual secured creditors. Most charges created under English law give the charge holder the power to appoint a receiver. There is no court involvement and the security agreement usually states when the appointment can be made.

(e) Administrative receivership
The number of creditors who are able to appoint an administrative receiver has been significantly limited by the Enterprise Act 2002. An administrative receiver can be appointed by a secured creditor who has a pre-September 15 2003 floating charge over all, or substantially all, of the assets of a company, or a qualifying floating charge holder who satisfies the various statutory tests. An administrative receiver owes his duties to the creditor who appointed him and has the power to continue to trade the company's business and/or dispose of its assets to satisfy the secured debt.

While there is no general duty to file for insolvency in England and Wales, a director of a company may be held liable if, prior to liquidation, he knew, or ought to have concluded, that there was no reasonable prospect the company would avoid going into insolvent liquidation or, if after that time, he failed to take every step with a view to minimising the potential loss to the company's creditors.

Arrangements with creditors can also be made through a scheme of arrangement which offers an alternative method for reaching agreements or compromises with creditors without needing all creditors' consent. As with a CVA, if approved, a scheme of arrangement will bind non-voting and dissentient creditors. The scheme of arrangement process is found in the Companies Act 2006 and is not an insolvency process.

5.2 Are there any preference, fraudulent conveyance, clawback, hardening periods or similar issues or preferential creditor rights that lenders should be aware of?
Various rules give the courts the power to set aside transactions entered into by an insolvent company within a period of time before the commencement of administration or liquidation. The periods differ depending on the transaction but include six months for preferences (two years if to a connected person) and two years for transactions at an undervalue. Subject to certain exceptions, floating charges created within one year (two years if to a connected person) may also be invalid.

Actions can also be brought against a company in respect of transactions defrauding creditors. Such an action can be commenced by any affected party and is not subject to any time limits other than the usual limitation periods.

Fixed charge realisations are not subject to deductions other than expenses incurred by the liquidator (or administrator) in preserving or realising fixed charge assets. Floating charge realisations are subject to the following deductions: (a) liquidation and/or administration expenses as applicable; (b) preferential debts, (including employee salary and holiday claims and certain unpaid pension contributions and, for insolvency proceedings commencing after January 1 2015, certain amounts in respect of deposits insured by the Financial Services Compensation Scheme); (c) secondary preferential debts (being deposits in excess of the level insured by the Financial Services Compensation Scheme); and (d) a prescribed part of the net property subject to the floating charge up to a maximum of £600,000, to be made available to meet the claims of unsecured creditors.

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?
Unless the consent of the court or the administrator is obtained, administration imposes a moratorium on all legal proceedings and other enforcement actions against the company. With limited exceptions, the restrictions take effect when the application for an administration order is made, or the notice of intention to appoint an administrator out-of-court by notice is filed, rather than when the appointment is made. However, the secured party can enforce its security if the security interests fall within the scope of the Financial Collateral Arrangements (No 2) Regulations 2003. These regulations broadly cover outright transfer arrangements and security, in each case, involving financial collateral (either cash or financial instruments).

An automatic moratorium will apply in compulsory liquidation proceedings, but in creditors' voluntary liquidation proceedings there is no automatic moratorium and, if a moratorium is required, the liquidator (or a creditor or shareholder) must apply to the court for a stay of proceedings which are brought against the company in liquidation.

There are limited provisions for a moratorium for small companies under a CVA regime.

Section 6 – Your jurisdiction

6.1 In no more than 200 words, outline any cross-border financing trends specific to your jurisdiction.
In leveraged finance transactions arranged in London there is a trend towards strong global sponsors negotiating into English law facilities agreements financing terms which have historically been more typical in New York law-governed loan agreements or high-yield bond indentures. In some cases, certain provisions (such as covenants and events of default) may be expressed to be governed by English law but are to be interpreted in accordance with New York law.

This convergence gives rise to structural and documentation issues that need to be carefully addressed to ensure that, without the background of the (largely codified) US bankruptcy and commercial law, cross-border insolvency rules and intercreditor issues are properly provided for.

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