

IN-DEPTH

Acquisition And Leveraged Finance

EDITOR'S PREFACE

LEXOLOGY



Acquisition and Leveraged Finance

EDITION 12

Contributing Editor

Tracy Liu

Latham & Watkins LLP

In-Depth: Acquisition and Leveraged Finance (formerly The Acquisition and Leveraged Finance Review) provides a practical overview of the most common structures and methods used to finance acquisitions in major jurisdictions worldwide, along with the most salient features of the relevant legal and regulatory frameworks. With a focus on recent trends and developments, it offers incisive legal and commercial analysis for practitioners and market operators.

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Editor's Preface

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Many anticipated 2025 as the year when M&A dealmaking would make a robust comeback. By the end of 2024, the foundation for a resurgence was being established, with interest rates being gradually reduced across most major economies and the uncertainty associated with election outcomes becoming a thing of the past. Adding to the optimism was a strong beginning for the leveraged finance market, which continued the momentum from the previous year – one of the busiest on record – although activity remained concentrated on refinancings, repricings and add-ons during favourable market windows. Additionally, there was widespread expectation that the new US administration would create a more business-friendly climate and implement supportive regulatory policies, providing the necessary impetus for an increase in M&A dealmaking.

The initial optimism quickly faded as nervousness grew around the potential impact of the new US administration's tariff policies. This culminated in sweeping tariffs announced by the White House on what was dubbed 'Liberation Day', unleashing turmoil in the global equity and financial markets. Activity in the leveraged finance markets ground to a halt in the aftermath of 'Liberation Day', resulting in the shelving of deals in syndication as market sentiment soured and market participants grappled with the impact of the tariff-related turmoil.

As with previous episodes of market dislocation in recent years, private equity sponsors pivoted to private credit solutions to provide the certainty of execution, particularly for any M&A processes already in play. The syndicated market, no doubt battle-hardened from navigating multiple macroeconomic and geopolitical headwinds in recent years, bounced back very quickly as soon as market conditions stabilised to close out the second quarter strongly, with the market active into the start of the traditional summer lull. However, much of the supply on offer remains centred around opportunistic activity as private equity sponsors capitalised on robust demand and pricing compression. The market was also supportive of dividend recaps, evidenced by a few jumbo cross-border dividend recaps that came to market as the exit environment remains challenging.

While rosier predictions for a return to the pre-2022 glory days of M&A dealmaking have once again failed to materialise (at the time of writing), the 'tariff turmoil' creates both challenges and opportunities. As some private equity sponsors and corporates adopt a more cautious 'wait and see' approach in response to a range of new uncertainties, others are seizing compelling opportunities to acquire high quality assets or diversify into assets that are resistant to the vagaries of the evolving tariff landscape. Given the current comparatively more stable dealmaking backdrop in the UK and Europe, US players are increasingly seeking to expand their investment in the region, which should also hopefully translate to an uptick in deal flow.

Will the remainder of 2025 finally see the much yearned-for boom in M&A and LBO activity? In years past, we have sought to discuss the factors that will finally fully unlock the M&A pipeline. This year, however, with uncertainty still lingering despite more clarity on US trade

policy, let's instead highlight the fundamental strength, depth, versatility and resilience of the acquisition and leveraged finance market. It has proven resilient in successfully navigating shocks and challenges in recent years – including the pandemic, the invasion of Ukraine, the fastest interest rate hikes on record, surging inflation and heightened geopolitical tensions.

Moreover, it remains sufficiently flexible and creative to seize opportunities as they arise in the current complex dealmaking and regulatory landscape. In a fluid environment where market sentiment may shift rapidly, dealmakers continue to demonstrate agility, with competition between the syndicated and private credit markets emblematic of the market's shifting sands. That competitive tension has transformed into collaboration in recent years, demonstrated by hybrid financing structures (where banks and private credit lenders work in tandem to provide a comprehensive financing solution for borrowers, particularly those pursuing top tier assets commanding high valuation multiples) and private credit and bank partnerships that enable both sides to leverage their complementary strengths.

Many thanks to everyone who has contributed to this year's edition, and a special thank you to Law Business Research. We sincerely hope that this edition of *Lexology In-Depth: Acquisition and Leveraged Finance* will be an interesting read for you in this current environment.

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Introduction

Historically, leveraged acquisitions were typically financed through a mixture of high-yield bonds and syndicated term loans, with ongoing working capital requirements provided through cash flow or asset-backed revolving facilities entered into concurrently with the acquisition. More recently, we have also seen private credit options up and down the capital structure, with unitranche term loans and hybrid solutions, including preferred equity, now common sources of financing for acquisitions. Financings utilising term loans and revolving facilities are typically guaranteed by each material wholly owned domestic subsidiary of the borrower and secured by substantially all of the assets of the borrower and each guarantor. For syndicated transactions, the sources of funding are broad, including collateralised loan obligations and other institutional lenders, retail loan funds, direct lenders and commercial banks. According to *LSEG Global Syndicated Loan Review*, US syndicated loan market volume in 2024 was US\$3.6 trillion, an increase of 45 per cent compared with 2023's US\$2.48 trillion. Leveraged loans increased to US\$1.6 trillion of syndicated volume in 2024, a whopping 117 per cent year-over-year increase, and the highest level since 2017. *KBRA Direct Lending Deals* reported that total volume of sponsored, cash-flow-based direct lending in 2024 was US\$302 billion, more than double the volume recorded in 2023.

Year in review

The loan market was strong in 2024 - despite geopolitical uncertainty, the US economy remained resilient. The Federal Reserve Board cut rates in 2024, and companies took advantage of favorable economic conditions to lower borrowing costs. Refinancing and repricing volume surged in the syndicated market, while dividend recaps emerged amid slower M&A activity. In the private credit market, refinancings and opportunistic transactions also drove volumes. Healthy competition between the two markets led to spread compression, causing additional supply from borrowers looking to reprice loans or extend maturities.

Regulatory and tax matters

Regulatory issues

Regulatory concerns for debt finance in the leveraged acquisition context typically arise under regulations related to authorisation and sanctions. Certain types of collateral may also be subject to special regulations. In addition, there are regulatory limitations applicable to certain leveraged finance activities of banks.

Required authorisation

Assuming the lender does no other business in the United States, being a lender of record for commercial lending generally does not subject the lender to licensing or other qualification requirements to do business in the United States, although there are exceptions to this rule in certain states. Collection and enforcement activities are more likely to require an entity to obtain a licence and qualify to do business within a state. However, in almost all leveraged acquisition financing, only the administrative agent (or collateral agent) will be acting in the capacity of the collecting or enforcing bank, and these restrictions are generally not a concern for specific syndicate members.

Sanctions

Federal sanctions and anti-money laundering laws require financial institutions to implement due diligence procedures with respect to their customers to prevent the transfer of cash to certain prohibited countries and persons.

Collateral-related regulations

Margin loans

If the collateral for the loan consists of securities that are traded on an exchange in the United States, or 'margin stock', the loan may be subject to additional restrictions. These restrictions, often referred to as the 'margin regulations', limit the amount of a loan that can be collateralised by margin stock. The US margin regulations can also be implicated by the existence of arrangements that constitute indirect security over margin stock, such as through negative pledge provisions or other arrangements that limit a borrower's right to sell, pledge or otherwise dispose of margin stock.

Government receivables

With respect to collateral consisting of receivables, if the debtor under such receivable is the US government or one of its agencies or instrumentalities, the federal Assignment of Claims Act will apply to an assignment of receivables and the right of the federal government to exercise set-off. A minority of states have similar laws that apply to obligations of the state or agencies or departments thereof, and a few states extend these rules to municipalities and other local governmental entities.

Regulatory developments – leveraged lending guidance

In March 2013, the three US federal banking agencies, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Federal Reserve) and the Federal Deposit Insurance Corporation (FDIC) jointly issued updated supervisory guidance for financial institutions engaged in leveraged lending activities, including acquisition financing. The leveraged lending guidance sets forth enhanced expectations in a number of areas and cautions banks to strengthen their risk management of loans to highly leveraged borrowers. Although different US administrations since 2013 have taken differing views on the extent to which 'guidance' has the same legal effect as a regulation, the initial implementation and continued application of the leveraged lending

guidance has curtailed the ability of entities subject to regulation by one of the three US federal banking agencies to commit to certain highly leveraged transactions.

Tax issues

Withholding taxes

The United States generally imposes a 30 per cent federal withholding tax on interest paid to a non-US lender on a debt obligation of a US person (and certain non-US persons engaged in a trade or business in the United States). This withholding tax may be eliminated (or reduced to a lesser amount) pursuant to an applicable income tax treaty between the United States and the country in which a lender receiving interest is resident.

Alternatively, a non-US lender may qualify for an exemption from US federal withholding on interest under the 'portfolio interest exemption'. To qualify for the portfolio interest exemption:

1. the debt obligation must be in 'registered form' for US federal income tax purposes;
2. the lender must not be a controlled foreign corporation related to the borrower or a bank receiving interest on an extension of credit entered into in the ordinary course of its trade or business; and
3. the lender must not own, directly, indirectly or by attribution, equity representing 10 per cent or more of the total combined voting power of all voting stock of the borrower (or, if the borrower is a partnership, 10 per cent or more of capital or profits interest of the borrower).

In addition, the portfolio interest exemption does not apply to certain contingent interest, such as interest determined by reference to any receipts, sales, cash flow, income or profits of, or the fluctuation in value of property owned by, or dividends, distributions or similar payments by, the borrower or a related person.

The beneficial owner of interest generally must submit a properly completed Internal Revenue Service (IRS) Form W-8BEN-E (or, if an individual, IRS Form W-8BEN) to claim an exemption or reduction available under an applicable income tax treaty or the portfolio interest exemption. If the lender is (or is treated as) a non-US partnership, the lender generally must submit IRS Form W-8IMY with required attachments.

If interest paid to a non-US lender is effectively connected with the lender's trade or business in the United States, the interest will not be subject to US federal withholding as long as the lender submits a properly completed IRS Form W-8 ECI (or other applicable form), but generally will be subject to net income tax in the United States and, for foreign corporations, branch profits taxes.

Additionally, withholding taxes may arise in other circumstances, including the payment of various fees (such as letter of credit fees), modifications to debt obligations and certain adjustments to conversion ratio on debt obligations that are convertible into stock.

An applicable withholding agent, generally the US borrower or the administrative agent under the financing, must collect such IRS tax forms (or other required documents) as a

basis for not withholding. A withholding agent who fails to withhold may be liable for any under-withholding as well as interest and penalties related to such failure.

Foreign Account Tax Compliance Act

Under provisions in the Foreign Account Tax Compliance Act (FATCA), a 30 per cent withholding tax may be imposed on interest on and, subject to the proposed Treasury Regulations discussed below, gross proceeds from the sale, redemption, retirement or other disposition of a debt obligation of a US person (and certain non-US persons engaged in a trade or business in the United States) paid to a foreign financial institution or to a non-financial foreign entity, unless:

1. the foreign financial institution enters into an agreement with the IRS and undertakes certain investigation, reporting and other required obligations;
2. the non-financial foreign entity either certifies it does not have any substantial US owners or furnishes identifying information regarding each substantial US owner; or
3. the foreign financial institution or non-financial foreign entity otherwise qualifies for an exemption from these rules.

Foreign financial institutions located in jurisdictions that have an intergovernmental agreement with the United States governing these rules may be subject to different rules. FATCA withholding tax generally applies to payments of US-source interest made on or after 1 July 2014, and to payments of gross proceeds from a sale or other disposition of debt obligations producing US-source interest on or after 1 January 2019. However, proposed Treasury Regulations eliminate FATCA withholding on payments of gross proceeds entirely. Taxpayers generally may rely on these proposed Treasury Regulations until final Treasury Regulations are issued.

Deductions

Interest or original issue discount accruing on an obligation properly treated as debt for US federal income tax purposes will be deductible as interest or original issue discount accrues, subject to applicable limitations.

