



# ICLG

## The International Comparative Legal Guide to: **Lending & Secured Finance 2018**

### 6th Edition

A practical cross-border insight into lending and secured finance

Published by Global Legal Group, with contributions from:

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59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

**GLG Cover Design**  
F&F Studio Design

**GLG Cover Image Source**  
iStockphoto

**Printed by**  
Stephens & George  
Print Group  
April 2018

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ISBN 978-1-912509-02-7  
ISSN 2050-9847

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## Editorial Chapters:

1	<b>Loan Syndications and Trading: An Overview of the Syndicated Loan Market</b> – Bridget Marsh & Theodore Basta, Loan Syndications and Trading Association	1
2	<b>Loan Market Association – An Overview</b> – Nigel Houghton, Loan Market Association	6
3	<b>Asia Pacific Loan Market Association – An Overview</b> – Katy Chan, Asia Pacific Loan Market Association (APLMA)	11

## General Chapters:

4	<b>An Introduction to Legal Risk and Structuring Cross-Border Lending Transactions</b> – Thomas Mellor & Marcus Marsh, Morgan, Lewis & Bockius LLP	15
5	<b>Global Trends in the Leveraged Loan Market in 2017</b> – Joshua W. Thompson & Caroline Leeds Ruby, Shearman & Sterling LLP	20
6	<b>Avoiding Traps When Documenting Make-Whole Premiums for Term Loans</b> – Meyer C. Dworkin & Samantha Hait, Davis Polk & Wardwell LLP	26
7	<b>Commercial Lending in a Changing Regulatory Environment: 2018 and Beyond</b> – Bill Satchell & Sara Lenet, Allen & Overy LLP	31
8	<b>Acquisition Financing in the United States: 2018... Continued Growth</b> – Geoffrey Peck & Mark Wojciechowski, Morrison & Foerster LLP	38
9	<b>A Comparative Overview of Transatlantic Intercreditor Agreements</b> – Lauren Hanrahan & Suhrod Mehta, Milbank, Tweed, Hadley & McCloy LLP	43
10	<b>A Comparison of Key Provisions in U.S. and European Leveraged Loan Agreements</b> – Sarah M. Ward & Mark L. Darley, Skadden, Arps, Slate, Meagher & Flom LLP	50
11	<b>The Global Subscription Credit Facility and Fund Finance Markets – Key Trends and Forecasts</b> – Michael C. Mascia & Wesley A. Misson, Cadwalader, Wickersham & Taft LLP	61
12	<b>Recent Developments in U.S. Term Loan B</b> – Denise Ryan & David Almroth, Freshfields Bruckhaus Deringer LLP	64
13	<b>The Growth of European Covenant Lite</b> – James Chesterman & Jane Summers, Latham & Watkins LLP	70
14	<b>Yankee Loans and Cross-Border Loans – Recent Developments</b> – Alan Rockwell & Judah Frogel, Allen & Overy LLP	73
15	<b>Debt Retirement in Leveraged Financings</b> – David A. Brittenham & Scott B. Selinger, Debevoise & Plimpton LLP	82
16	<b>Analysis and Update on the Continuing Evolution of Terms in Private Credit Transactions</b> – Sandra Lee Montgomery & Benjamin E. Rubin, Proskauer Rose LLP	88
17	<b>Know Your Client: Adopting a Holistic Approach to Law Firm Representation</b> – Kelli Keenan & Shafiq Perry, HSBC	95
18	<b>Law of Astana International Financial Centre: Key Considerations</b> – Colby Jenkins, Moore & Van Allen PLLC & Saniya Perzadayeva, Unicase Law Firm	99
19	<b>Trade Finance on the Blockchain: 2018 Update</b> – Josias Dewey, Holland & Knight LLP	102
20	<b>Trends in the Expanding Global Private Credit Market: What to Expect for 2018 and Beyond</b> – Jeff Norton & Scott Zimmerman, Dechert LLP	108
21	<b>Replacing LIBOR: the Countdown to 2022</b> – Alexandra Margolis & Richard Langan, Nixon Peabody LLP	112
22	<b>Investment Grade Acquisition Financing Commitments</b> – Julian S.H. Chung & Stewart A. Kagan, Fried, Frank, Harris, Shriver & Jacobson LLP	119
23	<b>Acquisition Finance in Latin America: Navigating Diverse Legal Complexities in the Region</b> – Sabrena Silver & Carlos Viana, White & Case LLP	124
24	<b>The Mid-Market and Beyond</b> – Mark Fine & Sebastian FitzGerald, Willkie Farr & Gallagher LLP	130

