



ICLG

The International Comparative Legal Guide to: **Lending & Secured Finance 2017**

5th Edition

A practical cross-border insight into lending and secured finance

Published by Global Legal Group, with contributions from:

Advokatfirma Ræder DA
Ali Budiardjo, Nugroho, Reksodiputro
Allen & Overy LLP
Anderson Mori & Tomotsune
Asia Pacific Loan Market Association
Cadwalader, Wickersham & Taft LLP
Carey
Chadbourne & Parke LLP
Chiomenti
Cravath, Swaine & Moore LLP
Crales & Urcullo
CUATRECASAS
Davis Polk & Wardwell LLP
Debevoise & Plimpton LLP
Drew & Napier LLC
E & G Economides LLC
Estudio Saco-Vertiz & Landerer
Freshfields Bruckhaus Deringer LLP
Gonzalez Calvillo, S.C.

HSA Advocates
Holland & Knight LLP
HSBC
IKT & associates
K&L Gates LLP
Khan Corporate Law
King & Spalding LLP
King & Wood Mallesons
KPP Law Firm
Lakatos, Köves and Partners
Latham & Watkins LLP
Lee & Ko
Lee and Li, Attorneys-at-Law
Loan Market Association
Maples and Calder
Marval, O'Farrell & Mairal
McMillan LLP
Milbank, Tweed, Hadley & McCloy LLP
Montel&Manciet Advocats

Moore & Van Allen, PLLC
Morgan, Lewis & Bockius LLP
Morrison & Foerster LLP
Nielsen Nørager Law Firm LLP
Orrick Herrington & Sutcliffe LLP
Pestalozzi Attorneys at Law Ltd.
Pinheiro Neto Advogados
Proskauer Rose LLP
Rodner, Martínez & Asociados
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
The Loan Syndications and Trading Association
White & Case LLP





Contributing Editor

Thomas Mellor, Morgan, Lewis & Bockius LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Paul Mochalski

Editor
Sam Friend

Senior Editors
Suzie Levy, Rachel Williams

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
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 2017

Copyright © 2017
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-911367-46-8
ISSN 2050-9847

Strategic Partners



Editorial Chapters:

1	Loan Syndications and Trading: An Overview of the Syndicated Loan Market – Bridget Marsh & Ted Basta, The Loan Syndications and Trading Association	1
2	Loan Market Association – An Overview – Nigel Houghton, Loan Market Association	7
3	Asia Pacific Loan Market Association – An Overview – Janet Field & Katy Chan, Asia Pacific Loan Market Association	12

General Chapters:

4	An Introduction to Legal Risk and Structuring Cross-Border Lending Transactions – Thomas Mellor & Marcus Marsh, Morgan, Lewis & Bockius LLP	15
5	Global Trends in the Leveraged Loan Market in 2016 – Joshua W. Thompson & Caroline Leeds Ruby, Shearman & Sterling LLP	20
6	Escrow Funding in the Term Loan B Market – Meyer C. Dworkin & Samantha Hait, Davis Polk & Wardwell LLP	26
7	Commercial Lending in a Changing Global Regulatory Environment: 2017 and Beyond – Bill Satchell & Elizabeth Leckie, Allen & Overy LLP	30
8	Acquisition Financing in the United States: 2017... Uncertainty! – Geoffrey R. Peck & Mark S. Wojciechowski, Morrison & Foerster LLP	33
9	A Comparative Overview of Transatlantic Intercreditor Agreements – Lauren Hanrahan & Suhrod Mehta, Milbank, Tweed, Hadley & McCloy LLP	39
10	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	46
11	The Global Subscription Credit Facility and Fund Finance Markets – Key Trends and Forecasts – Michael C. Mascia & Wesley A. Misson, Cadwalader, Wickersham & Taft LLP	56
12	Recent Developments in U.S. Term Loan B – Denise Ryan & David Almroth, Freshfields Bruckhaus Deringer LLP	59
13	The Growth of European Covenant Lite – James Chesterman & Jane Summers, Latham & Watkins LLP	65
14	Yankee Loans – What You Need to Know – Alan Rockwell & Denise Gibson, Allen & Overy LLP	68
15	Debt Retirement in Leveraged Financings – David A. Brittenham & Scott B. Selinger, Debevoise & Plimpton LLP	76
16	In re Motors Expands Future Claimants' Rights at Expense of 363 Purchasers – George E. Zobitz & Omid H. Nasab, Cravath, Swaine & Moore LLP	82
17	The Continuing Evolution of Middle Market Lending – Sandra Lee Montgomery, Proskauer Rose LLP	87
18	An In-house Legal Team's Views on the Roles and Responsibilities of External Deal Counsel on Lending Transactions – Clifton Prabhu & Charles Bronowski, HSBC	93
19	The Section 363 Sale Process: Key Considerations for the Prepetition Secured Lender – Zachary H. Smith, Moore & Van Allen, PLLC	97
20	Distributed Ledger Technology, The Internet of Things (IoT) and Artificial Intelligence and Cognitive Analytics: The Future of Trade Finance is Rapidly Approaching – Josias Dewey, Holland & Knight LLP	102
21	Marketplace Lending – Vanessa Spiro & Edward Dartley, K&L Gates LLP	108
22	Overview of Sanctions Programs Affecting the Lending Market in the United States – Joseph F. Giannini & Adrienne Sebring, Chadbourne & Parke LLP	114