The US tax reform at the end of 2017 enacted a new limitation on interest expense deductions for most businesses under which, in general, net interest deduction is limited to 30 per cent of 'adjusted taxable income' of the relevant taxpayer. For this purpose, US corporations filing a consolidated return for US federal income tax purposes may be treated as a single taxpayer. For tax years beginning after 2021 but before the end of 2024, 'adjusted taxable income' was largely similar to earnings before interest and taxes. For tax years beginning after 2024, under the One Big Beautiful Bill Act (OBABA) legislation, 'adjusted taxable income' is largely similar to earnings before interest, taxes, depreciation and amortisation (i.e., as it originally had been under US tax reform prior to expiration in 2021). OBABA also now applies the limitation on interest expense deductions to capitalised interest (subject to certain exceptions).

If a debt obligation is issued by a corporation with a 'significant original issue discount' for US federal income tax purposes, matures more than five years after the issue date and its yield exceeds certain thresholds, the debt would be treated as an 'applicable high-yield debt obligation', in which case the original issue discount may not be deducted until paid and the deduction of a portion of the original issue discount on the debt may be permanently disallowed. These limitations can be avoided if the debt obligation provides for adequate partial prepayments after the fifth year (AHYDO catch-up payments).

There could be other limitations on deductions if the lender is related to the borrower, or if the debt obligation is convertible or payable in equity (or equity-like) instruments.

Credit support

Historically, non-US affiliates that are treated as controlled foreign corporations for US federal income tax purposes have not provided guarantees to support the debt obligations of a US borrower, because such a guarantee would result in a deemed dividend of earnings of such controlled foreign corporations to its direct or indirect US shareholders. In addition, to avoid a deemed dividend, no assets of a controlled foreign corporation must be pledged to support the debt obligations of a US borrower related to the controlled foreign corporation, and only up to two-thirds of the voting stock of a first-tier controlled foreign corporation should be pledged in support of such debt obligations. A controlled foreign corporation generally means a foreign corporation that is directly or indirectly or by attribution owned, in the aggregate, by more than 50 per cent (based on vote or value) by US shareholders. A US shareholder in this context generally means a shareholder that is a US person and owns at least 10 per cent of the foreign corporation (by vote or value).

The US tax reform at the end of 2017 and subsequent guidance issued by the Treasury, however, opened possibilities for obtaining credit support from a controlled foreign corporation without causing material adverse tax consequences arising from a deemed dividend (discussed above). More specifically, Treasury Regulations issued in May 2019 effectively turned off the deemed dividend rule in respect of earnings of a foreign subsidiary that is a controlled foreign corporation (CFC) when the foreign subsidiary guarantees or provides certain pledges in support of debt of a related US borrower to the extent any deemed dividend could have qualified for deductions for foreign-source dividends allowed under the US tax reform. Such deductions generally may be allowed provided that the following conditions are met:

1. the US corporate borrower (or its US corporate affiliate that owns the relevant foreign subsidiary) satisfies a one-year holding period requirement (and this requirement may be satisfied retrospectively, by continuing to own the CFC after the date of the deemed dividend);
2. the dividend is not a 'hybrid dividend' (generally, a dividend for which the foreign subsidiary would receive a deduction or other tax benefit with respect to taxes imposed by a foreign country had the foreign subsidiary paid an actual dividend); and
3. the dividend is foreign source (generally meaning the foreign subsidiary does not own a US business or US assets).

Security and guarantees

Guarantees

Guarantees of obligations typically are provided by all material wholly owned domestic subsidiaries and the direct parent (if any) of the borrower. Depending on the business deal, non-wholly owned subsidiaries also may serve as guarantors, though that is less common. While there are corporate limitations on the value of guarantees by subsidiaries of the obligations of their parent entities, these limitations typically do not affect the taking of guarantees, only potentially the value thereof in an enforcement or bankruptcy proceeding. Nevertheless, particularly in the case of non-wholly owned subsidiaries, the organisational documents of guarantors should be reviewed to ensure that any guarantees are within the capacity of the guarantor. In the case of a guarantee that is required by the principal obligation and is being issued contemporaneously with the principal obligation, separate consideration to the guarantor is not required under New York law nor the law of many other states, although laws may vary among the states. Where the guarantee is not contemporaneous with the principal obligation, New York law provides that such guarantee is enforceable as long as any consideration is recited in the guarantee and proven to have been given, and would be valid consideration except for at the time that it was given.^[1] The Restatement of the Law (Third), Suretyship and Guaranty takes a similar position, but not all states follow this approach and in some states separate consideration may be required for a guarantee, particularly one executed after the primary obligation. For example, Section 2792 of the California Civil Code provides that:

Where a suretyship obligation is entered into at the same time with the original obligation, or with the acceptance of the latter by the creditor, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.

In addition, as noted above, except in somewhat limited circumstances, because of the potential adverse tax consequences arising under the US Tax Code, subsidiaries organised outside of the United States generally do not provide guarantees of obligations of a US borrower.

Whether the guarantee is immediately enforceable would depend on the terms of the guarantee. A guarantee of collection (which is uncommon) would generally require the holder of the guaranteed obligation to first exhaust its remedies against the principal obligor prior to seeking payment from the guarantor (unless the principal obligor is insolvent or the subject of an insolvency proceeding). In contrast, guarantees of payment, which are much more typical, do not require the holder of the guaranteed obligation to pursue its remedies against the principal obligor prior to seeking to enforce the guarantee. If the secured obligations include hedging obligations, the guarantor must qualify as an 'eligible contract participant' (ECP) to guarantee the hedging obligations. An ECP includes, among other things, a corporation, partnership or other entity that:

1. has total assets exceeding US\$10 million; or
- 2.

has a net worth exceeding US\$1 million and enters into a swap in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business.

Typically, both the guarantee and the security agreement will exclude any swap obligations of any person that is not an ECP.

Security

Security interests are most commonly taken over substantially all assets (other than real property) in a single security agreement. These assets may include general intangibles, including contract rights and intellectual property, accounts receivable, goods, including equipment, movable assets and inventory, securities and securities accounts and cash deposits. The single security agreement typically is under the law of the state that governs the loan agreement, although the assets intended to be covered by the security agreement may be located outside of the state. Such security interests can, and typically do, also extend to after-acquired assets. Interests in real property, whether owned or leased, need to be addressed in separate mortgage agreements enforceable under the state in which such real property is located. Regardless of the type of security interest, the scope of the secured claim or guaranteed obligation can be a single claim, or a multitude of present or future claims, or both. To specify future secured claims or guaranteed obligations, a general description would suffice provided that these claims are reasonably identified and determinable. The perfection method for each type of these security interests is discussed in more detail below. It is essential to bear in mind that certain transactions, collateral and grantors are excluded from the Uniform Commercial Code (UCC) either in whole or in part. For example, in most cases, perfection of a security interest in titled motor vehicles will require compliance with the applicable state motor vehicles laws. With respect to motor vehicles titled in New York, a lien may be noted on the title by filing the appropriate documents with the Commissioner of the New York State Department of Motor Vehicles.

Creation and perfection

To create a valid security interest in those categories of collateral governed by the UCC, a grantor must execute or authenticate a written or electronic security agreement that provides an adequate description of the collateral. The grantor must have rights in the collateral or the power to transfer such rights, and value must be given. A security interest in most types of collateral governed by the UCC may generally be perfected by the filing of a notice filing under the UCC, referred to as a UCC financing statement. Although, as described below, certain assets may require actions beyond the filing of a financing statement, in many large transactions borrowers are able to limit the lender's ability to perfect the security to the filing of UCC financing statements, domestic intellectual property filings and the possession of certain equity interests and perhaps large dollar instruments.

Receivables

In addition to the general rules set forth above, if the receivable is evidenced by an instrument or chattel paper (a receivable secured by a specific good, such as a loan secured by a particular automobile, or a lease of specific goods, such as a lease of an automobile), perfection by possession or control of the instrument or chattel paper is preferable to perfection by a UCC financing statement as possession or control may entitle the secured party to higher priority and protect the secured party from third parties acquiring better rights in the collateral. Possession means physical possession of the original instrument or tangible written chattel paper by the secured party or an agent of the secured party (the grantor cannot be the agent of the secured party for purposes of perfection by possession). In the case of a chattel paper that exists solely in electronic form, an electronic equivalent of possession known as 'control' is legally possible; however, the rules are complex and counsel should be consulted if this method of perfection is desired. As noted earlier, if the underlying obligor is a federal, state or local governmental entity, compliance with various special laws applicable to these obligors may be necessary or advisable. Recent revisions to the UCC discussed below, which are currently in effect in roughly half of states and pending in several others, also permit the creation of controllable accounts and controllable payment intangibles, which may be perfected by control.

Movable assets and inventory

Consistent with the general rule, a security interest in inventory and equipment generally is perfected by the filing of a UCC financing statement. For most US corporations, limited liability companies and limited partnerships, the UCC financing statement would be filed in the jurisdiction in which that entity was formed, although there are exceptions for certain entities and collateral.

Securities and securities accounts

Unlike most other collateral, an oral security agreement with respect to securities and securities accounts can be sufficient in certain circumstances; however, such agreements are exceedingly rare, and a written or electronic security agreement is customary and advisable. The UCC provides separate perfection rules for each of the three methods by which a grantor may hold securities. A grantor may hold securities in the form of certificated securities issued directly to the grantor by the issuer of the security. This is a common way for a parent corporation to hold shares in a subsidiary corporation. Perfection of a security interest in a certificated security can be accomplished by either the filing of a UCC financing statement or by the secured party taking physical possession of the original share certificate either directly or through an agent of the secured party (the grantor cannot be the agent of the secured party for purposes of perfection by possession). Perfection by possession of the share certificate is preferable to perfection by a UCC financing statement as possession entitles the secured party to higher priority, and may protect the secured party from third parties acquiring better rights in the collateral. Although an endorsement is not required for perfection, there can be additional priority advantages from obtaining an endorsement, and the endorsement can help facilitate any disposition of the security upon foreclosure. It is customary for the share certificate to be delivered to the secured party accompanied by a stock transfer power duly executed in blank.

Another method of holding securities is in the form of uncertificated interests registered directly on the books and records of the issuer of the security or a transfer agent on behalf of the issuer. Perfection of a security interest in uncertificated securities can be accomplished by either the filing of a UCC financing statement or by the secured party obtaining control thereof. Control can be achieved by the secured party entering into an agreement with the issuer whereby the issuer agrees that it will comply with the instructions originated by the secured party directing the transfer or redemption of the security without further consent by the grantor. Control can also be achieved by the secured party becoming the registered owner of the uncertificated securities, although that is less common. Perfection by control is preferable to perfection by a UCC financing statement as control entitles the secured party to higher priority than a secured party that is perfected solely by the filing of a UCC financing statement, and may protect the secured party from third parties acquiring better rights in the collateral.

The final method of holding securities is through a securities account maintained by a financial institution referred to as a securities intermediary. This is the most common method of holding investment securities (whether debt or equity). The interest of the grantor in the securities maintained in a securities account is referred to as a security entitlement. Perfection of a security interest in these security entitlements can be accomplished by either the filing of a UCC financing statement or by the secured party obtaining control thereof. Control can be accomplished by the secured party entering into an agreement, commonly referred to as a securities account control agreement, with the securities intermediary whereby the securities intermediary agrees that it will comply with the instructions originated by the secured party directing the transfer or redemption of the underlying security without further consent by the grantor. Control also can be achieved by the secured party becoming the owner of the security entitlement on the books and records of the securities intermediary. As with other methods of holding securities described above, perfection by control is preferable to perfection by a UCC financing statement, as control entitles the secured party to higher priority and may protect the secured party from third parties acquiring better rights in the collateral. The United States is a party to the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the Hague Convention). The Hague Convention contains choice of law rules applicable to the law governing, among other things, perfection of a security interest in securities held in a securities account, and contains limitations on the parties' ability to select the law governing security interest. If the relevant securities intermediary does not maintain a qualifying office in the United States, the choice of US law or the law of a US state will not be respected.

