Loans & Secured Financing

Contributing editor
George E Zobitz

2018

GETTING THE DEAL THROUGH

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Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

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First published 2015
Third edition
ISSN 2059-5476

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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CONTENTS

Global overview 5
George E Zobitz and Christopher J Kelly
Cravath, Swaine & Moore LLP

British Virgin Islands 7
Ashley Davies and Omonike Robinson-Pickering
Walkers

Cayman Islands 13
Rob Jackson and Zoë Hallam
Walkers

Dominican Republic 19
Manuel Troncoso Hernández
OMG

Egypt 24
Mahmoud Bassiouny and Nadia Abdallah
Matouk Bassiouny

Germany 31
Stephan Brandes, Philipp von Ploetz and Andreas Herr
SZA Schilling, Zutt & Anschütz Rechtsanwalts AG

Greece 37
Athanasia G Tsene
Bernitsas Law Firm

Indonesia 44
Ibrahim Sjarief Assegaf, Ahmad Fikri Harahap, First Deddy Ariyanto and Luciana Fransiska Butarbutar
Assegaf Hamzah & Partners

Italy 54
Maurizio Delfino and Martin Pugsley
Studio Legale Delfino e Associati Willkie Farr & Gallagher LLP

Japan 60
Masayuki Fukuda
Nagashima Ohno & Tsunematsu

Kenya 66
Sonal Sejpal, Mona Doshi and Akash Devani
Anjarwalla & Khanna

Luxembourg 74
Peter-Jan Bossuyt and Denis Van Den Bulke
VANDENBULKE

Netherlands 82
Elizabeth van Schilfgaarde, David Viëtor, Diederik Vriesendorp and Janneke de Goeij
NautaDutilh

Nigeria 87
Onyinye Chukwu, Oluwatoyin Nathaniel and Ukamaka Okoli
G Elias & Co

Russia 93
Svetlana Dashevskaya
Orrick, Herrington & Sutcliffe LLP

Spain 98
Toni Barios
Cases & Lacambra

Switzerland 104
Patrick Hünerwadel and Marcel Tranchet
Lenz & Staehelin

United Kingdom 109
Azadeh Nassiri and Gabrielle Ereira
Slaughter and May

United States 115
George E Zobitz and Christopher J Kelly
Cravath, Swaine & Moore LLP

Uzbekistan 123
Nail Hassanov and Maxim Dogonkin
Kosta Legal

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Loans and secured financings

1 What are the primary advantages and disadvantages in your jurisdiction of incurring indebtedness in the form of bank loans versus debt securities?

The Luxembourg financial market is a very open market but due to the exiguity of the country, the loan activity of local commercial banks is relatively limited compared to the size of the financial place. Foreign banks, benefiting from the EU freedom of services, are, however, very active in the market and tend to impose their terms and conditions and the specificities of their national governing laws to the loan documentation. Debt securities would be mainly governed by Luxembourg law or governing laws common in large financing (eg, New York or English laws). The large contractual flexibility of Luxembourg law offers an array of various debt instruments, having different maturities and features including tracking or conversion characteristics and a hybrid nature (qualifying as debt in Luxembourg and as equity in some other jurisdictions), which make them very attractive from a tax perspective. In addition, the offering of debt securities is the preferred financing of investment funds and private equity firms and may be underwritten by a large panel of investors.

Issuance of debt securities is permitted by law either to the public or to a limited number of investors (for certain types of legal entities). Issuance to the public needs to comply with the relevant European directives transposed in Luxembourg national law (eg, the prospectus directive). What is interesting to note is that the Luxembourg stock exchange and its euro MTF platform are global leaders in listing of bonds issued by various non-Luxembourg issuers and governed by foreign law. As of 1 July 2017, 24,893 bonds are listed on the Luxembourg stock exchange markets, from which 4,078 have been issued by a Luxembourg issuer.

2 What are the most common forms of bank loan facilities? Discuss any other types of facilities commonly made available to the debtor in addition to, or as part of, the bank loan facilities.

Luxembourg banks and credit institutions are not geared towards large financing or syndications. In addition, they tend to focus their strategy more on private banking activities than on investment banking or commercial credit. Most of the financing operations are carried out by European branches of US or UK banks, or UK branches of French or German financial institutions. Each of them tends to deal according to their national market practices.

Depending on the loan origination and the financing purpose, a Luxembourg borrower will come across Loan Market Association (LMA) style (multi-currency) (revolving) facility agreements or straight term loans, US style credit agreements or loan agreements with a strong focus on the customary terms and conditions of the jurisdiction of the lenders. Indeed, the vast majority of bank loan financing is governed by foreign law and abides by the market practice and standards of the jurisdiction of the governing law of such bank loan financing or debt security.

Given the openness of the Luxembourg market and the diversity of market players and investors, financings vary from secured and unsecured lending in acquisition, real estate, structured, project, fund or Islamic financing to high-yield bonds either issued or guaranteed by Luxembourg entities.

3 Describe the types of investors that participate in bank loan financings and the overlap with the investors that participate in debt securities financings.

Luxembourg regulated banks and credit institutions participate in both bank loan financing and debt securities financing. However, Luxembourg credit institutions or banks governed by the law of 5 April 1993 on the financial sector (the 1993 Law) would typically provide mainly commercial or mortgage loan to local borrowers. Foreign banks, investment funds or pension funds, or securitisation companies provide a large portion of the loan financing, which is therefore governed by foreign law (such as private equity or mezzanine funds). Non-EU foreign lenders also establish a Luxembourg SPV for the purpose of one single credit operation to EU-based borrowers with the view to benefit from attractive tax features. Another large portion of the financing transiting through Luxembourg is made of intra-group financing or credit to related parties. Finally, the Luxembourg investment fund industry, being the second-largest in the world, remains a large credit provider.