Country Question and Answer Chapters:

23	Andorra	Montel&Manciet Advocats: Audrey Montel Rossell & Liliana Ranaldi González	119
24	Argentina	Marval, O'Farrell & Mairal: Juan M. Diehl Moreno & Diego A. Chighizola	125
25	Australia	King & Wood Mallesons: Yuen-Yee Cho & Elizabeth Hundt Russell	134
26	Belgium	White & Case LLP: Hadrien Servais & Nathalie Colin	142
27	Bolivia	Crales & Urcullo: Andrea Mariah Urcullo Pereira & Daniel Mariaca Alvarez	149
28	Botswana	Khan Corporate Law: Shakila Khan	156

Continued Overleaf ➔

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Country Question and Answer Chapters:

29	Brazil	Pinheiro Neto Advogados: Ricardo Simões Russo & Leonardo Baptista Rodrigues Cruz	164
30	British Virgin Islands	Maples and Calder: Michael Gagie & Matthew Gilbert	172
31	Canada	McMillan LLP: Jeff Rogers & Don Waters	179
32	Cayman Islands	Maples and Calder: Tina Meigh	188
33	Chile	Carey: Diego Peralta	195
34	China	King & Wood Mallesons: Jack Wang & Stanley Zhou	202
35	Cyprus	E & G Economides LLC: Marinella Kilikitas & George Economides	209
36	Denmark	Nielsen Nørager Law Firm LLP: Thomas Melchior Fischer & Brian Jørgensen	217
37	England	Allen & Overy LLP: Darren Hanwell & Temi Esho	224
38	Finland	White & Case LLP: Tanja Törnkvist & Oona Lilja	233
39	France	Orrick Herrington & Sutcliffe LLP: Emmanuel Ringeval & Cristina Radu	240
40	Germany	King & Spalding LLP: Dr. Werner Meier & Dr. Axel J. Schilder	250
41	Greece	KPP Law Firm: George N. Kerameus & Ilianna Sotiria Koraki	262
42	Hong Kong	King & Wood Mallesons: Richard Mazzochi & David Lam	270
43	Hungary	Lakatos, Köves and Partners: Szabolcs Mestyán & Andrea Spisák	277
44	India	HSA Advocates: Anjan Dasgupta & Harsh Arora	285
45	Indonesia	Ali Budiardjo, Nugroho, Reksodiputro: Theodoor Bakker & Ayik Candrawulan Gunadi	295
46	Ireland	Maples and Calder: John Breslin & David Burke	303
47	Italy	Chiomenti: Giulia Battaglia & Gregorio Consoli	310
48	Ivory Coast	IKT & associates: Annick Imboua-Niava & Othser Henri Tella	319
49	Japan	Anderson Mori & Tomotsune: Taro Awataguchi & Yuki Kohmaru	325
50	Korea	Lee & Ko: Woo Young Jung & Yong-Jae Chang	333
51	Mexico	Gonzalez Calvillo, S.C.: José Ignacio Rivero Andere	341
52	Norway	Advokatfirma Ræder DA: Kyrre W. Kielland & Anne Christine Wettre	348
53	Peru	Estudio Saco-Vertiz & Landerer: Carlos Saco-Vertiz Tudela & Jaime Sabat Pancorvo	357
54	Russia	Morgan, Lewis & Bockius LLP: Grigory Marinichev & Alexey Chertov	366
55	Singapore	Drew & Napier LLC: Valerie Kwok & Blossom Hing	373
56	South Africa	Allen & Overy LLP: Lionel Shawe & Lisa Botha	382
57	Spain	CUATRECASAS: Manuel Follía & María Lérida	391
58	Sweden	White & Case LLP: Carl Hugo Parment & Tobias Johansson	401
59	Switzerland	Pestalozzi Attorneys at Law Ltd.: Oliver Widmer & Urs Klöti	408
60	Taiwan	Lee and Li, Attorneys-at-Law: Hsin-Lan Hsu & Cyun-Ren Jhou	417
61	UAE	Morgan, Lewis & Bockius LLP: Ayman A. Khaleq & Amanjit K. Fagura	425
62	USA	Morgan, Lewis & Bockius LLP: Thomas Mellor & Rick Eisenbiegler	437
63	Venezuela	Rodner, Martínez & Asociados: Jaime Martínez Estévez	448