Many US companies are not organised as corporations, but rather as limited liability companies or limited partnerships. Interests in most limited liability companies and limited partnerships would not be classified as securities under the UCC unless the issuer makes a voluntary election to so treat the membership interests or partnership interests, or the interests are publicly traded. If the interests are not securities and are not credited to a securities account, they will be 'general intangibles', which can only be perfected by the filing of an appropriate UCC financing statement.

Cash deposits

Except as proceeds of other collateral, a security interest in deposit accounts can only be perfected by control, and the filing of a financing statement under the UCC would not perfect such security interest.

If the deposit bank that establishes and maintains the deposit account is the same legal entity as the secured party, then the secured party is deemed to be in control of the deposit account and thus perfected automatically. Historically, there has been a question as to whether this automatic perfection was available where the secured party is acting in a representative capacity (e.g., as an agent for its affiliates or a group of lenders). Amendments to the official comments of the UCC support the proposition that automatic perfection should be available even where the secured party is acting in a representative capacity. However, even in these cases, it is common for there to also be a deposit account control agreement both as 'belts and suspenders', and also because a deposit account control agreement has other provisions beyond mere control that may be helpful (clear choice of law rules, rules on set-off and so on).

In addition to automatic perfection, there are two other methods of control. The more common method for most types of financing transactions would be control by agreement, commonly referred to as a deposit account control agreement, whereby the debtor, the secured party and the deposit bank enter into a written agreement pursuant to which the deposit bank agrees to comply with all instructions issued by the secured party directing disposition of funds in the deposit account without further consent of the debtor.

The final method of control would be by the secured party becoming the deposit bank's customer with respect to the deposit account. This method is not commonly used for operating accounts, but it is more common for special accounts that the borrower is not intended to have access to, such as an account cash collateralising a letter of credit.

Intellectual property

A security interest in US-registered copyrights may be perfected solely by filing a copyright mortgage or copyright security agreement with the US Copyright Office. For patents and trademarks, these likely are perfected by the UCC financing statement. However, it is nonetheless customary to file a short-form security agreement with the US Patent and Trademark Office. This is both because of some lingering uncertainty as to the extent to which the UCC may be pre-empted by federal law in such circumstance, and because these filings may help protect against a buyer of the patent or trademark taking free of the security interest.

Controllable electronic records

A new Article 12 to the UCC and conforming amendments to the other articles of the UCC has now been enacted in roughly half of states and is pending in several others. These revisions create new methods of perfection for many digital assets that are in the form of controllable electronic records, such as cryptocurrencies and NFTs, as well as controllable accounts and controllable payment intangibles. 'Controllable electronic record' means a record stored in an electronic medium that can be subject to control under Section 12-105. While the control rules are too complex for detailed discussion here, in general a secured party must have the power to avail itself of substantially all the benefits of the electronic

record and, subject to certain exceptions, the exclusive power to prevent others from availing themselves of such benefits, as well as the power to transfer control of the record to another person.

Enforcement

Security interests are immediately enforceable upon the occurrence of an enforcement event, subject to any automatic stay if the grantor is subject to a bankruptcy proceeding. Although a secured party has the option of seeking judicial enforcement of its security interest, there are a variety of 'self-help' remedies available under the UCC without the necessity of judicial action, and self-help would be much more common than resorting to judicial remedies. Any enforcement action by a secured party must be done without a breach of the peace, and any sale of collateral by the secured party must be commercially reasonable. Various notices are required in connection with any enforcement action. In addition, if the security interest at issue is securities or securities accounts, or both, it is advisable to review the organisational documents of the issuer of the securities as well as the applicable corporate or other law pursuant to which the issuer of the pledged securities was organised to determine whether there are any prohibitions, restrictions or consent requirements applicable to the creation of the security interest or the exercise of remedies by the secured party. Enforcement of security interests are, more often than not, accomplished in connection with a proceeding under the US Bankruptcy Code.

Bankruptcy and preference concerns

In the event of an insolvency proceeding over a guarantor or the grantor of a security interest, treatment of the guarantees and security interests will depend on various considerations. Importantly, if the security interest is not properly perfected, it will be set aside. Even if the security interest is properly perfected, guarantees and security may be subject to avoidance by the bankruptcy trustee on a number of theories.

Upstream and cross-stream credit support consist of guarantees and security created by a subsidiary to support the obligations of its parent company or of an affiliate controlled by the common parent company. Both upstream and cross-stream credit support are common in the market and, subject to any restrictions in the organisational documents or under the law under which the entity was formed, such guarantees and security interests are permissible. Despite their widespread use, upstream and cross-stream credit support are subject to certain potential vulnerabilities. The biggest potential vulnerability is that these guarantees or security interests may be invalidated under federal or state fraudulent conveyance laws. Under the fraudulent conveyance provisions of the Bankruptcy Code and similar state fraudulent conveyance laws, even absent fraudulent intent, an upstream or cross-stream guaranty, as well as any security interest securing such guaranty, may be voidable as a fraudulent transfer if the provider of the guarantee or security interest receives less than 'reasonably equivalent value' in exchange for taking on the credit support obligations and the provider was insolvent at that time or as a result of the transfer (the incurrence of an obligation, including subsequent extensions of credit, is treated as a transfer); was engaged in a business for which it had unreasonably small capital; or intended to incur or believed it would incur debts beyond its ability to repay. Certain transfers made or obligations incurred with actual intent to hinder, delay or

defraud creditors may be avoided regardless of whether the transferor received reasonably equivalent value or fair consideration for the transfer or obligation. Additionally, New York and other state laws contain fraudulent conveyance provisions that are very similar to those under the Bankruptcy Code. While federal fraudulent conveyance law covers transactions that occurred up to two years prior to the date on which the bankruptcy case was commenced, if state law is applicable many states have a six-year look-back period.

Significant risks to be aware of are the facts that could cause the security interest to be viewed as a preference. In general, a security interest that is granted in respect of antecedent debt (that is, debt that precedes the creation of the security interest) or that is granted substantially simultaneously with the incurrence of the debt being secured, but not perfected within 30 days of the creation of the security interest, would be at risk of being set aside as a preference if, in either case, the grantor filed for bankruptcy within 90 days of the security interest becoming perfected (or one year if the beneficiary of the security interest is an 'insider' of the grantor). If the security interest in question is granted substantially contemporaneous with the incurrence of the debt being secured and is perfected within 30 days of its creation, it is generally exempt from attack as a preference.

Priority of claims

Priority generally

Assuming that the security interest is properly perfected and is not avoided (e.g., as a preference), the secured party will be entitled to receive the value of its interest in the collateral up to the amount of its secured obligations. The value of a secured party's interest in its collateral is generally the value of the collateral less the amount of any obligations secured by a security interest or lien that is senior in priority under applicable state law. All properly perfected secured claims would be paid (up to the value of the collateral securing such claims) prior to the payment of any unsecured claims or claims secured by a security interest that is junior in priority either under applicable law or by contract. In addition, various administrative and other claims given priority by law would be satisfied prior to the payment of any unsecured claims. No parties (including governmental agencies and employees) are given any automatic statutory priority over secured creditors as a result of the US Bankruptcy Code. The status and priority of secured creditors are determined almost exclusively by reference to applicable non-insolvency law, and the Bankruptcy Code generally does not affect status and priority. Under the Bankruptcy Code, the bankruptcy court may grant a security interest with priority over all other security interests to a lender providing new financing to the borrower; however, such security interests may only be granted if either the lenders being primed by the new security interest consent, or if the bankruptcy court decides that the terms of the transaction provide the lenders being primed with adequate protection – a judicial determination that the recovery of the lenders being primed on the secured claims should not be negatively affected by the new financing and security interest.

Equitable subordination

Equitable subordination is generally not an issue except under specific fact patterns. These facts usually include a lender with an equity or other position that allows the lender to exercise some level of control over the borrower, with the borrower using the position to the detriment of other creditors. The facts supporting equitable subordination can also include other inequitable conducts that the bankruptcy court determines are sufficiently extreme and have caused damage to the borrower sufficient to warrant an equitable remedy; for example, where a competitor of the borrower acquires the loan and then deliberately obstructs the reorganisation process in the hopes of forcing the borrower to liquidate.

Treatment of intercreditor or subordination agreements

Section 510(a) of the Bankruptcy Code specifically provides for the enforceability of 'subordination agreements' during a bankruptcy case. Thus, intercreditor and subordination agreements are generally enforceable in bankruptcy to the same extent that they are enforceable under state law. A bankruptcy court will generally enforce the parties' agreement as to the priority of their respective claims (whether secured or unsecured). A bankruptcy court will also enforce many (although not all) of the waivers of rights under the Bankruptcy Code that junior secured parties typically agree to in second-lien transactions.

Jurisdiction

The United States is a multi-jurisdictional country, and the loan agreement needs to select the law of a particular US state (rather than federal law) as the governing law. The choice by the contractual parties of a particular state's law to govern a contract may not be given effect if it does not bear a reasonable relationship with the transaction or parties. A few states, such as New York, permit the choice of their law to govern a contract even in the absence of any contacts if the contract satisfies certain dollar thresholds; however, another US state may not respect this choice of law if litigated in the other US state in the absence of a reasonable relationship.

Each state has somewhat different considerations in determining whether to give effect to a choice of law (other than the law of the applicable state). Typically, a choice of law will be given effect if:

1. the chosen law has a reasonable and substantial relationship and sufficient contacts with the underlying agreement, or the transaction contemplated thereby, and the chosen law has the most significant contacts with the matter in dispute;
2. application of the chosen law does not violate or contravene, nor is contrary or offensive to, a public or fundamental policy of the state or of another jurisdiction whose law would apply in the absence of an effective choice of law by the parties to the underlying agreement (which may be another US state or a foreign jurisdiction);
3. the chosen law was not induced or procured by fraud; and
4. the matter of law for which the chosen law is to be applied has been previously addressed by the chosen law, and the chosen law differs from the law that would be applied in the absence of the chosen law.

Under the Restatement (Second) of Conflicts of Law, a court may decline to apply the law of a jurisdiction chosen by the parties to a contract (which may be another US state or a foreign jurisdiction) when it is necessary to protect the fundamental policies of the state, the law of which would otherwise apply; and the state has a materially greater interest in the determination of a particular issue than the state of the chosen law. Regardless of which state's law governs a security interest, the UCC contains mandatory choice of law rules for perfection and priority that will frequently result in the law of a different state governing some or all of the perfection or priority of any security interest.

Acquisitions of public companies

Methods of acquisition

Acquisitions of public companies are generally accomplished through one of two methods. Either a consensual process by which the board of the target and the acquirer approve the acquisition and then solicit approval of the transaction by a majority vote of shareholders or through a direct tender offer for the shares followed by a squeeze-out merger of any remaining minority holdings (which may or may not be consensual at launch). While there are considerable federal regulatory requirements relating to public company takeovers as well as significant state laws that will affect the structuring of the acquisition, other than the margin regulations mentioned earlier, these rules are not directed at the financing. Acquisition financing typically has highly limited conditionality driven not by statute, but by both the competitive dynamics among potential bidders and the fiduciary duties of the board to approve the 'most certain' transaction.

Disclosure of financing terms

As part of the public disclosure required for the solicitation of votes on a merger agreement or the solicitation of shares pursuant to the tender offer, generic sources and uses, which would include fees, must be provided; however, market flex terms generally do not need to be disclosed. To the extent the borrower or the target have publicly traded securities, the securities rules that apply to material non-public information (MNPI) apply, and syndication processes are generally structured to allow lenders who do not wish to receive MNPI to have access only to materials that do not contain MNPI.

Margin regulations

Financing of acquisitions of public companies, including take-private transactions, can often raise issues under the US margin regulations discussed above. Even in the absence of a pledge of publicly traded securities, certain transaction structures can create indirect security over such securities. The existence of indirect security can trigger the margin regulation restrictions on the amount of credit that can be extended, either as loans or debt securities.