Loan financings funded by, for example, private equity, mezzanine funds or other types of asset management firms, will be closely aligned to standard agreements used by banks or credit institutions of their jurisdiction (eg, LMA style).

4 How are the terms of a bank loan facility affected by the type of investors participating in such facility?

The Anglo-Saxon structuring of loan financing is quite widespread in Luxembourg and borrowers and legal counsel are quite familiar with their terms and structure. The terms of the tranche A of the financing (funded generally by credit institutions) and tranche B or high-yield tranche (subscribed by institutional investors) differ slightly, in particular, in consideration of the subordination nature of the tranche B.

Institutional investors who remain invested until final repayment tend to offer more flexible terms re, for example, less stringent loan-to-value ratio or fewer covenants, but will require call protection, either under the form of conversion or otherwise. In the case of voluntary prepayment, such investors will call the option for whole loan repayment.

Institutional investors will also closely detail concepts such as permitted sale, change of control and initial public offering provisions.

5 Are bank loan facilities used as 'bridges' to permanent debt security financings? How do the structure and terms of bridge facilities deviate from those of a typical bank loan facility?

Bank loan facilities, with a shorter term and higher interest rate, can be used as a bridge to permanent debt security financings, fuelled by historic low interest rates as well as the quanititve easing programme of the European Central Bank.

When sufficient time is available, an LMA-style syndicated facility will often be combined with the issuance of New York law governed bonds that may be exchanged against the loan. If the issuance does not occur, the lender may request repayment or consolidate the loan into a permanent financing.

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6 What role do agents or trustees play in administering bank loan facilities with multiple investors?

There are no specific regulations relating to the activity of administrative agents for a bank financing.

The law of 10 August 1915 on commercial companies, as amended (the Company Law) provides for the appointment of a fiduciary agent (to some extent equivalent to a trustee) in certain types of companies such as public companies limited by shares that have issued debt securities. Such trustee will act as representative of the bondholders and undertake certain responsibilities set out in the Company Law.

Luxembourg has adopted the law of 23 July 2003 on trusts and fiduciary agreements (the 23 July Law), bringing into force the Hague Trusts Convention on the law applicable to trusts and on their recognition of 1 July 1985. Although it is not possible to create a trust in the Anglo-Saxon sense in Luxembourg, trusts governed by foreign law are recognised in Luxembourg to the extent that they are authorised by the law of the jurisdiction in which they are created.

The adoption of the of 23 July Law introduced, under Luxembourg law, a specific regime equivalent to the trust institution, known as the fiduciary agreement. The undertaking of the role of fiduciary agent is, however, limited to financial institutions and certain professionals of the financial sector. A fiduciary agreement can be easily implemented (there are no registration or publication requirements) and is effective towards third parties upon its execution, without further notification requirements. An assignment of debt to a trust is enforceable against third parties upon its execution.

The law of 5 August 2005 on financial collateral (the Financial Collateral Law) specifically provides that a security interest over financial instruments can be granted to an agent or a trustee acting for itself and/or for the benefit of all lenders, to secure the claims of third-party beneficiaries, present or future, provided such third-party beneficiaries are determined or determinable.

For other type of securities (including fiduciary arrangements), the effect of the agency provisions (whether governed by Luxembourg or foreign laws) will be recognised and enforceable in Luxembourg. It is, however, recommended to specify the capacity in which the security beneficiary is acting in the relevant security agreement.

The lenders or, as the case may be, the borrowers will indemnify the security agent or trustee for any cost, loss or liability they incur other than by reason of its own gross negligence or wilful misconduct.

7 Describe the primary roles and typical fees of the financial institutions that arrange and syndicate bank loan facilities.

Large financings in Luxembourg tend to be arranged by the lead lender, who will often act as mandated lead arranger and often an affiliate company from the lead lender will act as security agent under the loan agreement and as administrative agent. In certain transactions, such roles are performed by unrelated third-party service providers.

All such roles give entitlement to specific fees, which are generally set out in separate fee letters. Arrangement fees are often a certain percentage of the total amount of the financing.

To the extent the syndicated loan facilities are governed by Luxembourg law, arrangement and syndication fees will generally be in line with the LMA standards and practices.

8 In cross-border transactions or secured transactions involving guarantees or collateral from entities organised in multiple jurisdictions, which jurisdiction's laws govern the bank loan documentation?

Luxembourg law will usually not govern bank loan documentation in cross-border transactions. English, German or New York law will largely apply to the main finance documentation. Documentation with respect to security interests over assets located in Luxembourg is governed by Luxembourg law on the basis of the lex rei sitae principle. In large acquisition finance transactions the parties will have agreed to so-called 'agreed security principles' setting out certain principles (and restrictions) that are to be reflected in the various local law security agreements.

Regulation

9 Describe how capital and liquidity requirements impact the structure of bank loan facilities, including the availability of related facilities.