Continued Overleaf →

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## Country Question and Answer Chapters:

25	<b>Andorra</b>	Montel&Manciet Advocats: Maïtena Manciet Fouchier & Liliana Ranaldi González	134
26	<b>Angola</b>	Gabinete Legal Angola Advogados / PLMJ: Bruno Xavier de Pina & João Bravo da Costa	140
27	<b>Argentina</b>	Marval, O'Farrell & Mairal: Juan M. Diehl Moreno & Diego A. Chighizola	147
28	<b>Australia</b>	King & Wood Mallesons: Yuen-Yee Cho & Elizabeth Hundt Russell	156
29	<b>Austria</b>	Fellner Wratzfeld & Partners: Markus Fellner & Florian Kranebitter	165
30	<b>Belgium</b>	Laga: Werner Van Lembergen & Laurent Godts	175
31	<b>Bermuda</b>	Wakefield Quin Limited: Erik L. Gotfredsen & Jemima Fearnside	181
32	<b>Bolivia</b>	Criales & Urcullo: Andrea Mariah Urcullo Pereira & Daniel Mariaca Alvarez	189
33	<b>Brazil</b>	Pinheiro Neto Advogados: Ricardo Simões Russo & Leonardo Baptista Rodrigues Cruz	196
34	<b>British Virgin Islands</b>	Maples and Calder: Michael Gagie & Matthew Gilbert	205
35	<b>Canada</b>	McMillan LLP: Jeff Rogers & Don Waters	212
36	<b>Cayman Islands</b>	Maples and Calder: Tina Meigh	222
37	<b>Chile</b>	Carey: Diego Peralta	229
38	<b>China</b>	King & Wood Mallesons: Jack Wang & Stanley Zhou	236
39	<b>Colombia</b>	Lloreda Camacho & Co.: Santiago Gutiérrez & Juan Sebastián Peredo	243
40	<b>Costa Rica</b>	Cordero & Cordero Abogados: Hernán Cordero Maduro & Ricardo Cordero B.	250
41	<b>Croatia</b>	Macesic & Partners LLC: Ivana Manovelo & Anja Grbes	258
42	<b>Cyprus</b>	E & G Economides LLC: Marinella Kilikitas & George Economides	266
43	<b>Denmark</b>	Nielsen Nørager Law Firm LLP: Thomas Melchior Fischer & Brian Jørgensen	274
44	<b>England</b>	Allen & Overy LLP: David Campbell & Oleg Khomenko	281
45	<b>Finland</b>	White & Case LLP: Tanja Törnkvist & Krista Rekola	290
46	<b>France</b>	Orrick Herrington & Sutcliffe LLP: Emmanuel Ringeval & Cristina Radu	298
47	<b>Germany</b>	SZA Schilling, Zutt & Anschutz Rechtsanwalts-gesellschaft mbH: Dr. Dietrich F. R. Stiller & Dr. Andreas Herr	309
48	<b>Greece</b>	Sardelas Liarikos Petsa Law Firm: Panagiotis (Notis) Sardelas & Konstantina (Nantia) Kalogiannidi	318
49	<b>Hong Kong</b>	King & Wood Mallesons: Richard Mazzochi & David Lam	326
50	<b>Hungary</b>	BPSS Attorneys at Law: Eszter Dávid & Gergely Stanka	333
51	<b>India</b>	HSA Advocates: Anjan Dasgupta & Harsh Arora	342
52	<b>Indonesia</b>	Ali Budiardjo, Nugroho, Reksodiputro: Theodoor Bakker & Ayik Candrawulan Gunadi	353
53	<b>Ireland</b>	Dillon Eustace: Conor Houlihan & Richard Lacken	361
54	<b>Italy</b>	Allen & Overy Studio Legale Associato: Stefano Sennhauser & Gian Luca Coggiola	370
55	<b>Ivory Coast</b>	IKT Law Firm: Annick Imboua-Niava & Osther Henri Tella	378
56	<b>Japan</b>	Anderson Mori & Tomotsune: Taro Awataguchi & Yuki Kohmaru	384
57	<b>Jersey</b>	Carey Olsen: Robin Smith & Laura McConnell	392
58	<b>Luxembourg</b>	Wildgen: Michel Bulach & Giuseppe Cafiero	402
59	<b>Mexico</b>	Gonzalez Calvillo, S.C.: José Ignacio Rivero Andere	410
60	<b>Mozambique</b>	TTA – Sociedade de Advogados / PLMJ: Nuno Morgado Pereira & Gonçalo dos Reis Martins	417
61	<b>Norway</b>	Advokatfirmaet CLP DA: Ragnhild Steigberg	425
62	<b>Pakistan</b>	Kabraji & Talibuddin: Maheen Faruqui & Zara Tariq	433
63	<b>Portugal</b>	PLMJ: Gonçalo dos Reis Martins	440
64	<b>Puerto Rico</b>	Ferraiuoli LLC: José Fernando Rovira-Rullán	447
65	<b>Romania</b>	Trofin & Asociații: Valentin Trofin & Mihaela Spiridon	454