Special considerations

Given the competitive loan environment, some sponsors and borrowers have pursued a dual track, negotiating terms in both the BSL and private credit markets. A number of borrowers refinanced their private credit deals in the BSL market due to lower borrowing costs and a growing number of BSL deals were refinanced with private credit deals to extend out tenor. Private credit responded with lowering spreads, and continuing to offer flexible terms, such as delayed draw term loans and PIK loans. Direct lenders also partnered with banks to create joint ventures around both sourcing and funding, underscoring the interconnection between the two types of lenders. Though competition has received much of the attention, the partnerships allow bankers a broader set of tools that can include private credit as an option. Ultimately, the strength in both markets in 2024 demonstrate they are able to coexist successfully.

Outlook and conclusions

Market sentiment headed into 2025 continued to be extremely positive after the strong performance of the loan markets in 2024. Market participants are hopeful that M&A/LBO volume will pick up due to lower anticipated base rates and a friendlier regulatory environment. Continued and evolving competition between the broadly syndicated and private credit markets is expected, with spreads reflecting that competition. The market continues to be focused on terms that have been utilised in certain liability management transactions over the past few years, with documentation attempting to keep pace with dynamic and creative new liability management tactics. In those transactions, borrowers and a subset of lenders have utilised the basket capacity and voting provisions of various financing agreements in a manner both adverse and unexpected by a material portion of the market participants. Borrowers have used new and creative structures to generate liquidity, and lenders in turn have renewed focus on the provisions that enabled them.

Endnotes

- 1 Section 5-1105 of the New York General Obligations Law. [^ Back to section](#)

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Introduction

London continues to maintain its status as a leading market for leveraged finance transactions, with English law frequently governing the finance documentation for both European and international leveraged finance deals. Diversity in both the range of financial instruments and sources of financing available to borrowers remains, with high-yield bonds, syndicated loans, unitranche or direct lending financings, second lien, super senior, payment-in-kind financings, and preferred equity seeing continued strength, and private capital providers playing a role along with commercial and investment banks and institutional lenders.

Credit funds have continued to expand their market share beyond their core mid-market offerings in European leveraged finance transactions through unitranche and direct lending financings, as well as holdco financings in more complex structures. European covenant-lite structures, which feature loans with high-yield bond-style incurrence covenants and no maintenance financial covenants, have become standard in large-cap syndicated loans, especially in sponsor-led transactions. While financings by private credit lenders still include maintenance covenants, covenant-lite unitranches and senior direct lending are increasingly becoming a part of the private credit market as private capital lenders gain market share in the large-cap segment of the leveraged finance market. Increasing competition in the large-cap segment of the leveraged finance market is likely to drive a greater convergence of terms between the syndicated loan and private credit markets on large-cap deals.

Year in review

Many predicted that 2025 would finally be the comeback year for robust M&A dealmaking. A more stable political landscape following the UK general election, along with elections in other major economies last year, was expected to rekindle market confidence. Inflation had also largely stabilised in the United Kingdom, and signals of better growth indicators, along with steady rate cuts by the Bank of England were expected to provide the impetus for M&A dealmaking.

That prediction was, however, once again upended following the turmoil that gripped the global equity and financial markets after the new US administration's trade policy announcements on 'Liberation Day'. In the aftermath of 'Liberation Day', any positive momentum for M&A dealmaking at the start of the year all but evaporated. The uncertainty and market volatility that followed caused auction processes to stall and deals to be pulled from the market. Dealmakers also rushed to reassess their risk exposure and portfolio and investment strategies, a task complicated by the never-ending headlines dominated by the new US administration's on-again, off-again stance on tariffs. In a now familiar pattern during episodes of market dislocation, the pendulum swung back in favour of private credit lenders where certain funds financing was required. Private credit lenders are now increasingly seen as valuable partners within the leveraged finance ecosystem, not only during periods of volatility but also in general, as they steadily expand their market share, particularly in the large-cap space, to compete with banks on pricing, leverage levels

and deal terms, while offering the added advantage of providing customised and flexible solutions.

As the US administration announced temporary tariff reprieves to calm the markets, dealmakers capitalised on favourable market windows to make the most of the abundant liquidity and unsatiated investor demand. In a continuation of a theme from last year, supply has been largely driven by repricings, refinancings and other opportunistic deals as the uncertainty permeating the market caused the M&A engine to stall once again. Amid a challenging exit environment, particularly as sellers adopt a 'wait and see' approach, private equity sponsors, already facing longer holding periods, also tapped into favourable market windows to extract dividends, with a few jumbo cross-border dividend recaps boosting sponsored issuance volumes.

Although the UK has secured a trade deal with the US, trade and businesses with a global footprint continue to grapple with the uncertainty and potential economic impact of higher tariffs. Valuation mismatches, a stumbling block to the resurgence of M&A activity in the last few years, have been made more complex as tariffs may impact EBITDA levels, particularly for companies operating in tariff-sensitive sectors. Added to the mix is the uncertainty surrounding the direction of travel of the UK economy, as the Bank of England walks the monetary policy tightrope, in the face of continued uncertainty which may weigh on economic growth.

The US tariffs have brought about challenges and uncertainty but they have also created new opportunities. The United Kingdom and Europe are now proving to be increasingly attractive investment destinations, given the relatively stable regulatory backdrop. In support of the government's pro-growth approach, the UK Competition and Markets Authority has indicated that it will only intervene if a merger is "truly problematic", which should provide certainty for dealmakers and enhance the attractiveness of the UK as a destination for international investment. While the government has extensive powers under the National Security and Investment Act 2021 (NSIA) to scrutinise and intervene in certain transactions involving sensitive sectors of the economy to protect national security, at the time of writing, it has proposed reforms aimed at easing unnecessary bureaucracy for businesses and is also consulting on proposed amendments to the NSIA regime.^[1]

As UK-listed corporates continue to trade at a discount, renewed interest from the international investor pool is likely to pave the way for a surge in take-privates, with US investors already leading a few marquee P2Ps this year. Add-on acquisitions are also on the rise as private equity sponsors look to streamline portfolio operations and create synergies to maximise value. Corporate carve-outs continue to gain traction with larger corporates, as a means to de-lever balance sheets and unlock cash. In a muted M&A environment, there is also a flight to quality, with top-tier assets, particularly those in tariff-resistant sectors, continuing to attract interest, leading to a number of jumbo M&A deals this year, despite the wider market uncertainty.

Regulatory and tax matters

Regulatory matters

The Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) are the financial regulators in the United Kingdom. The PRA is part of the Bank of England and authorises and prudentially supervises banks, building societies, credit unions, insurers and major investment firms. The FCA is responsible for authorising and prudentially supervising other firms that undertake regulated financial services activities, and for supervising all regulated financial services firms from a conduct of business perspective.

Cash loans to businesses are largely unregulated in the United Kingdom, unlike consumer lending or residential mortgages. Therefore, providing a secured or unsecured loan to, or subscribing for a secured or unsecured debt instrument issued by, an entity that is incorporated or tax-resident in the United Kingdom is not considered a regulated activity and does not require any kind of banking or similar licence or approval. It is important to note, however, that because much of this activity is carried out by businesses that are regulated for other purposes (banks and investment firms), there may be broader regulation impacting them that may impact the terms of any loan. Similarly, borrowers who are themselves regulated may have restrictions on the nature or scope of security they can offer owing to financial regulation affecting their business (in particular, regulatory capital requirements). More complex forms of lending, such as arranging the issuance of, or transacting in, debt instruments that embed derivatives or underwriting a bond issuance would constitute regulated activities, requiring the financial institutions offering those services to comply with regulatory obligations.

Borrowers and lenders are subject to the anti-money laundering and sanctions regimes in the United Kingdom, and will also need to take into account anti-corruption legislation.

Tax matters

Three areas of taxation are particularly significant in the context of leveraged finance transactions:

1. withholding tax on payments of interest to the lender;
2. the deductibility of interest for the borrower; and
3. tax issues on the enforcement of security.

Withholding tax

Payments of yearly UK-source interest are subject to UK withholding tax at the basic rate of 20 per cent. There are, however, a number of exemptions from the charge to withholding tax, with the following being the most commonly used:

1. Exemption from withholding tax relating to the nature of the lender: corporates and banks that are taxed in the United Kingdom may receive interest gross, given the income of these lenders is taxable in the United Kingdom in any event. Advances from building societies are also generally free of withholding tax on interest.
2. Exemption relating to the nature of the security: the 'private placement' exemption entitles the holder of privately placed securities to interest free of withholding tax, provided that certain requirements are met, including the term of the relevant

security being less than 50 years and the security (or where a placement consists of several relevant securities, the total value of the placement) having a minimum value of £10 million. Additionally, the 'quoted Eurobond' exemption enables the holder of a security to receive interest free of withholding tax, provided the security is issued by a company and is listed on a recognised stock exchange or is admitted to trading on a multilateral trading facility operated by a regulated recognised stock exchange.

3. Exemption relating to double taxation treaties between the United Kingdom and other jurisdictions: the United Kingdom has entered into a number of treaties with other jurisdictions, which provide for a nil rate of withholding tax in the United Kingdom. Non-UK lenders tax resident in such jurisdictions are entitled to receive interest free of withholding tax. There is an administrative burden involved in relying on this exemption, since it must be claimed, and interest may only be paid free of withholding once a borrower has received an instruction from HM Revenue and Customs (HMRC). Furthermore, a claim under the normal certification process can take several months. The double taxation treaty passport scheme, however, grants certain lenders a 'passport', thereby streamlining the otherwise lengthy certification process.

The broad nature of the above exemptions gives significant flexibility, enabling UK borrowers to raise funds from different types of lenders, and different types of security. In particular, the 'quoted Eurobond' exemption enables capital to be raised from offshore funds, which would usually not be capable of benefiting from double taxation treaties with the United Kingdom, as the latter will generally not provide for a nil rate of withholding tax in treaties with tax haven jurisdictions.

Deductibility of interest

As a starting point, interest incurred by a UK corporate borrower is, under the loan relationship rules, deductible in calculating taxable profits. The loan relationship provisions, as a general rule, follow the accounts. This means that the amounts recognised in determining a company's profit or loss under generally accepted accounting practice will usually constitute credits and debits under the loan relationship rules. Interest on a loan is a debt service cost to the borrower, and this classification is the starting point for interest-related tax deductions. There are, however, rules that can restrict or prevent the deductibility of interest to be borne in mind, as interest deductibility is often a key commercial driver of debt financings. Three important examples are set out below, but there are other relevant restrictions beyond the scope of this chapter; for example, the unallowable purposes rule, the targeted anti-avoidance rule and rules re-characterising interest as a distribution.

1. Corporate interest expense restriction rules limit the amount of interest expense large businesses can deduct when calculating their profits subject to corporation tax. Broadly, the rules place a cap to limit deductions to 30 per cent of a group's UK 'tax EBITDA', or alternatively a modified debt cap is imposed that ensures that a group's UK interest deductions cannot exceed the total net interest expense of the worldwide group. Net interest expenses under the *de minimis* allowance of £2 million will not be restricted by the rules.

2. Where transfer pricing rules apply to a loan (particularly relevant in the context of related-party borrowing arrangements), they operate to deny the borrower a tax deduction for any part of the interest that exceeds an arm's-length rate of interest. The terms, amount and availability of the debt will be readjusted (for tax purposes) to those of an arm's-length transaction. The government has published draft legislation which would make various changes to the operation of the UK transfer pricing rules. One proposed change is to reform the rules on guarantees; this should be borne in mind in the context of debt financings.
3. In circumstances where interest expense is deductible, corporate income loss restriction rules limit the amount of post-1 April 2017 profits against which carried-forward losses incurred in any period can be relieved to 50 per cent of profits over an annual allowance of £5 million. Since 1 April 2020, the relief provided by the £5 million annual allowance is shared between both carried-forward corporate income losses and carried-forward corporate capital losses. Tax grouping rules enable the surrender of losses between UK group members on a current year basis. This enables deductible interest to be set off against the income generated by another group member, meaning borrowing need not be engaged in by an income-generating company within the group.