Since January 2014, credit institutions have been subject to Directive 2013/36/EU (CRD IV) and the Capital Requirements Regulation. Banks are therefore required to comply with the prescribed liquidity coverage ratio (LCR) and to report it to the Luxembourg authorities on a monthly basis. The LCR compares the stock of high-quality liquid assets held by the banks with the total net cash outflows expected over the next 30 days. This requirement aims to ensure that banks maintain enough liquid assets to survive for 30 days in a stress scenario, as specified by the Commission of Financial Sector Surveillance (CSSF). On 23 July 2015, Luxembourg adopted a law transposing these capital requirements in compliance with the deadline set as 1 January 2016 under CRD IV.

Hence, banks must have total capital of at least 8 per cent of risk-weighted assets. Following the transposition of CRD IV, the minimum requirement for Tier 1 capital has been increased from 4 per cent to 6 per cent, and the minimum requirement for common equity Tier 1 (CET 1) has been increased from 2 per cent to 4.5 per cent.

In 2014, credit institutions started to report elements of the net stable funding ratio (NSFR), which aims to ensure that banks maintain stable sources of funding for more than one year relative to illiquid assets and off-balance-sheet contingent calls. Although not binding until 2018, the NSFR is likely to be modified or altered during the course of the coming years. The CSSF has published in its Circular 14/582 the European Banking Authority guidelines on retail deposits.

Following implementation of these critical reforms, one of the main results for the banking industry may be more stringent rules in relation to the granting of credit facilities on, for example, shorter times or limitation of loans having a speculative grade. The requirement of higher liquidities for covering short-term facilities is likely to affect their profitability and also impact the costs of long-term loans. Banks may decide to diversify the scope of their banking products or services and to place less focus on credit activity. Another potential result involves cost. In particular, transposition of the CRD IV requirements may increase the cost of credit, even on an undrawn commitment.

10 For public company debtors, are there disclosure requirements applicable to bank loan facilities?

The amended law of 11 January 2008 relating to the transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and transposing applicable EU directives and regulations requires the disclosure of periodic and ongoing information about issuers of securities as from the moment those securities are admitted to trading on a regulated market situated or operating in Luxembourg.

The issuer for which Luxembourg is the home member state must make its annual financial and half-yearly financial reports public, such reports intending to give a true and fair view of the assets, liabilities (including bank loan facilities), financial position and profit or loss of the issuer. To the extent the obtaining of a bank loan facility constitutes information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments, the disclosure requirements as set out in EU Regulation 596/2014 of 16 April 2014 on market abuse (into force as of 3 July 2016) apply.

11 How is the use of bank loan proceeds by the debtor regulated? What liability could investors be exposed to if the debtor uses the proceeds contrary to regulations? Can investors mitigate their liability?

In Luxembourg there is no specific requirement or regulation in respect of the use of bank loan proceeds as long as no public order interest is breached. However, the law of 12 November 2004 on the fight against money laundering and terrorist financing (the Law of 2004) is fully applicable to credit institutions and the 1993 Law provides that these credit institutions are bound by the professional obligations laid down by the Law of 2004.

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In particular, credit institutions must perform customer due diligence measures in the following cases:
- when establishing a business relationship;
- when carrying out occasional transactions amounting to €15,000 or more, whether the transaction is carried out in a single operation or in several operations that appear to be linked;
- when there is a suspicion of money laundering or terrorist financing, regardless of any derogation, exemption or threshold; and
- when there are doubts about the veracity or adequacy of previously obtained customer identification data.

Such customer due diligence measures must include:
- the identification of the customer and the verification of the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;
- the identification, where applicable, of the beneficial owner and the provision of 'reasonable measures' to verify his or her identity so that the professional is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts and similar legal arrangements, the provision of reasonable measures to understand the ownership and control structure of the customer;
- the provision of information on the purpose and intended nature of the business relationship; and
- the conduct of ongoing monitoring of the business relationship to ensure that the transactions being conducted are consistent with the professional's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up to date.

The Luxembourg parliament is currently discussing the implementation of the European Union Fourth Anti-Money Laundering Directive (2015/849/EU), which should have been transposed into national law by 26 June 2017. The transposing draft bill is amending the Law of 2004 and endorsing a new holistic and risk-based approach in order for the professionals subject to this legislation to adapt their level of vigilance in accordance with the identified risks.

According to the Law of 2004, any person or entity who knowingly contravenes the above-mentioned provisions shall be fined between €1,250 and €1.25 million. Considering that the infringement of these requirements constitutes a criminal offence, neither the banks nor the investors can limit their liabilities.

While there is in general no obligation for the investors or lenders to monitor the use of the funds, allocating the funds of a facility for another purpose than provided for in the agreement will very likely constitute an event of default and cause acceleration of the facility and early repayment.

12 Are there regulations that limit an investor's ability to extend credit to debtors organised or operating in particular jurisdictions? What liability are investors exposed to if they lend to such debtors? Can the investors mitigate their liability?

Apart from the international financial sanctions imposed on specific jurisdictions and taken at the EU or global levels, there is no particular regulation limiting an investor's ability to extend credit to debtors organised or operating in particular jurisdictions.

13 Are there limitations on an investor's ability to extend credit to a debtor based on the debtor's leverage profile?

If an investor wants to extend credit to a debtor, the Luxembourg law is, in general, very flexible and does not impose any debt-to-equity ratios. However, to the extent relevant, thin capitalisation rules apply in certain situations (see question 28).