Country Question and Answer Chapters:

66	<b>Russia</b>	Morgan, Lewis & Bockius LLP: Grigory Marinichev & Alexey Chertov	464
67	<b>Serbia</b>	JPM Jankovic Popovic Mitic: Nenad Popovic & Janko Nikolic	472
68	<b>Singapore</b>	Drew & Napier LLC: Blossom Hing & Renu Menon	479
69	<b>Slovakia</b>	Škubla & Partneri s.r.o.: Marián Šulík & Zuzana Moravčíková Kolenová	489
70	<b>Slovenia</b>	Jadek & Pensa: Andraž Jadek & Žiga Urankar	496
71	<b>South Africa</b>	Allen & Overy LLP: Lionel Shawe & Lisa Botha	505
72	<b>Spain</b>	Cuatrecasas: Manuel Follía & María Lérica	515
73	<b>Sweden</b>	White & Case LLP: Carl Hugo Parment & Tobias Johansson	525
74	<b>Switzerland</b>	Pestalozzi Attorneys at Law Ltd: Oliver Widmer & Urs Klöti	532
75	<b>Taiwan</b>	Lee and Li, Attorneys-at-Law: Hsin-Lan Hsu & Cyun-Ren Jhou	541
76	<b>United Arab Emirates</b>	Morgan, Lewis & Bockius LLP: Ayman A. Khaleq & Amanjit K. Fagura	550
77	<b>USA</b>	Morgan, Lewis & Bockius LLP: Thomas Mellor & Rick Eisenbiegler	563
78	<b>Venezuela</b>	Rodner, Martínez & Asociados: Jaime Martínez Estévez	574

EDITORIAL

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

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

It is divided into three main sections:

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

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

Country question and answer chapters. These provide a broad overview of common issues in lending and secured finance laws and regulations in 54 jurisdictions.

All chapters are written by leading lending and secured finance lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Thomas Mellor of Morgan, Lewis & Bockius LLP for his invaluable assistance.

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

The *International Comparative Legal Guide* series is also available online at [www.iclg.com](http://www.iclg.com).

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# China

Jack Wang



Stanley Zhou



King & Wood Mallesons

## 1 Overview

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

The loan markets in the People's Republic of China (the "PRC") continued to be active in 2017. In particular, the "One Belt, One Road Initiative" (the "BRI") proposed by the Chinese Government that focuses on connectivity and cooperation with neighbouring countries in South East Asia, the Middle East, Europe, and Africa, has developed rapidly. The BRI mainly relates to investment in infrastructure, construction materials, railway and highway, automobile, real estate, power grid, and iron and steel, and has contributed to rapid growth in the volume of project finance and other loans provided by financial institutions. China Development Bank, the largest outbound investment and financing cooperation bank in the PRC, set up a special lending plan equivalent to RMB 250 billion in support of projects in connection with the BRI in May 2017.