Enforcement of security

The UK tax consequences of enforcement of security by a creditor can be complex and will depend on the method of enforcement. A detailed discussion of the potential UK corporation tax and stamp duty issues is outside the scope of this chapter but consideration will need to be given to, among other things, whether the method of enforcement gives rise to any tax degrouping events, has any impact on the availability of net operating losses or triggers any withholding tax on guarantee payments.

Security and guarantees

Taking English law security is relatively straightforward and security can be taken over most asset classes. Security is granted to a security trustee (commonly also referred to as a security agent) to hold the security interests on trust for the secured creditors, allowing new lenders and other creditors coming into the transaction to continue to benefit from the security without the risk of restarting hardening periods associated with taking new security.

The nature of the security taken (whether charge, mortgage or pledge) is a function of the asset in question and the commercial agreement as to the security package.

Security in leveraged finance transactions is typically created either by way of a charge, which is an equitable interest in the asset, or by way of a mortgage, which involves transfer of title. A charge can be either 'fixed' or 'floating', depending on the degree of 'control' that the lenders have over the assets, with 'control' being a fact-specific assessment of the lenders' ability to prevent the security provider from dealing with the charged asset. A fixed charge can be taken over specific assets, whereas a floating charge is taken over a

fluctuating pool of assets. Until a floating charge crystallises into a fixed charge upon the occurrence of certain common law or contractually agreed events, the grantor of a floating charge is allowed to deal with the floating charge assets in the ordinary course of business. A floating charge will not 'crystallise' on the occurrence of a moratorium under Part A1 of the Insolvency Act 1986.

Security over 'financial collateral' such as shares and cash can also benefit from the Financial Collateral Arrangements (No. 2) Regulations 2003, which disapply certain statutory formalities and modify certain insolvency law provisions in respect of such a 'security financial collateral arrangement' and the lender can 'appropriate' the secured asset if the security becomes enforceable.

Depending on the asset and the nature of security interest, certain steps may need to be taken to perfect the security. English law perfection and registration steps are fairly straightforward, inexpensive and help to protect the priority of the secured creditors. Additionally, subject to limited exceptions, security granted by English companies or limited liability partnerships (LLPs) must be registered at Companies House within 21 days of its creation or it will be void against creditors, administrators and liquidators of that company or LLP.

English law insolvency rules dealing with the priority of security interests are complex and depend on, among other factors, the nature of security interest (whether a fixed or floating charge or legal or equitable security), timing of security (second in time, second ranking) and whether security has been perfected. In addition, where an English company has entered into a formal insolvency process, certain types of 'antecedent' or 'reviewable' transactions entered into by that company before the commencement of the insolvency process may be challenged by the insolvency officeholder. The period for reviewing such 'antecedent' transactions ranges from six months to three years, although there is no time limit within which a challenge to a transaction defrauding creditors may be brought, which, in short, requires the purposeful alienation of assets from creditors.

Upstream, downstream and cross-stream guarantees are generally available under English law. When dealing with upstream and cross-stream guarantees, the board of directors of the guarantor must carefully consider the corporate benefit to the guarantor, keeping in mind the financial position of the guarantor. It is therefore not uncommon to obtain shareholder approval to support the giving of such upstream and cross-stream guarantees.

Priority of claims

In a corporate insolvency, creditors will be paid in accordance with the following 'waterfall' of priority under law from proceeds of realisation of assets of the insolvent estate:^[2]

1. First, creditors holding a fixed charge (but only to the extent of the value of the applicable secured assets): as discussed above, a fixed charge requires the lender to retain a level of control of such assets. If the chargor is authorised to deal with the charged assets in the ordinary course of business, the charge could be re-characterised as a floating charge (notwithstanding any designation of the charge as 'fixed' by the parties), and the priority of the lender's claim will be affected

accordingly. The proceeds of the realisation of the assets subject to a fixed charge will be paid to the holder of that fixed charge.

2. Second, creditors of 'moratorium debts' and 'priority pre-moratorium debts': if a company goes into administration or liquidation, in each case within 12 weeks of the end of a moratorium under Part A1 of the Insolvency Act 1986, any debts that are incurred during the moratorium and certain debts incurred before the moratorium (such as the monitor's remuneration or expenses, rent during the moratorium or non-accelerated financial debt) (if the company is in liquidation, fees of the official receiver will take priority over these debts).
3. Third, fees and expenses of the insolvent estate incurring during the relevant insolvency proceedings (there are statutory provisions setting out the order of priority in which expenses are paid).
4. Fourth, ordinary and secondary preferential creditors: ordinary preferential debts include (but are not limited to) debts owed by the insolvent company in relation to: contributions to occupational and state pension schemes; wages and salaries of employees for work done in the four months before the insolvency date, up to a maximum of £800 per person; and holiday pay due to any employee whose contract has been terminated, whether the termination takes place before or after the date of insolvency. Secondary preferential debts rank equally between themselves for payment after the discharge of ordinary preferential debts and include claims by HMRC in respect of certain taxes including VAT, PAYE income tax (including student loan repayments), employee NI contributions and Construction Industry Scheme deductions (but excluding corporation tax and employer NI contributions) that are held by the company on behalf of employees and customers.
5. Fifth, creditors holding a floating charge: the proceeds of the realisation of the assets subject to the floating charge will be paid to the holders of the floating charge. Where the floating charge was created after 15 September 2003, a portion (or 'prescribed part') of the charged assets is made available for the satisfaction of unsecured creditors' claims, subject to a cap of £800,000 where the floating charge is created on or after 6 April 2020 or £600,000 if created before then.
6. Sixth:
 - provable debts of unsecured creditors and any secured creditor to the extent of any remaining debt due to it (a shortfall), in each case, including accrued and unpaid interest on those debts up to the date of commencement of the relevant insolvency proceedings;
 - interest on the company's debts (at the higher of the applicable contractual rate and the official rate in accordance with the Judgments Act 1838, currently 8 per cent per annum) in respect of any period after the commencement of liquidation, or after the commencement of any administration that had been converted into a distributing administration; and
 - non-provable liabilities, being liabilities that do not fall within any of the categories above and therefore are only recovered in the (unusual) event that all categories above are fully repaid.

7. Seventh, shareholders: members of the company may receive any surplus funds following the satisfaction of all creditors' claims.

Contractual subordination via the use of intercreditor or subordination agreements to govern claims between various third-party creditors and also between third-party creditors and any intra-group creditors (including shareholder claims) is commonplace, and case law has held that they do not inherently offend the above rules of priority or other English insolvency principles of distribution.

Jurisdiction

Prior to Brexit, the law governing contractual and non-contractual obligations arising out of and in connection with a particular contract was, as a matter of English law, ascertained pursuant to Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations (Rome I) and Regulation (EC) No. 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II). Both of those pieces of legislation were retained as part of English law following Brexit (by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019) such that, in essence, the Rome I and Rome II Regulations provide a governing law playbook of near universal application in the context of claims in the English courts.

In very broad terms, both the Rome I and Rome II Regulations (as retained in English law) allow parties to choose freely the law applicable to their contractual obligations and their non-contractual obligations. Where no choice is made, contractual obligations are generally governed by the law of the country where the party required to effect the characteristic performance of the contract has their habitual residence, and non-contractual obligations are generally governed by the law of the country in which damage occurs.

As to jurisdiction, in the context of the leveraged finance market in England and Wales, disputes between the parties are typically referred to the courts, although in some cases, financing parties are given an option to refer disputes to arbitration. Whether a court has jurisdiction can be decided by the courts themselves, although contracting parties almost always include a jurisdiction clause in their agreement that allows them to choose which court has jurisdiction (and such provisions will be given effect by the English courts).

There are three principal types of jurisdiction clauses:

1. an exclusive jurisdiction clause specifies a jurisdiction in respect of disputes and prevents either party from bringing proceedings against the other in the courts of any jurisdiction other than the one specified;
2. a non-exclusive jurisdiction clause enables either party to bring proceedings against the other in the courts of the chosen jurisdiction or in the courts of any other jurisdiction (provided any alternative court has jurisdiction over the dispute under its own rules); and
- 3.

an asymmetric jurisdiction clause permits one of the parties to sue the other party in any competent jurisdiction (or in certain specified jurisdictions) but restricts the other party to bringing proceedings in only one jurisdiction.

Brexit has had an impact on issues of jurisdiction, and on the enforcement of English judgments in Europe (arbitration clauses and proceedings are unaffected by Brexit). Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Recast Brussels Regulation) regulates jurisdiction and the recognition and enforcement of judgments between EU member states, but no longer applies in the United Kingdom post-Brexit. That means that whether the English courts will take jurisdiction over cases with foreign defendants now depends on the satisfaction of one of the 'jurisdictional gateways' set out in Practice Direction 6B of the Civil Procedure Rules (in practice, the English courts are now able to take jurisdiction in a wider set of circumstances than might have been the case under the Recast Brussels Regulation). That also means that the simple and convenient route to the enforcement of English judgments in EU member states that was provided by the Recast Brussels Regulation no longer exists.

The United Kingdom has acceded to the Hague Convention on Choice of Court Agreements 2005 (Hague 2005). Courts of the parties to the Hague 2005, including EU member states, will respect exclusive jurisdiction clauses and enforce judgments from courts selected pursuant to those clauses. Hague 2005 does not, however, cover non-exclusive jurisdiction clauses or asymmetric jurisdiction clauses (or judgments resulting from the operation of those kinds of clauses). In order to improve the position with regard to the enforcement of English judgments, the United Kingdom applied to re-join the Lugano Convention in early 2020, but the accession process has been blocked by the European Commission.

Following this, the United Kingdom ratified and brought into force the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 2019 (Hague 2019), which has a broader scope than Hague 2005. For proceedings that commenced on or after 1 July 2025, Hague 2019 provides uniform rules for the recognition and enforcement of civil and commercial judgments between the United Kingdom and other contracting state parties, which include the EU member states (except Denmark). While, unlike the Lugano Convention, Hague 2019 does not include jurisdiction rules, it applies to a wider range of judgments than Hague 2005 – not only judgments in proceedings arising out of exclusive jurisdiction clauses, but also those in proceedings stemming from non-exclusive and asymmetric jurisdiction clauses. This is a positive development for financing parties and others wishing to benefit from the flexibility of asymmetric and non-exclusive jurisdiction clauses.

Although Hague 2019 is not a perfect substitute for the framework existing under the Recast Brussels Regulation or the Lugano Convention, it offers more streamlined enforcement of judgments between the United Kingdom and EU member states, which is particularly important in light of the United Kingdom's blocked application to re-join the Lugano Convention.

In practice, English judgments may still be enforced with relative ease in EU member states, despite the various changes post-Brexit. That is either because there is a reciprocal relationship with the relevant country or that country generally allows enforcement without significant hurdles.

Acquisitions of public companies

Where the City Code on Takeovers and Mergers (the Takeover Code) applies to the acquisition of a UK public company, there are additional considerations for lenders. The provisions of the Companies Act 2006 (CA 2006), which regulate the giving of financial assistance by public companies in relation to the acquisition of their own shares (as further described below), and which contain the requirements in relation to the compulsory acquisition of minority interests, can also be relevant.

There are two principal mechanisms to effect a takeover of a UK public company: a contractual offer to all of a target's shareholders to acquire their shares; and a court-approved scheme of arrangement, which is a statutory mechanism involving a target shareholder vote and court approval. A significant majority of UK takeovers use the latter method.

The Takeover Code, which is administered by the Panel on Takeovers and Mergers (the Takeover Panel), applies to any takeover offer or scheme of arrangement to acquire a company registered in the United Kingdom, Channel Islands or the Isle of Man, if any of its securities are admitted to trading on a UK regulated market or a UK multilateral trading facility (such as the London Stock Exchange's Main Market and AIM) or any stock exchange in the Channel Islands or the Isle of Man.