Lenders should, however, consider the solvability of their creditor because lenders providing credit to a debtor who is in a situation of financial distress, suspension of payments or whose financial situation is in an irreversible and deteriorated state can be held liable for any increases of loss caused by a disproportionate financial support to such debtor. The lender must, for instance, avoid creating an appearance of creditworthiness that would be likely to inspire unjustified trust in the borrower's solvency. Case law is, however, quite limited in this respect in Luxembourg, unlike in countries such as France and Belgium.

14 Do regulations limit the rate of interest that can be charged on bank loans?

There are usury rules in the Luxembourg Civil Code, allowing a judge to reduce an interest deemed abusive to the legal interest rate (currently 8.05 per cent for professionals). But there is no fixed rate nor legal provision prohibiting a high remuneration on a loan.

An interest would only be deemed excessive if obtained by a lender who would abuse of the inexperience of the borrower (case law generally excludes loans between professionals), such that the rate would be deemed excessive in comparison to the risk associated with the loan. There is no automatic requalification of a remuneration on a loan and it is quite common in Luxembourg to have high interest rates with high exit fees. However, if the lender voluntarily abuses the borrower's need to get an interest clearly exceeding the normal interest in respect of the risk coverage of the loan, a Luxembourg judge, at the request of the borrower, can reduce its obligations to repay the loan capital and the payment of interest.

Article 494 of the Luxembourg Criminal Code provides that whoever, by abusing a borrower's weaknesses, obtains a rate exceeding the legal interest (annually fixed via a Grand-Ducal Regulation and currently equal to 8.05 per cent per annum) can be sentenced to imprisonment of one month to one year and pay fines ranging from €500 to €25,000, or either one of these penalties.

Another rule of Luxembourg public policy forbids the lender to demand interest on interest (prohibition of anatocism). The principle of anatocism (governed by article 1154 of the Luxembourg Civil Code) limits the frequency at which interest can be compounded on interest: interest can only be compounded once a year, provided such interest is due at that moment in time.

The principle of freedom of contract is further limited by the general duty of care. Parties should act reasonably and fairly when negotiating, executing and performing a contract. The principle of due care sometimes allows a Luxembourg judge to intervene when a party's negotiating position would result in unreasonable contractual provisions for the other party, including any imbalance between the parties' interests.

15 What limitations are there on investors funding bank loans in a currency other than the local currency?

There are no foreign exchange control in Luxembourg and there exist no limitations on investors in funding bank loans in currency other than the euro.

However, Recommendation A – Risk awareness of borrowers of the recommendations of the European Systemic Risk Board (ESRB/2001/1) recommends to require financial institutions to provide borrowers with adequate information regarding the risks involved in foreign currency lending.

16 Describe any other regulatory requirements that have an impact on the structuring or the availability of bank loan facilities.

While there are no specific Luxembourg regulatory requirements that will have a direct impact on the structuring of the bank loan facilities, the following European and international regulations or agreements do have an impact on the loan documentation itself whereby the debtor may incur additional filing and reporting obligations or which will increase the cost of lending for banks or credit institutions.

In addition to the Law of 2004 and the CRD IV regulations mentioned above, the banking industry has to face new regulatory and reporting obligations resulting from the 2008 financial crisis, mainly imposed by the EU regulations. This has imposed new organisational and technical constraints on financial institutions who are subject to a whole set of new regulatory requirements. Stringent requirements for transparency and exchange of banking information are reshaping the banking activity in Luxembourg.

On 1 August 2015, the Foreign Account Tax Compliance Act (FATCA) became effective. Among other provisions, the FATCA implemented the intergovernmental agreement entered into on 28 March 2014 between the Grand Duchy and the United States in order to comply with the FATCA regulation in force in the United States. This act requires that any foreign financial institution reports to the US tax administration any US account holders (and US beneficial owners of passive non-financial foreign entities). FATCA imposes a 30 per cent US withholding tax on US-sourced payments to foreign financial institutions (including banks,

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brokers, custodians and investment funds) that fail to comply with the FATCA rules.

Other similar reporting obligations bearing on the financial institutions have recently been implemented in Luxembourg such as the Common Reporting Standard transposed by the law of 18 December 2015 on the automatic exchange of financial account information. In addition, the European Market Infrastructure Regulation 648/2012 as amended by the Regulation 2365/2015 on OTC derivatives, central counterparties and trade repositories (EMIR) has been in force since 12 January 2016. The purpose of EMIR is to introduce new requirements to improve transparency and reduce the risks associated with the derivatives market. EMIR also establishes common organisational, conduct of business and prudential standards for central counterparties and for trade repositories and applies to all financial and non-financial counterparties established in the EU that enter into derivative contracts.

Security interests and guarantees

17 Which entities in the organisational structure typically provide collateral and guarantee support for bank loan financings? Are there limitations on which entities in the organisational structure are permitted to provide such support?

In cross-border financing transactions, Luxembourg companies are often located in the upper part of the group structure and are required to provide security interests over their assets and/or provide guarantees in relation to the obligations of their (in)direct subsidiaries.

From time to time Luxembourg companies are involved in cross-collateralised transactions implying the granting of security interest also for the obligations of their parent company or sister companies. In such situation, the ultimate corporate benefit of the grantor must be carefully scrutinised to ensure full enforcement of the securities.

Security interests over assets (rights in rem) are limited recourse to the extent they are limited to the assets over which a security interest is granted.