Outside of the BRI, the PRC regulators hold a conservative attitude on other types of cross-border financing; in particular, financings which are used to support the overseas direct investment conducted by PRC enterprises. In December 2017, the State Administration for Foreign Exchange ("SAFE") issued the *Notice on Improving Foreign Exchange Administration on Bank NeiBaoWaiDai Business* to strengthen regulatory supervision and scrutiny of guarantees provided by PRC enterprises to offshore lenders to support obligations of offshore borrowers under offshore financings for the purpose of the PRC enterprise's overseas direct investment.

2017 also witnessed significant development in microcredits for individuals or small-and-medium-sized enterprises in PRC, as part of an overall growth of fintech.

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

One of the most significant transactions in 2017 was the US\$4.108 billion loan for a Chinese consortium's US\$16 billion privatisation of Global Logistic Properties ("GLP"), the largest warehouse operator in Asia. The consortium comprised Hopu Investment Management, Hillhouse Capital Group, Vanke Group and Bank of China Group Investment. This acquisition was the largest private equity acquisition in Asia to date, and was voted 2017 deal of the year and leveraged financing deal of the year by Finance Asia.

Another significant financing deal in 2017 was the HK\$28 billion loan for the HK\$53.1 billion privatisation of Belle International Holdings Limited, the largest shoe retailer in the PRC. The management buyout acquisition is the largest privatisation deal ever for a Hong Kong listed company. KWM advised the lenders on this transaction.

## 2 Guarantees

### 2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

A company can generally guarantee borrowings of one or more other members of its corporate group. According to PRC company law, any guarantee provided by a company for a third party must be approved by its board of directors or its shareholders in accordance with the provisions of its articles of association ("AOA"). However, if a company guarantees the liabilities of one of its shareholders or actual controller, the guarantee must be approved by affirmative votes of more than half of the shareholders at a shareholders' meeting, excluding the shareholder whose liabilities are guaranteed.

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

There are no corporate benefit rules under PRC law. Accordingly, there are no enforceability or other concerns under PRC law where benefit is difficult to demonstrate, as long as that the guarantee/security is provided in accordance with the applicable PRC law as well as the AOA of the guarantor/security provider.

### 2.3 Is lack of corporate power an issue?

PRC company law does require appropriate corporate action to be taken to authorise the giving of a guarantee by a company for the benefit of a third party. Lenders should review a guarantor's AOA and verify that necessary corporate and shareholder authorisations are in place. However, there is case law which supports the view that a guarantee will not necessarily be invalid just because such authorisations were not obtained.

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

A guarantee/security given by an onshore company securing an obligation of an offshore borrower owing to an offshore lender may be subject to approval by or registration with SAFE. See question 2.1 above on board and shareholder approvals. No other formalities are required for a company to grant a guarantee/security.

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

A company's AOA may limit the amount that the company can guarantee. If the guarantor is a listed company, there are additional mandatory requirements which require shareholder approval for: (1) any guarantee/security given when the aggregate amount of the external guarantee given by the listed company and its controlling subsidiary companies has exceeded 50% of the listed company's latest audited net assets; (2) any guarantee/security given to secure the obligation of a debtor whose asset to liability ratio exceeds 70%; (3) any guarantee to secure an amount exceeding 10% of the latest audited net assets of the guarantor; and (4) any guarantee provided to secure obligations of any shareholder, actual controller or their affiliated parties.

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

There are no exchange control or similar obstacles to enforce a guarantee so long as the giving of the guarantee complies with the regulations of the SAFE. For example, a guarantee given by a PRC company to secure the obligations of an offshore debtor owing to an offshore creditor must be registered with the SAFE within 15 business days after the date of the guarantee. The use of proceeds will also need to comply with the SAFE regulations.