The Takeover Code will also apply to any such company for two years following that company ceasing to be admitted to those trading venues.^[3]

The Takeover Code sets out detailed rules on the process and timetable for conducting UK takeovers. In particular, it requires strict secrecy concerning any potential offer and also provides that a bidder must announce a bid only after ensuring that it has the funds to meet in full any cash consideration offered.

The Takeover Code's strict requirements in relation to secrecy and bid confidentiality mean that the bidder's approach to sharing information with its advisers and other third parties and due diligence on the target can differ from that taken on private acquisitions. If details of the bid leak to the market, the Takeover Panel may require the bidder to make an immediate holding announcement and to confirm within 28 days whether it intends to make a binding offer for the target. Where triggered, this 28-day 'put up or shut up' period can limit the time a bidder has to undertake due diligence (although the 28-day period may be extended with the consent of the target). For hostile takeovers, lack of cooperation by the target will mean that the bidder's and lenders' due diligence will be limited to information available from public sources or third parties. For bids that are expected to be recommended by the target board, more extensive due diligence may be carried out. However, sensitivity around potential leaks, the related timetable pressures and the Takeover Code requirement that information provided to one bidder must, on request, be provided to other (potentially less welcome) bidders can mean that due diligence for public company acquisitions may not be as extensive as for private acquisitions.

Rules that require equality of information between target shareholders can also give rise to issues where a lender is also, or could become, a shareholder in the target; for example, where a bank has a trading desk or a fund has an equities business. These issues can be

addressed if the lender confirms in the relevant NDA it has effective information barriers in place between the lender's debt and equities businesses or if the potential provider of debt finance represents that it does not hold any shares in the target (and undertakes not to acquire any shares in the target during the offer period, subject to technical exceptions to permit the acquisition of shares in client serving capacities or (with the consent of the Takeover Panel) as security for a loan made in the normal course of business).

In the case of any bid including a cash consideration element, the announcement must include a confirmation by the bidder's financial adviser or by another appropriate third party that, so far as they are reasonably able to ensure, resources are available to the bidder sufficient to satisfy full acceptance of the offer (including any cash consideration to be paid to option and warrant holders in the target). This 'cash confirmation' is also required to be repeated in the subsequent offer or scheme document when it is made available to shareholders, normally required to be within 28 days after the firm offer announcement. This is driven by a fundamental tenet of the Takeover Code that there is maximum certainty an announced bid will go ahead.

Because there is a theoretical risk that the financial adviser may be required by the Takeover Panel to fund the offer if the bidder does not have sufficient resources and the financial adviser has not exercised the appropriate standard of care required by the Takeover Code in giving the 'cash confirmation', the bidder's financial adviser will generally require fundable and largely unconditional debt and equity documentation to have been signed before the announcement is made. Financial advisers are normally willing to provide a cash confirmation on the basis of short-form interim loan agreements (in relation to any debt funding) and an equity commitment letter (in relation to any equity funding) put in place at announcement, with the long-form documentation to be negotiated and entered into subsequently. The financial adviser will also be concerned with ensuring that the bidder's financing is available for a sufficient period to cover the range of possible closing dates for the transaction. Following amendments to the Takeover Code that took effect in July 2021, it has been suggested that the relevant periods should extend to the date falling eight weeks after the transaction long-stop date in the case of a contractual offer, and six weeks after the transaction long-stop date in the case of a scheme of arrangement.

The Takeover Code requires the disclosure of any debt facility documentation (including fee letters) at the time a firm intention to make an offer is announced. When published, the offer document must include details of the terms of any financing arrangements. Where a bidder's financing includes syndication-related flex arrangements, the Takeover Panel will typically agree to a delay (by way of redaction) in disclosing the flex terms until the offer document is posted to shareholders. If the flex terms are no longer capable of being exercised at that point in time (e.g., because successful syndication has been achieved), the flex disclosure may be omitted. However, if the debt is not syndicated by that time, the flex arrangements must be described in the offer document and the full terms published on the target's website.

The Takeover Panel requires that, prior to announcement, a bidder may only impart confidential information in relation to a bid to another person 'if it is necessary to do so'. The Takeover Panel interprets this requirement restrictively, and ordinarily a bidder must consult the Takeover Panel before disclosing the possibility of a bid beyond a very limited number of parties, usually no more than six entities outside of the bidder's advisory

team, including potential finance providers (whether equity or debt) and shareholders in the bidder or the target.

While a scheme of arrangement will be binding on all target shareholders if approved by the requisite majority, with a takeover offer the bidder may receive acceptances for less than 100 per cent of the shares in the target. Provided that the bidder receives acceptances for 90 per cent of the shares to which the offer relates, it will usually be able to utilise the minority squeeze-out procedure under section 979 of CA 2006 to compulsorily acquire the remaining shares.

Where the 90 per cent threshold is not obtainable, provided the bidder acquires at least 75 per cent of the target's voting shares, it would be able to pass the special resolutions of the target necessary to cancel the target's listing, re-register it as a private limited company and cause it to give financial assistance for the acquisition of its shares. Consequently, financing terms will often include a minimum acceptance threshold, usually ranging between 75 and 90 per cent, to ensure control or a minority squeeze-out can be achieved.

Under CA 2006, public limited companies incorporated in England are restricted from giving financial assistance for the acquisition of, or (re)financing the acquisition of, shares in the company. The subsidiaries of such companies are also restricted (regardless of whether they are public limited companies) from giving such financial assistance. This prohibition on financial assistance includes upstream guarantees and security from the target and its English incorporated subsidiaries to secure the bidder's financing for the acquisition of shares in an English incorporated public limited company. These principles do not, however, restrict the bidder's ability to grant security over any shares in the target that it holds, provided that security does not involve any element of assistance by or from the assets of the target. In addition, they do not restrict the ability of the target to give guarantees and security for the portion of the financing that is to be made available to the target. These financial assistance limitations do not apply to private limited companies. Accordingly, lenders financing a UK takeover will typically require that, once the offer has successfully completed, the target will have its listing cancelled and be re-registered as a private limited company.

Special considerations

With expectations for a resurgence in M&A dealmaking moving into next year, there has been a notable uptick in private equity sponsors requesting the inclusion of portability provisions in their loan documents, particularly in conjunction with a refinancing or extension of their debt beyond the initial investment horizon. Portability provisions (sometimes called a 'specified change of control') allow a private equity sponsor to sell its interest in a group it owns to a third party without triggering a 'change of control' and, therefore a mandatory prepayment of the loan.^[4] Instead, the debt transfers with the borrower to its new owner, provided the new owner is on a pre-agreed whitelist or meets certain criteria. The inclusion of portability provisions provides flexibility for private equity sponsors to exit their investments which are nearing the end of the investment hold periods in an efficient manner with reduced execution risk when the M&A environment is more favourable.

While lenders may be happy to agree to the inclusion of a portability feature to maintain exposure to certain good credits, there is focus around the conditions to accessing portability. At times, private credit lenders are more accommodating to portability provisions to ensure their investment horizon is achieved. Overall, debt portability provisions, while more common in European high yield deals, are still relatively uncommon in the European leveraged loan market.

Outlook and conclusions

As the dust settles after the uncertainty and volatility that have rocked the acquisition and leveraged finance markets in the last few months, there is once again optimism (albeit with a healthy dose of caution) for an acceleration in M&A activity in the UK, propelled by take-privates. The global dealmaking landscape is still, however, characterised by uncertainty as the impact posed by US tariffs has not yet fully played out. Closer to home, the effects and policies unveiled in the autumn budget also remain to be seen.

Dealmakers are, however, more adept at dealing with the unexpected, having navigated a period of elevated uncertainty with no shortage of economic, market and geopolitical challenges that have dampened M&A dealmaking in the last few years. Factors that favour an uptick in UK M&A activity include a stable regulatory backdrop and a government that looks to promote growth and innovation. There is also the prospect of more interest rate cuts to come, although this is anticipated to be at a steady and gradual pace. Market sentiment has also improved and, with private equity sponsors poised to seize opportunities given the healthy levels of dry powder, M&A dealmaking may finally be on the cusp of a full resurgence.

Endnotes

- 1 A detailed overview of the NSIA regime is beyond the scope of this chapter. The implications of the NSIA regime will need to be considered in acquisition financings of qualifying entities or qualifying assets to which the NSIA regime applies, or when taking or enforcing security over shares or assets that are in scope of the NSIA regime. On 22 July 2025, the government announced plans to remove the requirement for a mandatory notification when undertaking certain types of internal reorganisations or when appointing liquidators, special administrators and official receivers. The government is also consulting on updates to the sensitive sectors of the UK economy that are subject to mandatory notification under the NSIA regime. [^ Back to section](#)
- 2 The insolvent estate of a company does not include property in which the company does not have a beneficial interest. So, for example, assets subject to a valid retention of title claim or which the company holds on trust for a third party will not fall within the insolvent estate. [^ Back to section](#)

- 3 From 3 February 2025 to 2 February 2027, transition arrangements apply to certain unquoted public or private companies subject to the Takeover Code immediately prior to the implementation date. For these companies, broadly, the Takeover Code would continue to apply during this transition period provided that the company meets the “residency test” (i.e., having their place of central management and control in the UK, the Channel Islands or the Isle of Man) at the time of the transaction. ^ [Back to section](#)
- 4 A detailed overview of portability provisions in loan agreements is beyond the scope of this chapter. ^ [Back to section](#)

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Introduction

Spain is set to emerge as a significant player in the European economic arena by 2025 and 2026, buoyed by a resilient tourism sector, a robust export market, and substantial investments from the European Union. Despite these positive indicators, Spain faces ongoing challenges, including structural issues such as high unemployment.

In the acquisition and leveraged finance sector, Spain is expected to experience a resurgence in high-yield issuance, driven by refinancing needs, new corporate investments and increased private equity interest. Sectors such as telecommunications, consumer services, and renewables are expected to draw significant investor attention, supported by trends in digitalisation, tourism growth and renewable energy demand.

As we approach 2026, Spain's GDP is projected to grow by 2 per cent, with the tourism sector reaching unprecedented levels and manufacturing and exports enhancing economic competitiveness. However, to fully capitalise on its growth potential, Spain must address potential risks from political gridlock and structural vulnerabilities. With a maturity wall approaching in 2029, the outlook includes significant refinancing activities and strategic transactions, positioning Spain's acquisition and leveraged finance market for a dynamic and promising future.

Year in review

In the face of persistent inflationary pressures and global economic uncertainty, Spain's economic outlook is robust, with GDP growth forecast at 2.6 per cent in 2025 and 2 per cent in 2026, outpacing the Eurozone average. This growth trajectory is supported by strong domestic consumption, a thriving export sector, and EU-funded investment. Moreover, Spain's economy is significantly bolstered by its thriving tourism industry, a key driver of GDP growth. In this regard, Spain's tourism sector is expected to reach an all-time high of approximately €261 billion in 2025, representing 16 per cent of GDP, according to the World Travel and Tourism Council (WTTC).^[1]

In Spain, recent leveraged buyouts (LBOs) indicate a notable shift in financing structures, with equity contributions decreasing from a minimum of 65 per cent in 2023 to an average of approximately 40 per cent by 2025. This trend highlights a significant change in how these transactions are being financed, reflecting a broader reliance on debt over equity in the Spanish market.

The acquisition and leveraged finance sector in Spain is experiencing growth, driven by refinancing demands and fresh corporate investments. Private equity is a key player, with a substantial portion of Spanish companies under PE ownership. This trend is expected to persist, as investors are drawn to Spain's favourable economic conditions and strategic sectors, presenting ample opportunities for growth and expansion in the leveraged finance arena.

Regulatory and tax matters

General regulatory requirements

Generally, no regulatory permits or authorisations are required to act as a lender or security agent in acquisition finance deals in Spain. However, certain regulatory authorisations and registrations may be required to act as a credit entity for consumers according to Law 2/2009 of 31 March 2009, which regulates contracting with consumers for mortgage loans or credits and intermediation services for concluding loan or credit contracts, and Law 5/2019 of 15 March, which regulates real estate credit contracts.