There may be limitations where cross-group guarantees or upstream guarantees are being granted. Luxembourg does not recognise the concept of 'group of companies' and the interest of the corporate group is not sufficient to justify and validate an upstream guarantee. Corporate benefit must be scrutinised case by case: the guarantor should have some personal interests in the guarantee, notably through its expected benefits, and the risks it may take should be commensurate with the benefit deriving therefrom. In addition, the financial exposure deriving from the guarantees should not exceed the financial means of the guarantor, and in particular should not induce the guarantor, if the guarantee is called, into an insolvent position. In practice, guarantors under cross-group guarantees tend to limit, however disputable, the contractual recourse to a certain percentage of the net asset value of the grantor.

18 What types of obligations typically share with the bank loan obligations in the collateral and guarantee support? If so, are all such obligations equally and ratably covered by the collateral and guarantee support?

Luxembourg collateral will secure the secured liabilities or obligations as defined in the foreign law governed loan documentation and in general follow the market practice of that jurisdiction.

19 Which categories of assets are commonly pledged to secure bank loan financings? Describe any limitations on the pledge of assets.

The main categories of assets commonly pledged to secure bank loan financings or debt issued to the public are the following:

- financial instruments (as defined in the Financial Collateral Law) (mainly consisting of shares, bank accounts, bonds and receivables) comprising:
    - all securities and other instruments, including but not limited to shares in companies and other securities equivalent to shares in companies, participations in companies and units in collective investment undertakings, bonds and other forms of debt instruments, certificates of deposit, loan notes and payment instruments;
    - securities that give the right to acquire shares, bonds or other securities by subscription, purchase or exchange;
    - term financial instruments and instruments giving rise to a cash settlement (excluding instruments of payment), including money market instruments;
    - all other instruments evidencing ownership rights, claim rights or securities;
    - all other instruments related to financial underlyings, indices, commodities, precious metals, produce, metals or merchandise, other goods or risks; and
    - claims relating to the items described above or rights in or in respect of these items, whether these financial instruments are in physical form, dematerialised, transferable by book entry or delivery, bearer or registered, endorseable or not and regardless of their governing law; and
- real estate property.

Luxembourg law does not provide for the creation of floating charges or debentures. It is, however, often the case in international transactions that a Luxembourg company grants a floating charge or a debenture over non-Luxembourg-located assets.

20 Describe the method of creating or attaching a security interest on the main categories of assets.

Pursuant to the Financial Collateral Law a security over shares, claims and bank accounts needs to be granted contractually in writing, however no notarial deed is required.

There are no particular taxes, costs or charges in relation to the creation of a guarantee or security interest. No stamp duty or similar tax or charge applies to the creation or enforcement of a security interest over moveable assets such as shares, bank accounts or receivables, nor are there any public registration requirements. However, in order to obtain a definite date the lender or security agent can choose to voluntary register the security agreement with the Administration of Registration and Domains in Luxembourg.

Mortgages over real property are passed before a Luxembourg notary public in the form of a notarial deed and are subsequently registered at the mortgage registry. Such registration is only valid for a duration of 10 years (but is renewable), and entails certain costs. A tax of 0.05 per cent on the total amount of the secured debt for first registration and renewal is levied for mortgage. Mortgages are subject to a tax of 1 per cent on the total amount of the secured debt. Notary fees are calculated on a sliding scale, based on the value of the mortgaged property (ranging between 4 per cent and 0.05 per cent).

21 What steps are necessary to perfect a security interest on the main categories of assets? What are the consequences of failing to perfect a security interest?

Under Luxembourg law, the transfer of the possession (dispossession) of the assets over which the pledge is granted is a condition to the constitution of the pledge. Such dispossession can be done in various ways depending on the type of assets to be pledged. Dispossession is also required to make the pledge enforceable towards third parties. The law of the pledgor's jurisdiction may impose further perfection or notification requirements.

The dispossession of registered financial instruments whose transfer takes place by a transfer in the registers of the issuer (as this is the case with respect to the shares in public company limited by shares) may be established by recording the pledge in those registers.

A pledge created over shares in a private limited liability company has to be notified to the company whose shares are pledged.

Unless the debtor whose claims are pledged is party to the pledge agreement, such pledge agreement shall be notified to or acknowledged by the debtor. Lacking such notification, the debtor of a pledged claim may validly discharge his or her obligation to the pledgor as long as he or she has no knowledge of the mere conclusion of the pledge.

A pledge over bank accounts shall be notified to and acknowledged by the account bank maintaining the accounts.

A mortgage over real property shall be registered at the mortgage registry.

Failure to comply with these provisions could jeopardise the enforceability of the security interest and its ranking towards third parties and other creditors.

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22 Can security interests extend to future-acquired assets? Can security interests secure future-incurred obligations?

The Financial Collateral Law specifically provides that a security over financial instruments can be granted over all collateral whether presently owned or in the future by the collateral provider.

Luxembourg security interest can secure future-incurred obligations.

23 Describe any maintenance requirements to avoid the automatic termination or expiration of security interests.

Luxembourg security interests are accessory in nature and continue to exist as long as the principal claim they secure is in place. No maintenance is required to avoid automatic termination or expiration.

An exception to the above are mortgages over real property assets. This mortgage needs to be renewed every 10 years (see question 20).

24 Are security interests on an asset automatically released following its sale by the debtor? If so, are the releases mandated by law or contract?

As mentioned in question 23, Luxembourg security interests are accessory in nature and hence, as long as the claim they secure remains in place, the security interests continue to exist, in spite of the transfer of the pledged assets to another party. This transfer is customarily not authorised under the Luxembourg security documentation, unless a specific 'permitted disposal' and related release of the security interest have been considered and agreed upon by the parties in the main finance documentation.