### 3 Collateral Security

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

According to PRC law, the following collateral is available to secure lending obligations:

- (1) land, buildings or other fixtures;
- (2) manufacturing facilities, raw materials, semi-manufactured goods and products;
- (3) transportation vessels;
- (4) drafts, checks, promissory notes, bonds, deposit certificates, warehouse receipts, bills of lading;
- (5) transferable shares and fund units;
- (6) trademark rights, patent rights, copyright or other property rights in intellectual property that can be transferred;
- (7) accounts receivable;
- (8) any other property that is not prohibited by the laws;
- (9) construction-in-progress; and
- (10) any other property that is not prohibited by PRC law to be mortgaged, or any other rights that can be pledged as stipulated by PRC law.

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

It is not possible to give asset security by means of a general security agreement, as security created over different types of assets is subject to different perfection procedures.

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

Yes. A mortgage over real property, machinery or equipment is recognised by PRC law. Mortgages over real property need to be registered with the property bureau at the place where the property is located. Mortgages over machinery and equipment need to be registered with the State Administration of Industry and Commerce ("SAIC") at the place where the mortgagor is located. Mortgages over real property, machinery or equipment all have to be created by a written contract.

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

Yes. A pledge over receivables is recognised by PRC law. The pledge has to be registered with the Credit Information Centre of the People's Bank of China ("PBOC"). This registration is generally done by the pledgee. The Credit Information Centre does not conduct any review or impose any other conditions. According to the PBOC regulations, receivables over which a pledge could be created must be generated from: (i) claims arising from a sale or lease, including the sale of goods, the supply of water, power, gas and heat, the licensed use of an intellectual property right, and the lease of movable properties or immovable properties; (ii) claims arising from the provision of services in areas of medical care, education, tourism, labour or other services; (iii) the right to obtain profits from energy, transport, water conservancy, environmental protection, municipal projects and other infrastructure and public utility projects; (iv) claims arising from the provision of loans or other credit activities; and (v) other rights entitled by the right holder under the law to claim payments. PRC law does not require notice of the security to be given to the debtor. However, it is good practice for notice to be given.

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

Yes. A pledge over a cash deposit is recognised by PRC law. To create a pledge over a cash deposit, cash in the bank account must be ascertained and identified at the time of the creation of the pledge. The general understanding is that the bank account balance must not change. However there has been a recent court case indicating that fluctuation in the bank account balance may be permitted under certain circumstances.

#### 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?

Yes. A pledge of shares can be created over shares in companies

incorporated in China. The documents granting security over the shares must be governed by PRC law. If not, the security interest would not be enforceable in China. The procedures to create a pledge of shares differ depending on the type of company. In the case of shares of a listed company, the pledge must be registered with the China Securities Deposit and Clearing Corporation Limited. In the case of shares of a foreign invested enterprise (“FIE”), the pledge is subject to approval from or online filing with the Ministry of Commerce or its local branch (“MOFCOM”), as the case may be, depending on whether such FIE’s business scope falls into the catalogue of encouraged/permitted industries for foreign investment or restricted industries for foreign investment (approval from MOFCOM may be required if the FIE falls into a restricted category). In the case of shares of a non-listed and non-FIE company, the pledge must be registered with local SAIC where the company whose shares are being pledged is registered.

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

Yes. PRC property law provides that a party may create a mortgage over manufacturing equipment, raw materials, semi-finished products and finished products owned by it at the present or in the future. This is a concept similar to the concept of a floating charge under the common law. The mortgage must be in writing and registered with the SAIC. Without SAIC registration, the claim of the mortgagee is vulnerable to third-party claims.

### 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. The conditions outlined in questions 2.1 and 2.6 also apply here.

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

Generally, no notarisation or stamp duty is required for creating security over different types of assets. If a security document involves a non-PRC party, notarisation by a notary and legalisation by a Chinese embassy or consulate may be required. In respect of registration requirements, see questions 3.3 to 3.7. Registration fees may be charged depending on the types of assets but the fees are mostly nominal.