Sanctions and anti-money laundering

Sanctions

As a member of the European Union and United Nations, Spain follows the sanctions imposed by the Security Council of the United Nations and by the EU authorities under the Common Foreign and Security Policy.

AML regulations

Anti-money-laundering (AML) regulations in Spain require that, prior to initiating any business relationship, the ultimate beneficial owner (UBO) of the parties involved in the deal must be clearly identified.

For legal entities, the UBO is defined, in simplified terms, as the natural person who ultimately owns or controls, directly or indirectly, more than 25 per cent of the share capital or voting rights of the legal person, or who by other means controls, directly or indirectly, the management of a legal person.

If a particular legal entity has no UBO, the Spanish anti-money laundering laws presume that the control is exercised by the directors and, therefore, their personal details should be disclosed. If a director is a legal person, the personal details of its representatives (or directors) should be disclosed.

These requirements are of particular significance in Spain because, while notarisation of a loan document is not required by law, it affords the lenders material enforcement advantages. In addition, as a general rule, Spanish security interests must be notarised. In any case, it is market practice to do so. A notary may refuse to grant the relevant deed if there is any failure to satisfy these UBO requirements.

Regulations of foreign investments in Spain

Act 19/2003 of 4 July on the legal framework of capital movements and foreign economic transactions and its associated regulations establish the regime for foreign direct investment (FDI) in Spanish companies.

Traditionally, Spain's FDI regime only applied in relation to investments directly related to Spanish national defence. However, in March 2020, within the covid-19-related measures

adopted by the Spanish government, Act 19/2003 was amended to include a broader FDI screening regime (Article 7bis). Act 19/2003 has been recently developed by Royal Decree 571/2023, of 4 July 2023, on foreign investments, which clarifies the scope of application of the Spanish FDI regime.

Pursuant to Article 7bis, transactions that allow the foreign investor to directly or indirectly reach ownership of 10 per cent or more of the shares of a Spanish company or attain control of the Spanish company, or part of it, as understood under antitrust regulations, may require prior authorisation. This prior authorisation is required only if:

1. the target carries out activities that may affect public order, public security or public health in certain sectors that are considered strategic (strategic sectors); or
2. regardless of the sector of the target, the foreign investor meets certain characteristics (qualified investors).

Foreign investors include investors resident outside the European Union and the European Free Trade Association and investors resident in the European Union and the European Free Trade Association whose UBO is a non-EU or non-EFTA investor. Ownership by the UBO is understood to exist if it holds, directly or indirectly, a stake above 25 per cent of the share capital or voting rights of the company making the investment, or when the UBO exercises control by any other means.

Temporarily, and until 31 December 2026, the regime has been extended to investments carried out in the strategic sectors by investors resident in the European Union and the European Free Trade Association provided that the Spanish target is listed in a Spanish official secondary market (regardless of the value of the transaction) or if it is a non-listed Spanish target company, to the extent that the value of the transaction is greater than €500 million.

Strategic sectors include:

1. critical infrastructure (physical or virtual);
2. critical technology and dual-use products and key technologies for industrial leadership and training and technologies developed under projects or programmes that are of particular interest to Spain;
3. supply of critical inputs, in particular energy, fossil fuels and raw materials, as well as food supply and strategic connectivity services;
4. sensitive information, including access or control of personal data under the General Data Protection Regulation (EU) 2016/679; and
5. media.

Qualified investors are those who:

1. are directly or indirectly controlled by a government of a third country, including state bodies, sovereign funds or armed forces;
- 2.

have made an investment or have already been involved in activities affecting security or public order in an EU member state and in particular in the sectors listed above; or

3. pose a risk of carrying out criminal or illegal activities affecting public order, public security or public health.

The review period for the authorisation is three months.

Investments carried out without the required authorisation will be considered invalid and with no legal effect in Spain, pending clearance. Additionally, the foreign investor may be fined. The sanction may reach the full value of the transaction.

While FDI approval is principally a matter of concern from an M&A perspective, it is also relevant in a debt finance context as this approval may be required to enforce security documents granted directly or indirectly over the shares of Spanish companies.

Tax matters

Deductibility of interest

Spanish corporate income tax (CIT) law does not provide for a thin capitalisation regime, but has an interest-stripping regime limiting the deductibility of net interest expenses to 30 per cent of adjusted operating profits (roughly speaking, earnings before interest, taxes, depreciation and amortisation (EBITDA^[2])) in a given fiscal year, with a €1 million floor. The excess difference could benefit from a carry-over for an indefinite period. Where a taxpayer incurs net interest expenses not exceeding the €1 million floor, the difference between the interest cost and the floor amount will increase the applicable 'cap room' in the five subsequent years. These rules must be tested at a group level where the Spanish borrower belongs to a Spanish fiscal unity (subject to the anti-LBO rules described below).

The existence of a Spanish fiscal unity could have certain advantages. In general, a leveraged holding company may be able to shelter taxable income obtained by its subsidiaries belonging to the Spanish fiscal unity against interest expenses incurred at the holding company level.^[3]

The Spanish interest-stripping rules are in line with the conclusions of Action 4 of the Base Erosion and Profit Shifting initiative.^[4] These rules were amended (with effects from the fiscal year starting on 1 January 2024) to ensure their compatibility with the interest limitation rule provided under the EU Anti-Tax Avoidance Directive adopted by the Council of the European Union in July 2016. Such amendments led to the exclusion of dividends benefiting from the Spanish participation exemption regime from the concept of 'EBITDA' for purposes of such interest-stripping regime. Another noteworthy development from the 2024 reform was the inclusion of securitisation funds in the scope of the regime. Prior to 2024, securitisation funds were deemed similar to financial entities and insurance companies and, therefore, are not subject to the interest deductibility limitations.^[5] That notwithstanding, securitisation funds should generally be in a break-even position from a CIT perspective, provided that the income they obtain is deemed to be financial income.^[6]

Other features of the EU Anti-Tax Avoidance Directive have not been adopted by the Spanish legislator, such as an increase of the minimum interest deductibility floor up to €3 million, the introduction of safe harbours to public infrastructure financing projects and the introduction of a consolidated group ratio rule.

On the other hand, there are certain anti-abuse rules that may limit the availability of interest deductions within a fiscal unity or upon a post-acquisition merger. For instance, an anti-LBO rule imposes an additional limitation to the deductibility of interest accruing on debt incurred to make acquisitions of shares. Under this rule, where the bidco vehicle and the target company merge or form a fiscal unity in the four years following the acquisition, the above-mentioned 30 per cent EBITDA limitation should be tested taking into account only the bidco's stand-alone EBITDA and not the fiscal unity's (or the EBITDA corresponding to the merged entity, as the case may be). To the extent that the bidco is a special-purpose vehicle set up for purposes of performing the shares acquisition (and not an operating entity), this rule would, in practice, prevent acquisition interest from being tax deductible.

To dispel allegations that the anti-LBO rule puts private equity firms at a disadvantage as regards industrial groups, the Spanish lawmaker introduced an 'escape clause' to the anti-LBO rule, whereby the additional 30 per cent limitation would not apply if:

1. the level of leverage does not exceed 70 per cent of the purchase price of the shares acquired; and
2. the acquisition debt is reduced on a proportionate basis within the eight years following the acquisition, until the debt reaches a threshold of 30 per cent of the purchase price.^[7]

Where the acquisition is financed through different kinds of loan facilities (e.g., junior, senior, mezzanine, vendor loans or other types of loans), the amortisation required under the anti-LBO rule may be performed in any of such facilities, provided that the combined outstanding principal amount of all of them does not exceed the maximum threshold for the year in question.^[8] On the other hand, the indebtedness existing at the target company prior to its acquisition does not appear to fall under the scope of this rule.^[9]

In addition, there are other anti-abuse rules under Spanish tax law that may limit the deductibility of interest incurred by a Spanish borrower. Interest expenses arising in connection with intragroup debt, where that debt is used to acquire shareholdings from other group entities or to perform equity contributions into other group entities are non-deductible, unless the borrower is able to evidence to the Spanish tax authorities that there are sound business reasons for the transactions.^[10] Furthermore, interest accruing on profit-participating loans (PPLs) granted by group entities and interest giving rise to hybrid mismatches^[11] are also non-deductible. Spanish transfer-pricing rules may also be used by the Spanish tax authorities to challenge interest deductibility in a related-party loan and to reclassify debt instruments into equity instruments (depending on the features of the instrument). The deductibility of interest incurred in connection with debt financing an equity distribution to the shareholders of the borrower entity (e.g., a dividend recap) should be reviewed on a case-by-case basis.^[12]

Withholding tax

General rules

From a practical perspective, it is standard for foreign lenders to use EU-based vehicles to make loans to Spanish borrowers, as it is not market practice for borrowers to gross-up interest withholding tax (WHT) levied on payments made to lenders who are not 'qualifying lenders' (i.e., lenders entitled to an interest withholding exemption). As a general rule, payments of Spanish-sourced interest are currently subject to WHT at a 19 per cent rate. Tax haven-based lenders will be subject to this standard WHT rate. EU- and EEA-based lenders (or EU and EEA permanent establishments of EU- and EEA-based lenders)^[13] may receive interest free from Spanish WHT, subject to the fulfilment of compliance requirements (e.g., holding a valid government-issued tax residence certificate, or certain alternative certification requirements applicable to pension funds, collective investment vehicles and alternative investment funds). Spanish-resident registered banks, registered Spanish permanent establishments of foreign banks and Spanish securitisation funds also benefit from the WHT interest exemption. Finally, certain tax treaties entered into by Spain may also provide for a WHT exemption on interest (e.g., the tax treaties entered into with Switzerland, the United Kingdom (which place UK lenders in a similar position to EU lenders following Brexit) and the United States), also subject to the fulfilment of compliance and specific eligibility requirements.

Anti-abuse

Spanish tax law does not provide for a definition of 'beneficial owner' in respect of interest. In fact, the above-mentioned rule exempting interest payments made to EU lenders from WHT does not provide for a 'beneficial ownership' provision. Notwithstanding this, the Spanish domestic rule derives from the transposition of Council Directive 2003/49/EC (the Interest Directive) and the Court of Justice of the European Union (CJEU). The CJEU has analysed in the 'Danish cases' (C-115/16, C-118/16, C-119/16 and C-299/16) the concept of 'beneficial owner' under the Interest Directive, and concluded that the notion of beneficial owner (to be interpreted in a way consistent with the OECD standards) may be applicable by member states regardless of the inclusion of a beneficial ownership requirement in the domestic laws. There is still uncertainty as regards to how this doctrine, as applied by the Spanish tax audit, will be interpreted by the Spanish courts of law (and the interplay between such doctrine and general anti-abuse rules).^[14] However, given the scope of the Danish cases (which addressed related-party lending structures and no third-party financing structures) and the background of the Spanish exemption rule, which apply regardless of the existence of borrowing between associated entities (and therefore go beyond the scope of the Interest Directive), there are grounds for supposing that the impact of this doctrine might be limited in the context of third-party lending. In any event, back-to-back lending structures, shareholder loan financings and sub-participation arrangements should be carefully reviewed in light of these precedents and of anti-abuse principles generally. An assessment of the robustness of a lending structure against such potential challenges must be carried out on a case-by-case basis.

Special regime for notes offerings

Spanish tax law provides for a special tax regime^[15] applicable to, among others, qualifying notes offerings made by Spanish-resident companies and by wholly owned subsidiaries of Spanish companies resident within the European Union,^[16] provided that certain additional requirements relating to the offering (e.g., the listing of the notes on a suitable exchange) are met, and certain compliance information is timely supplied by the paying agent involved. This regime provides for a WHT interest exemption on payments made to all foreign noteholders, regardless of their jurisdiction of residence (i.e., tax-haven investors are not penalised) and without requiring individualised tax documentation (such as government-issued tax residence certificates) to be supplied.