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 year 2016 witnessed significant developments in the Foreign Debt management system. On 25 January 2016, the Notice of the People's Bank of China ("PBOC") on Expanding All Pilot Programs of Macro Prudential Administration of Cross-Border Financing ("PBOC Notice") became effective, which applies to enterprises registered in the China (Shanghai) Pilot Free Trade Zone, China (Guangdong) Pilot Free Trade Zone, China (Tianjin) Pilot Free Trade Zone, and China (Fujian) Pilot Free Trade Zone ("Enterprises Implementing the Pilot Program") and 27 banking financial institutions ("Financial Institutions Implementing the Pilot Program"). Pursuant to the PBOC Notice, Enterprises Implementing the Pilot Program and Financial Institutions Implementing the Pilot Program may carry out cross-border financing in domestic and foreign currencies based on a ceiling quota calculated by reference to their respective capital or net assets, as the case may be. A foreign invested enterprise ("FIE") which implements the pilot program and foreign invested banks which implement the pilot program may choose the existing cross-border financing management model or the model as prescribed in the PBOC Notice.

On 29 April 2016, PBOC issued the Circular of the People's Bank of China on the Nationwide Implementation of Macro-prudential Management of Full-covered Cross-border Financing Activities ("Circular 132"), which became effective on 3 May 2016 and expanded the application scope of the PBOC Notice to the whole country. Under the PBOC Notice and Circular 132, it is much easier than before for Chinese incorporated enterprises to borrow from overseas financial institutions and we have seen a number of deals under this structure notwithstanding the depreciation of Renminbi.

In terms of foreign exchange control, companies (excluding financial institutions) incorporated in the PRC are now permitted to freely convert foreign exchange proceeds into RMB. Pursuant to the Notice of the State Administration of Foreign Exchange on Reforming and Regulating the Policies for the Management of Foreign Exchange Settlement of Capital Account ("Notice 16"), foreign exchange proceeds under capital accounts, including loans borrowed from overseas, can be converted into RMB based on the actual needs of the company, except to the extent restricted in current regulations.

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

The year 2016 was significant for bond issuance in Chinese Inter-Bank

Bond Market. On 2 September, the World Bank issued its first Special Drawing Right (SDR)-denominated bond in the Chinese Inter-Bank Bond Market, achieving a landmark development for China's bond market and for the SDR as an international reserve asset.

Syndicated loan transactions continued to be active this year. Sun Hung Kai Properties, a major property developer in Hong Kong, was financed with a RMB 14.5 billion onshore loan at the beginning of 2016.

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 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 filing with the State Administration for Foreign Exchange (“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 obligation 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 for 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 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 pledge could be created must be generated from: (i) the sale of goods, the supply of water, power, gas and heat; (ii) a lease of movable or immovable property; (iii) fees for rendering services; (iv) fees for the use of immovables such as highways, bridges, tunnels and ferries; and (v) rights under loans or other credit. 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 of the amount 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 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 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 considerably 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 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 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 December 2016, the PRC government has entered into tax treaties with 102 countries, and Hong Kong and Macau Special Administrative Regions, of which 98 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 than 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 business tax and income 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 132, whilst a FIE may choose between the regulation regime under Circular 132 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 public order.

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 the 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 in 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 clawback 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 employee's 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.

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

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.

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

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

9 Jurisdiction and Waiver of Immunity

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

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.