### 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?

Timing for security perfection varies depending on the type of security. For example, perfection of a pledge of shares of a FIE requires online filing with or approval from (as the case may be) MOFCOM and SAIC registration. The approval from MOFCOM normally takes a couple of months while online filing and SAIC registration may take a couple of weeks. A mortgage of equipment

or property on the other hand can take a considerable period of time. When a foreign party is involved, notarisation and legalisation may be required, in which case the security perfection process is longer. Other than registration fees there are no other governmental charges in respect of the creation of security.

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

There are no regulatory or similar consents required with respect to the creation of security except for the limited circumstances discussed in questions 2.6 and 3.6.

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

If the borrowings to be secured are under a revolving credit facility, usually a “maximum amount security” will need to be used. Under PRC law, a maximum amount security refers to a security created to secure obligations incurred during a period of time and the aggregate secured amount is subject to a maximum cap agreed by the parties. When applying a maximum amount security under a revolving credit facility, it is necessary for the lender to calculate the maximum loan amount and the interest with a cushion.

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

If a PRC law-governed contract requires both signing and affixing of a company chop, due execution of the contract requires both signing by authorised signatory(ies) as well as affixing of the company chop. If a contract does not require both signing and affixing of a company chop, either signing by authorised signatory(ies) or affixing a company chop would be considered as due execution of the contract. A company is bound by execution by its legal representative. There are no special requirements on notarisation, execution under power of attorney, counterparts or deeds by a PRC party. If a signing party is a non-PRC party, notarisation and legalisation may be required in respect of the non-PRC party’s execution of the relevant security documents.

## 4 Financial Assistance

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

There is no general prohibition on financial assistance. However, the restrictions on granting of a guarantee outlined in question 2.1 also apply to the grant of security. Where a loan is extended from an offshore lender to an offshore borrower supported by a security and/or guarantee given by a PRC company to finance or refinance an offshore acquisition, SAFE regulations require that PRC outbound investment procedures are to be duly complied with.

## 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?

The role of agent for a syndicate of banks who may change from time to time is recognised under PRC law. Trustees are not generally used in the context of syndicated lending in China. It is usual for syndicated loan lenders to appoint a facility agent or security agent to act for and on behalf of the syndicate. Subject to the provisions of the transaction documents, the agent bank may claim the whole amount of the loan from the obligors and distribute the proceeds to the syndicate banks in accordance with the provisions of the transaction documents.

### 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?

This is not applicable in the PRC.

### 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?

According to PRC contract law, a party to a contract may transfer its rights to a third party by notifying the obligor of the transfer of the contractual rights and a party to a contract may assign its obligations after getting consent from the obligee, unless otherwise agreed in a contract. Accordingly, unless the loan agreement provides otherwise, Lender A may transfer its right to a loan already disbursed to the borrower by giving notice to the borrower. If a loan is yet to be disbursed, Lender A may only assign the obligation to disburse a loan if the borrower's consent is obtained. The notice or the consent must be in writing. No consent is required from a guarantor for the transfer or assignment of the loan from Lender A to Lender B unless the guarantee document expressly required this. It is good practice to notify the guarantor of the transfer or assignment.

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

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

Income received by a lender from loans extended by it to a PRC borrower will be subject to PRC income tax. Such income may

include (a) interest received by it on the loans, and (b) the proceeds of a claim under a guarantee or of enforcing security which constitutes payment of interest. For a PRC onshore lender in general, the income tax rate is 25% of its annual net profit. Tax payable by an offshore lender will be withheld from the PRC obligor's payment – the usual rate is 10% income tax and 6% value added tax on the interest amount, but preferential rates may be applied depending on the applicable tax treaty.

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

There are no preferential tax incentives or other incentives provided specifically to foreign lenders, except that foreign lenders may enjoy a preferential income tax rate provided by the applicable tax treaty between the PRC government and the government of the offshore lender's place of business. As of the end of October 2017, the PRC government has entered into tax treaties with 103 jurisdictions, and Hong Kong and Macau Special Administrative Regions, of which 99 have come into force. In addition to income tax, stamp duty is payable at 0.05% of the loan amount by both the lender and the borrower, respectively. A lender will also be subject to a business tax. Apart from these, there is no other tax in relation to a loan transaction.