25 What defences does a guarantor have against claims for non-fulfilment of guarantee obligations? Can such defences be waived?

Under Luxembourg law, a guarantor under a suretyship (caution) benefits from various defences for non-fulfilment of its guarantee obligations in particular when the guaranteed obligations are challenged, and in particular in the following occurrences:

- the borrower has not defaulted under the loan agreement;
- the lender has not satisfied its own obligations under the loan agreement; or
- the guaranteed obligations are null and void.

In case of a first demand guarantee the guarantor undertakes to irrevocably guarantee the secured obligation up to a fixed sum irrespective of the secured obligations. This payment obligation is abstract and independent from any objection that can be raised with respect to the validity or enforceability of the guaranteed obligations.

The large contractual flexibility of Luxembourg law allows the waiver of defences or objections by the guarantor in relation to the payment of the guaranteed obligations.

26 Describe any parallel debt or similar requirements applicable in a secured bank loan financing where an agent acts for multiple investors.

The Financial Collateral Law specifically provides that a security over financial instruments can be granted to an agent or a trustee acting for itself and for the benefit of all lenders, to secure the claims of third-party beneficiaries, present or future, provided such third-party beneficiaries are determined or determinable. Hence, there is no need for a parallel debt mechanism in relation to a pledge created over financial instruments.

To the extent a mortgage over real property is granted in favour of a security agent or trustee, parallel debt provisions are required. Such parallel debt will be the claim secured by the mortgage.

27 What are the most common methods of enforcing security interests? What are the limitations on enforcement?

The Financial Collateral Law provides that security interests in relation to financial instruments can be enforced as follows (with the first option being the most common one), unless otherwise agreed by the parties at the moment of contracting. A notice prior to enforcement is not required:

- to appropriate or cause a third party to appropriate the pledged assets at a price fixed, before or after their appropriation, according to the valuation method mutually determined by the parties;
- to assign or cause the assignment of the pledged assets by private sale in a commercially reasonable manner, by a sale on the stock exchange or by public auction;
- to obtain a court decision ruling that the pledged assets shall remain in the party's possession up to the amount of the debt, on the basis of an expert's estimate; or
- in the case of financial instruments, to appropriate these financial instruments at the market price, if they are admitted to official listing on a stock exchange located in Luxembourg or elsewhere or are traded on a recognised, functionally operational, regulated market that is open to the public or at the price of the last net asset value published, in the case of units or shares of a collective investment undertaking that regularly calculates and publishes a net asset value.

Unless agreed otherwise in the financing documentation, a mortgage over a real property will be exercised by a bank or credit institution by appointing a notary public to organise the sale of the real property through a public auction. In the event the mortgagor is declared bankrupt, the court-appointed receiver will organise the sale of real property.

28 Describe the impact of fraudulent conveyance, financial assistance, thin capitalisation, corporate benefit and similar doctrines on the structure of bank loan financings.

Financial assistance

As a general principle, it is unlawful for a Luxembourg limited liability company incorporated in the form of a public company limited by shares and for companies generally governed by rules applicable to corporations to provide financial assistance (advance funds, grant loans or provide security) for the acquisition of its own shares by a third party. Luxembourg law does not elaborate further on what constitutes prohibited financial assistance.

Prohibited financial assistance does not apply to transactions undertaken by banks and financial institutions in their ordinary course of business, or to transactions in which shares are acquired by, or for the benefit of, employees.

A breach of the financial assistance prohibition may result in civil and criminal liability for the target's directors. Third-party lenders may face civil liability and the transaction may be annulled.

Financial assistance is, however, allowed provided the company complies with the whitewash procedure, which requires, among other things, sufficient distributable reserves at least equal to the amount of the financial assistance granted, approval from the shareholders and the inclusion of the amount of the financial assistance as a non-distributable reserve (liability) in its accounts.

Cross-stream and upstream guarantee

See question 17.

Corporate benefit

The granting of a guarantee or security must meet the requirement of a minimum and adequate corporate benefit. The corporate benefit analysis must be considered on a case-by-case basis and be explicitly resolved upon by the board of managers or directors of the company (and also by the shareholders, if required by the articles of incorporation of the company). See also question 17.

Thin capitalisation

There are no specific thin capitalisation rules in Luxembourg and if for example an investor wants to fund an acquisition as far as possible with debt, the Luxembourg tax law is, in general, very flexible and does not impose any strict debt-to-equity ratios on ordinary taxable companies.

Informal limits are, however, applied by the tax authorities for the financing of an acquisition of a subsidiary by intra-group loans. In this situation, the Luxembourg tax authorities generally consider a ratio of 85:15 as being in line with the arm's-length principle, which means that up to 85 per cent of the purchase price of the participations can be financed by interest-bearing intra-group loans. Interest rates of the intra-group loans must be in line with the arm's-length principles evidenced by a transfer pricing report in accordance with transfer pricing

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regulations in Luxembourg. This may be further affected by the Anti-Tax Avoidance Directive formally adopted by the European Council on 12 July 2016, to be transposed into national law by 31 December 2018. The upcoming exit of the United Kingdom from the EU should not have a priori any adverse effect when structuring a financing between Luxembourg and the UK as the applicable zero rate withholding tax pursuant to the EU Savings Directive would be substituted by the provisions of the double tax treaty between Luxembourg and the UK, which currently provides for a full exemption on interest payments.