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

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.

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?

Only financial institutions or quasi-financial institutions with lending as one of its 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.

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?

In addition to all other issues covered in this chapter, it is worth noting that, in 2016, against the background of Renminbi depreciation and decrease in China's foreign exchange reserves, SAFE has provided guidance to PRC banks to impose strict scrutiny on the purchase and outbound payment of large amounts of foreign exchange – this has implications on paying funds out of China in cross-border financing transactions.

**Jack Wang**

King & Wood Mallesons
17th Floor, One ICC, Shanghai ICC
999 Middle Huai Hai Road, Xuhui District
Shanghai 200031
China

Tel: +86 21 2412 6051
Email: jackwang@cn.kwm.com
URL: www.kwm.com/en

Jack Wang is a banking and finance partner in the Shanghai office of KWM. He has extensive experience in international finance, covering general banking business, bilateral financing, syndicated loans, financial derivative instruments, trade financing, structured financing in M&A and real estate, incorporation and acquisition of financial institutions, NPL dispositions, online purchase technologies, debt restructuring, the issuance of bonds, and commercial paper on capital markets among other areas.

Jack is a recognised market leader, and is ranked as a "Leading Individual" by *Chambers Asia Pacific Guide 2016*, and as one of the world's leading banking lawyers by *IFLR1000*, *Chambers & Partners*, *Who's Who Legal* and *Expert Guides*.

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

Prior to joining KWM in 2003, Jack was in charge of the Department of International Finance, at the Global Law Office in Beijing. Before that, Jack worked at Shearman & Sterling (New York) and Linklaters (HK).

Jack is qualified to practise law in China and in New York State, and is fluent in Chinese and English.

**Stanley Zhou**

King & Wood Mallesons
17th Floor, One ICC, Shanghai ICC
999 Middle Huai Hai Road, Xuhui District
Shanghai 200031
China

Tel: +86 21 2412 6056
Email: stanley.zhou@cn.kwm.com
URL: www.kwm.com/en

Stanley Zhou is a partner in KWM's Shanghai office specialising in general banking, structured financing, property financing, financial regulation and compliance, financial institutions, internet-financing, financial lease, and commercial factoring.

Stanley advises domestic and international banks and other financial institutions and corporate borrowers on a wide range of banking and finance transactions, including merger and acquisition of financial institutions, syndicated loans, property finance, cross-border RMB trade, pre-IPO finance, privatisation finance, cross-border transactions, derivatives transactions, structured products and wealth management. Stanley also has strong expertise in the bank card industry, payment service institutions and payment business, pre-paid cards and internet-financing.

Stanley has been recognised as an "Up and Coming" lawyer in Banking & Finance by *Chambers Asia-Pacific 2015-2016*. Clients describe Stanley as: "Very good with response times, and knows the banking market and regulations in China very well." In 2016, Stanley was awarded the "Recommended Lawyer" in Banking & Finance – PRC by *The Legal 500*, and as the exclusive "Client Choice" for PRC Banking & Finance by *Globe Business Media Group*.

Stanley is fluent in Chinese and English.

KING & WOOD
MALLESONS
金杜律师事务所

King & Wood Mallesons (**KWM**) is a unique leading global firm headquartered in Asia.

Our Global Banking & Finance team offers depth and breadth across acquisition and corporate finance, asset finance, property finance, project finance, capital markets, derivatives, structured products, financial services regulation and restructuring & insolvency.

Our clients include top commercial and investment banks, large listed and unlisted corporates, private equity and other financial sponsors, market infrastructure participants, regulators and industry bodies.

Recent industry recognition includes:

- Best Law Firm (revenue over \$200m) and Best Professional Services Firm (over \$200m) AFR Client Choice 2016.
- Most Innovative Law Firm in China and Innovation in the Business of Law, Financial Times Asia-Pacific Awards 2016.
- Regional Law Firm of the Year and National Firm of the Year (for the 6th year) – China, International Financial Law Review 2016.
- Banking Law Firm of the Year, ALB China Law Awards 2016.
- Finance Team of the Year – Hong Kong, The Asia Legal Awards 2016.
- Best Financial Law Firm – Australia/New Zealand, FinanceAsia's 2015 Awards.
- Law Firm of the Year, Australian Banking & Finance Awards 2015.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- 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 Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

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

www.iclg.co.uk