### 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?

See question 6.1 above. A foreign lender may be subject to income tax and value-added tax with respect to income received by it from loans provided to a PRC obligor.

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

Except for stamp duty, registration fees (e.g. for mortgage registration) and notary costs (if applicable); there are no other government fees or costs.

### 6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

If some or all of the lenders are foreign lenders, the loan made to PRC companies is considered as foreign debt. There are restrictions as to whether a company could borrow foreign debt and how much it can borrow. Treatment is different for a FIE in China or non-FIE. FIE and non-FIE companies may carry out cross-border financing in RMB or foreign currencies in accordance with Circular on the Matters Relating to the *Macro-prudential Management of Full-covered Cross-border Financing* ("Circular 9"), whilst a FIE may choose between the regulation regime under Circular 9 and its existing foreign debt management system.

## 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?

The PRC courts will recognise and enforce a governing law in a contract that is the law of another jurisdiction if there is a foreign element in connection with the contract; for example, if one of the parties to the contract is a foreign party or if the subject matter is located outside of China. The choice of foreign governing law must not violate China’s social public interest.

### 7.2 Will the courts in 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?

A judgment rendered by a New York court or English court is currently not enforceable in China. This is because a PRC court will only recognise and enforce a foreign court judgment if (a) a bilateral judicial assistance treaty exists between China and the country of the foreign court, (b) both countries have joined an international convention on recognising and enforcing foreign court judgments or written orders, or (c) precedents of reciprocity exist. There is no reciprocal recognition or enforcement of judgments or written order between China and the UK or the US.

### 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?

A foreign lender may immediately file a suit against the company as soon as all the required court papers are in order. It will generally take up to six months to obtain a first instance judgment which shall be final if no party makes an appeal. If either party makes an appeal to a second instance court, it will generally take up to three months to obtain a second instance judgment, which shall be the final judgment. It is difficult to predict how long it will take to enforce the judgment.

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

Enforcement of security could be either on a consensual basis, i.e. the creditor and the security provider agree on the realisation of the collateral by conversion to value, or the creditor and security provider arrange auction or sale without going to court. If the security provider is not cooperative, the creditor will need to bring proceedings in a competent PRC court seeking a judgment. If a favourable judgment is rendered, the creditor may commence

an enforcement proceeding during which the collateral could be auctioned or sold at the oversight of the court. Consents from government bodies are generally not required unless state-owned assets or FIE shares are involved.

### 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?

The fact that a lender is foreign does not in itself impose additional restrictions on enforcing a loan or security.

### 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?

After a Chinese court accepts a bankruptcy application, any preservation measure in respect of the bankrupt debtor’s assets shall be released and any enforcement proceeding shall be suspended. Further, pending civil proceedings or arbitrations relating to the bankrupt debtor shall also be suspended and such proceedings may resume after the administrator has taken over the assets of the bankrupt debtor.

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

Chinese courts will not examine the substance of the arbitral award given by a foreign arbitration tribunal and will give effect to and enforce the award provided that it is in compliance with the New York Convention.

## 8 Bankruptcy Proceedings

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

According to PRC bankruptcy law, once a PRC court accepts an application for a bankruptcy petition in relation to a bankrupt debtor, both secured creditors and unsecured creditors will need to declare their claims to the administrator for such claims to be registered. All creditors can then participate in the distribution of the assets of the bankrupt debtor.

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

In order to protect the interests of the creditors and the equity-owners of the debtor, PRC bankruptcy law allows the administrator to petition the court to invalidate certain types of transactions conducted by the debtor within one year before the court accepts the bankruptcy petition, and to claw back the relevant assets back into the debtor’s assets pool for subsequent distribution to the creditors and the equity-owners: (1) transfers of assets without consideration; (2) trading at an obviously unreasonable price; (3) providing assets-based security for debts not secured by property; (4) paying off undue debts in advance; or (5) giving up its right as a creditor.

The administrator may also petition the court to claw back payment made by the bankrupt debtor to certain creditors within six months before the court accepts the bankruptcy petition, provided that, at the time of the payment, the bankrupt debtor was insolvent.