For the purposes of determining the debt-to-equity ratio, an interest-free loan from shareholders may be treated as equity for corporate income tax purposes, so it may be possible to structure funding with a 99:1 debt (interest free/bearing)-to-equity ratio. A debt-to-equity ratio of 99:1 could also be achieved by using certain exit instruments such as tracking loans. Funding structures should be analysed on a case-by-case basis. Any excess interest payments that result from an excess over the above debt-to-equity ratio would be reclassified as hidden profit distribution, subject to withholding tax at a rate of 15 per cent generally applicable on dividends payments, unless the recipient qualifies for the affiliation privilege in Luxembourg. This may be further affected by the Anti-Tax Avoidance Directive formally adopted by the European Council on 12 July 2016 and to be transposed into national law by 31 December 2018.

Finally, gross-up provisions are common in lending documentation and the borrower is usually required to gross-up its payment against any withholding tax that would apply on interest payments.

Clawback and fraudulent conveyance

Transactions can only be clawed back or challenged in a bankruptcy. A clawback is initiated by the receiver and debated in court. Only specific transactions can be challenged.

Transactions entered into during the hardening period – fixed up to six months before the bankruptcy judgment – and up to 10 days before this period may be declared invalid if they constitute the preferential satisfaction of one creditor over another.

The court can cancel the following transactions: disposal of assets without adequate consideration; payments made for debts not yet due; payments of due debts by means other than cash or bills of exchange; and granting of any security for a debt contracted before the hardening period.

Any payment for accrued debt or any transactions against money made after a company has ceased its payments and before the bankruptcy judgment may be cancelled by the court if the beneficiary of the payment or the contracting party was aware of the debtor's cessation of payments.

Mortgages granted during the hardening period (or 10 days before) may be cancelled if their registration has not been performed within 15 days of the conclusion of the mortgage agreement. Payments made in fraud of creditors' rights are void irrespective of the day they were made.

The rights of creditors benefiting from a security governed by the Financial Collateral Law, even granted during the hardening period, are not affected by bankruptcy or reorganisation proceedings and therefore remain enforceable.

Intercreditor matters

29 What types of payment or lien subordination arrangements, or both, are common where the debtor has obligations owing to more than one class of creditors?

For multi-jurisdictional syndicated facilities the borrowers and the lenders will commonly enter into a foreign law intercreditor agreement, which will determine the rights of each class of creditors (senior, mezzanine, junior) with respect to, in particular, their rank and subordination, the payment arrangements and the enforcement of security interests. Such intercreditor agreements will generally be in the form of an LMA-style agreement.

For mid-cap transactions and straight loans, the sponsors of the borrower and the lenders will enter into a subordination agreement whereby the sponsors agree to the full subordination of their claims as regards the bank loan. In limited cases, the sponsors are entitled to certain 'permitted payments'.

Under Luxembourg law, no legal provision exists preventing creditors from agreeing on the rank of their respective claims. Case law and Luxembourg legal scholars recognise the validity of contractual subordination arrangements. Such agreements are effective towards third parties and courts would normally enforce them.

30 What creditor groups are typically included as parties to the intercreditor agreement? Are all creditor groups treated the same under the intercreditor agreement?

See question 29.

31 Are junior creditors typically stayed from enforcing remedies until senior creditors have been repaid? What enforcement rights do junior creditors have prior to the repayment of senior debt?

Junior creditors cannot generally exercise any of their rights until the senior liabilities have been satisfied. However, as mentioned under question 29, for multi-jurisdictional syndicated facilities a foreign law LMA-style intercreditor agreement will be but in place, including the usual LMA provisions regarding junior creditors' rights and restrictions.

32 What rights do junior creditors have during a bankruptcy or insolvency proceeding involving the debtor?

The intercreditor agreement sets out the rights and obligations of each category of creditor as well as the control of such rights per creditor category for any action that is to be taken during a bankruptcy or insolvency proceeding involving the debtor. Control of, for example, 66.7 per cent is required to restructure the loan agreement or enforce the security interests.

The junior creditors will be entitled to enforce their rights under the intercreditor agreement, subject to compliance with directions of or consent from the majority of the senior creditors and from the majority of the mezzanine lenders (if any).

Unsecured junior lenders will be entitled to a pari passu distribution of any monies with other unsecured creditors but only after the satisfaction of the senior secured liabilities.

33 How do the terms of the intercreditor arrangement change if creditor groups will be secured on a pari passu basis?

To the extent all creditor groups are secured on a pari passu basis, the intercreditor agreement will foresee an instructing group (generally representing the larger portion of the debt), which shall decide on the enforcement of the pari passu security interests.

Loan document terms

34 What forms or standardised terms are commonly used to prepare the bank loan documentation?

International financing transactions generally follow the sample standards of the banks extending the credit and contain the essentials of the terms and conditions in the contractual agreement. An Anglo-Saxon lender would follow the LMA standards, while German and French banks would go by their template used in domestic transactions. Reference to Luxembourg law is fairly limited in those agreements, but is used to comply with the imperative and public policy provisions prevailing in Luxembourg. When foreign lenders have established their operations or a branch in Luxembourg, LMA standards can be used with a substantial reference to Luxembourg law. However, this type of LMA Luxembourg standard is very limited in the market.

Bank loan documentation used in Luxembourg is mostly prepared on the base of the standardised terms of the LMA. The Association of German Banks provides a master agreement that is used from time to time.