The secured creditor's rights rank behind any outstanding salaries, pensions for the disabled, basic pension insurance, basic medical insurance or other compensation incurred before 27 August 2006 (the date on which the PRC bankruptcy law was adopted and promulgated) and payable to the employees of the bankrupt debtor according to relevant laws and regulations. These employees' claims, if incurred after 27 August 2006, will rank behind the secured creditor's secured obligations. In addition, if the security is created after incurring overdue tax payment, the tax payment shall rank ahead of the security.

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

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PRC bankruptcy law applies to PRC companies in general, but does not apply to PRC financial institutions. The bankruptcy proceedings of financial institutions shall be governed by rules which are yet to be promulgated by the State Council.

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### 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?

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No, seizure of assets of a company in an enforcement scenario may only occur following court proceedings.

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## 9 Jurisdiction and Waiver of Immunity

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

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If a contract has no foreign elements, the subject matter shall be deemed as in the exclusive jurisdiction of the Chinese courts. The submission to a foreign jurisdiction shall be valid under PRC law if the subject matter is not under the exclusive jurisdiction of the PRC courts. As for the enforcement of a judgment made in a foreign jurisdiction, it depends on the applicable bilateral treaties, or otherwise on the basis of reciprocity.

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

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China adopts the "absolute immunity" principle, which provides complete immunity to the sovereign state. Therefore, any waiver

of sovereign immunity is not legally binding and not enforceable if it is made by a Chinese governmental body. Please note, however, that state-owned enterprises are considered as separate legal entities rather than Chinese government bodies and therefore sovereign immunity does not apply to state-owned enterprises.

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## 10 Licensing

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### 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?

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Only financial institutions or quasi-financial institutions with lending as one of their approved business activities (e.g. banks, trust companies, auto-financial companies, micro-lending companies) can engage in the lending business. A foreign lender who makes a loan to a PRC company cross-border is not required to be licensed, qualified or otherwise entitled to carry on business in the PRC. A lender which carries out a lending business without lending as its approved business scope will be deemed to be carrying on illegal financial services and be sanctioned accordingly. In China, it is usual for a facility and security agent under a syndicated facility to also be a syndicate lender. A foreign lender can be an agent without any licence in PRC.

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## 11 Other Matters

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

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It is worth noting that, when non-bank entities are acting as guarantor/security providers in offshore financing transactions, domestic enterprises and overseas banks must also pay close attention to the requirements imposed by SAFE and other PRC regulators in relation to cross-border guarantee/security in such cases, to ensure the compliance of such transactions.

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Jack Wang specialises in international finance, project finance, foreign direct investment, and mergers and acquisitions.

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Jack has handled many large transactions in industries such as power, petrochemicals, expressways, water plants, bridges, aluminium plants, and MTR. He has also represented various international companies in their incorporation of foreign-invested enterprises or acquisitions of domestic companies.

**Work Experience**

Jack joined King & Wood Mallesons in 2003. Prior to joining King & Wood Mallesons, Jack was in charge of the Department of International Finance, at the Global Law Office in Beijing. He has also practised law at the New York office of Sherman & Sterling and at the Hong Kong office of Linklaters.

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Stanley has extensive experience in banking and finance area and provides legal advice to domestic and international banks and other financial institutions in a variety of matters, including set-up, merger and acquisition of financial institutions, syndicated loans, property finance, cross-border RMB trade, pre-IPO finance, privatisation finance and other cross-border transactions, and providing regulatory advices in relation to their business, operation and marketing activities in China. Stanley also advises borrowers and other corporate clients in their receiving various financial services from banks and other financial institutions, including borrowing, derivative transactions, structured products and wealth management. Stanley is very familiar with Shanghai Pilot Free Trade Zone, advising plenty of financial institutions and corporations in the FTZ on their cross-border transactions.

Stanley also has strong expertise in the bank card industry, payment service institutions and payment business, pre-paid card and internet-financing.

Stanley has worked in reputable local and international law firms in their Shanghai and Hong Kong offices.

Stanley graduated from the Law School of Fudan University and qualified in the same year.

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