35 What are the customary pricing or interest rate structures for bank loans? Do the pricing or interest rate structures change if the bank loan is denominated in a currency other than the domestic currency?

Interest rate structures will depend upon types of credit loans but also the banking practices of the lenders. A fixed rate is preferred in fixed asset-backed financing (real estate, equipment, immoveable investments) while floating rates are used in most corporate lending transactions. It will generally be a US structure with a base rate or a Libor plus a margin fixed on a specific period. Mandatory costs may also be

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included in the computation of the interests to reflect cost of lending. Floating interest rates refer generally to a benchmark rate such as Libor for US dollars, British pounds, Swiss francs, yen or Euribor for loans denominated in euros or occasionally NIBOR (NOK), CIBOR (DKK) and STIBOR (SEK) and a margin. In private equity transactions, exit fees are also common and ensure a minimum tax return from lenders on the loan operation.

36 What other bank loan yield determinants are commonly used?

Credit facilities are not issued at a discount, however pricing floors can be instituted with respect to the determination of interest rates. Zero floor provisions are often included to avoid negative interest rates. Pricing on tranche B loans may be more diverse and can include conversion rights in equity or additional warrants with attractive pricing conversion with a view to enhancing the targeted return.

37 Describe any yield protection provisions typically included in the bank loan documentation.

When a bank financing is put in place on the basis of a foreign law governed LMA-style agreement the following yield protection provisions are generally included in the loan agreement:

- increased cost provisions to cover costs the lenders may incur as a result of:
  - the introduction of or any change in (or in the interpretation, administration or application of) any law or regulation; or
  - compliance with any law or regulation made after the date of the financing agreement (eg, according to Basel III and CRD IV, see question 9);
- make-whole amounts or prepayment fees;
- tax gross-up provisions; and
- break-up costs.

Gross-up provisions are in most cases irrelevant in Luxembourg since there is no withholding tax on interest payments in Luxembourg, but aim at protecting any requalification of interest into profit distribution when rates are formed of a fixed and high variable portion deriving from the borrower profits.

38 Do bank loan agreements typically allow additional debt that is secured on a pari passu basis with the senior secured bank loans?

When a bank financing is put in place on the basis of a foreign law governed LMA-style agreement and in particular in acquisition finance, accordion facilities can be included on an uncommitted basis. Depending on the negotiated terms, such debt may be secured pari passu. To the extent permitted, additional debt can be incurred outside of the financing arrangement and will, depending on the situation or the negotiation, be either super senior secured (DIP financing), pari passu secured or secured on a second-ranking basis. A specific intercreditor agreement will be put in place to arrange enforcement of security interests and the distribution of proceeds. Under the Financial Collateral Law a security interest of a higher or lower ranking can only be granted with the express consent of the existing beneficiary of a security interest.

39 What types of financial maintenance covenants are commonly included in bank loan documentation, and how are such covenants calculated?

When a bank financing is put in place on the basis of a foreign law governed LMA-style agreement the following financial maintenance covenants are generally included in the loan agreement:

- equity-to-debt ratio;
- loan-to-value ratio, indicating the maximum percentage of the loan towards the value of a pool of assets;
- an interest cover ratio, indicating the minimum ability of the debtor to pay its interest obligations for a certain interest period; and
- capital expenditure indicating the maximum amount for capital expenditures.

In case of a breach of a financial maintenance covenant, equity cure rights are included in the loan documentation enabling the sponsors to inject equity in the structure to cure such breach.

In Luxembourg law governed straight loans, the financial maintenance covenants will generally be limited to loan-to-value covenants and interest cover ratios.

40 Describe any other covenants restricting the operation of the debtor's business commonly included in the bank loan documentation.

Covenants patterns follow the type of sample loan used in the transaction, in particular the common-law or civil-law oriented nature of the contractual documentation. Concepts of good faith in civil law imposed under Luxembourg statutory laws require the adoption of fair and responsible practices from lenders and borrowers. The contractual documentation may strengthen or add some obligations on the borrowers not foreseen in the law, such as covenants restricting payments of dividends, disposal of assets, change of control and negative pledge preventing them from granting additional security interests or securities with lower rankings, or incurrence of further debt.

41 What types of events typically trigger mandatory prepayment requirements? May the debtor reinvest asset sale or casualty event proceeds in its business in lieu of prepaying the bank loans? Describe other common exceptions to the mandatory prepayment requirements.

When a bank financing is put in place on the basis of a foreign law governed LMA-style agreement, mandatory prepayment is generally triggered by events such as changes of control, unauthorised payments of dividends by the borrower to the sponsor, sale of assets and any other event that benefits the borrower to the extent not permitted under the loan facility or otherwise not authorised by the lender. In specific loans, contractual provisions may foresee that free cash proceeds exceeding certain pre-agreed thresholds trigger some prepayment obligations (cash sweep provision).

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42 Describe generally the debtor's indemnification and expense reimbursement obligations, referencing any common exceptions to these obligations.

In Luxembourg law governed straight loans a borrower will indemnify the lenders for any costs, expenses or loss incurred by the lender in relation to:

- investigating any event that it reasonably believes is an event of default;
- acting or relying on any notice, request or instruction that it reasonably believes to be genuine, correct and appropriately authorised; or
- instructing lawyers, accountants, tax advisers or other professional advisers or experts as permitted under the loan agreement.

A Luxembourg judge may, however, reduce the amount of such indemnities if it is considered as punitive damages.

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Loans & Secured Financing
ISSN 2059-5476

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

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