Horizontal tax groups

The tax consolidation regime for Spanish companies income tax (CIT) purposes mandatorily includes within a tax group the Spanish subsidiaries of a common non-Spanish resident parent company,^[17] allowing the formation of a horizontal tax group that would include all Spanish-resident direct or indirect subsidiaries in respect of which such ultimate non-Spanish parent company had a qualifying shareholding (i.e., generally, 75 per cent of share capital and majority of the subsidiary's voting rights). The wording of the law (and, in particular, the rules governing the formation of horizontal tax groups) creates several pitfalls that may affect a wide array of industries (e.g., multinational groups with Spanish investments, private equity sponsors and financial institutions financing Spanish acquisitions).

For instance, under the horizontal group rules, a multinational group's parent company holding indirect investments in different businesses without any relationship whatsoever among them from an organisation standpoint (which is a fairly common situation in multinational conglomerates) could be deemed to be the parent company of a sole fiscal unity that should be automatically formed by all the Spanish entities it owns. Under the Spanish CIT Act provisions (which have already been interpreted by the Spanish tax authorities),^[18] if these indirect Spanish subsidiaries already formed their own tax groups in Spain, one of the pre-existing tax groups should cease to exist, with the de-grouping charges that could derive from the termination (i.e., recapture of certain intra-group gains that were eliminated in the past owing to the applicability of the consolidated tax regime). Spanish law does not, however, determine which tax group should be terminated.^[19]

Another example of unwarranted implications of the horizontal group rules may be followed in private equity structures. Generally, private equity sponsors have 'master' holding companies in an EU jurisdiction and make leveraged buyout acquisitions through Spanish bidco vehicles partly financed through loans granted by financial institutions. Once the Spanish bidco acquires the shares of the Spanish 'target' company, bidco and target generally form a tax consolidated group. In these structures, the second Spanish investment made indirectly from the same master holding company (with the same bidco–target structure) may turn out not to be eligible to form a stand-alone tax consolidated group. The fact that there is a common parent company for both the first bidco and the second bidco would mean that the entities related to the second acquisition (i.e., the second bidco and the second target group) should form a single horizontal tax group.

Such an unwarranted outcome may be a great inconvenience for the private equity sponsor (as the financial models prepared for the first acquisition – taking into account the features of the first target and the first bidco's leverage level – may be significantly changed)^[20] and for the financial institutions (as the formation of a horizontal tax group may imply an additional exposure to tax risks associated with companies that did not fall under the perimeter of the acquisition that was financed).^[21]

While there may be strategies to structure investments to avoid the adverse implications of this regime,^[22] their implementation requires individualised tax advice.

Security and guarantees

Parallel debt

Parallel debt structures governed by Spanish law are not used in the Spanish market, as there is a risk of their being declared null and void pursuant to the Civil Code owing to the absence of a legal consideration supporting the creation of such autonomous, independent and abstract debt. Moreover, the legal concept of trust is not regulated under Spanish law. Therefore, it is not court-tested whether a security agent under a syndicated finance deal would be able to validly hold any debt or security interest on behalf of the lenders acting as trustee pursuant to a parallel debt structure. Accordingly, the relevant security interest must be granted in favour of each and every secured party. That being said, parallel debt structures have been recently recognised in other civil law jurisdictions (e.g., France); therefore, the possibility of future changes in Spain cannot be disregarded.

Limits to guarantees and security interests of Spanish guarantors

Limitations on guarantees provided by Spanish guarantors incorporated as SLs

Spanish guarantors incorporated in the form of *sociedades de responsabilidad limitada* (SLs) can only issue notes up to an aggregate maximum amount of twice its own equity (*recursos propios*), unless the issue is secured or guaranteed, as applicable, by a mortgage, a pledge of securities, a public guarantee or a joint and several guarantee from a credit institution. It is not fully clear if this limitation on SLs applies to the level of credit support that SLs can provide in respect of notes issued by any third party.

Financial assistance

When structuring acquisition finance deals or refinancing previous acquisition finance deals, it is important to bear in mind that neither SLs nor *sociedades anónimas* (SAs, which are the most common form of big Spanish corporations) may secure or guarantee, or participate, help or render any sort of financial assistance for the acquisition of their own shares or quotas, or those of their parent companies. Furthermore, SLs may not secure or guarantee, or participate, help or render any sort of financial assistance for the purchase of the shares or quotas of any company within their group. Any security interest or guarantee

that constitutes unlawful financial assistance in accordance with the foregoing rules is null and void. Additionally, financial assistance may raise civil liability issues for the directors.

Unlike English law, Spanish law does not regulate a whitewash procedure and, therefore, in the past the traditional way to avoid financial assistance was the 'forward merger' between the bidco and the target, which should be backed by a valid economic reason for the merger to benefit from an advantageous tax regime.^[23] Royal Decree-Law 5/2023 of 28 June, which approved a new regime on structural modifications, maintains the specific regulation to leveraged mergers consisting of a merger between two or more companies where any of them has incurred debt in the three years prior to the merger to acquire control of any of the other companies involved in the merger or to acquire assets of any of the other companies involved in the merger that are essential for normal operation or are significant for the equity value of the company. In this scenario, the following rules apply:

1. the merger plan will specify the resources and terms envisaged for payment by the resulting company of the debts incurred for the acquisition;
2. the directors' report on the merger plan must indicate the reasons that justify the acquisition and, if applicable, the merger. The directors' report must also contain an economic and financial plan setting out the resources and providing a description of the objectives to be achieved; and
3. the experts' report on the merger plan must contain an opinion on whether the aforementioned information is reasonable.

According to Article 42 of Royal Decree-Law 5/2023 of 28 June, an independent expert (appointed by the relevant mercantile registry) is no longer required to render an opinion on whether financial assistance exists.

Nowadays, the usual approach is to assume that these restrictions also apply to a refinancing of debt incurred in connection with a previous acquisition.

While there are practitioners that consider that the Spanish financial assistance limitations applicable to Spanish companies should be extended to foreign subsidiaries, the extra territorial application of the Spanish financial assistance limitations is usually not the approach followed by the market.

Corporate benefit

The corporate benefit concept is not expressly recognised under the Spanish legal system. Nonetheless, several points should be borne in mind:

1. if a Spanish company grants security interest or guarantees where the transaction pursuant to which the security interest granted is not found to result in the ultimate corporate benefit (direct or indirect) of said company, the directors of that company could be in breach of their fiduciary duties; and
2. to the extent that the power to grant security interest or a guarantee for the benefit of third parties is not included in the directors' powers, the directors may need to seek a special authorisation from the company's shareholders.

In view of the above, corporate upstream guarantees may be challenged to the extent that they do not result in a tangible and identifiable interest to the guarantor beyond the abstract group interest.

In a non-insolvency situation, the corporate benefit requirement still applies. However, it does not need to be quantified, and it will not prevent a guarantee from covering working capital facilities that are not linked to the acquisition of the company's or its holding company's shares or quotas.

SLs must obtain their shareholders' approval prior to providing security or guarantees in favour of their shareholders or directors, unless the beneficiary of the security or guarantee, as applicable, is a company that belongs to the same group of companies.

Although there are some practitioners that understand that the shareholders' meeting must approve the granting of security interest over assets that may be considered essential for the company, there is no market standard in this regard. However, this is typically seen as a condition precedent in the framework of LBOs in Spain.

Under the Spanish Insolvency Act,^[24] any agreement entered into by a Spanish company within the two-year period immediately preceding the petition of insolvency or the notice of the initiation of negotiations with the creditors or the intention to initiate them to reach a restructuring plan (as well as the agreements entered into between any of the aforementioned events and the declaration of insolvency by the relevant commercial court) may be rescinded by the relevant insolvency court, provided that the insolvency receiver deems that the terms of the agreement are detrimental to the insolvent estate, even if there was no fraudulent intention. Likewise, any agreements entered into by a Spanish company within the two-year period immediately preceding the date of the communication of existence of negotiations with its creditors, or the intention to commence such negotiations, to reach a restructuring plan pursuant to Articles 585 et seq of the Spanish Insolvency Act may be also rescinded (even if there was no fraudulent intention) unless:

1. it is not approved a restructuring plan or being approved it is not sanctioned (- *homologado*) by the competent court; and
2. the insolvency is declared within the year following the end of the effects of the aforementioned communication or of the extension that would have been granted.

In addition to the foregoing, the Spanish Insolvency Act contains a presumption by virtue of which it will be deemed detrimental to the insolvency state, and therefore it will be declared null and void, any *in rem* security granted, within the clawback period, as collateral for either an existing obligation or a new obligation in replacement of an existing one.

However, any security interest and guarantee granted within the context of a sanctioned (*homologado*) restructuring plan will not be subject to the aforementioned presumption, to the extent that the relevant restructuring plan affects at least 51 per cent of the total liabilities of the debtor, unless it is proven that the security interest was granted in fraud of creditors.

Security

The most typical securities in the Spanish market are real estate mortgages and pledges over shares or quotas,^[25] bank accounts and credit rights. Promissory mortgages are also not unheard of in the Spanish market, although they may not be considered security interest but just an undertaking to create security interest.

A universal floating catch-all security interest, similar to an English law debenture or US Uniform Commercial Code security interest, is not recognised under Spanish law. In contrast, each security interest over an asset class is documented in a separate deed and signed before a notary public. In this sense, Spanish law security documents must accurately describe the assets that are subject to a particular charge as well as the obligations they intend to secure.

The possibility of creating a single global pledge to secure multiple liabilities is not expressly regulated by the Spanish Civil Code; however, there are grounds to sustain the validity of security interests and guarantees being granted in respect of multiple liabilities. Royal Decree 5/2005, for example, allows for the creation of a single financial security interest to secure several obligations. The use of global real estate mortgages to secure multiple liabilities is also recognised and regulated by Article 153*bis* of the Spanish Mortgage Law dated 8 February 1946. Lastly, the use of personal guarantees to secure multiple liabilities was expressly recognised by Article 98 of Spanish Royal Decree Law 3/2011 of 14 November, which approved the Consolidated Text of the Public Sector Contracts Act. However, Article 98 of the former Public Sector Contracts Act was repealed by Act 9/2017 of 8 November, which approved the new Public Sector Contracts Act that entered into force on 9 March 2018. As a consequence of the above, there are also grounds to sustain the validity of global pledges, even though a different view from the competent courts cannot be disregarded.

Mortgages

As a general rule, pursuant to the principle of speciality, each mortgaged asset may secure the obligations arising from one debt instrument only. However, when all lenders are financial entities (as defined in Article 2 of the Spanish Mortgage Market Act)^[26] and certain formal requirements are also met, the relevant mortgage may be created in the form of a maximum liability mortgage (*hipoteca de máximo*), which may secure several present or future obligations arising from debt instruments up to the said maximum liability.^[27]

Spanish law mortgages can be created over real estate assets and over movable assets such as intellectual property rights, industrial machinery, aircraft, vehicles and business premises; as a perfection requirement, they must all be registered with the relevant public registry.

The mortgage deed must expressly mention, among others, the maximum amount of the underlying obligations that is secured by the mortgage. In this sense, it is important to carry out a cost-benefit analysis, given that stamp duty must be paid on the basis of the maximum secured amount. Currently, the stamp duty applicable to public deeds of mortgage may generally range between 0.5 and 2 per cent of the secured amount (depending on the region where the asset is located).

Since November 2018, following a long court controversy regarding the party who should be liable for stamp duty upon the grant of a mortgage loan, the Spanish government

enacted legislation shifting taxpayer status to the lenders, regardless of the type of loan, the status of the lender (bank or otherwise) or the status of the borrower (e.g., consumer, individual or corporation). From a practical standpoint, however, lenders often demand that borrowers contractually bear the cost of stamp duties, although lenders will continue being liable for such payment before the Spanish tax authorities.

Assignments of commitments under the relevant facility agreement between lenders do not automatically result in the assignment of the assigning lender's participation in the mortgage. The assignment of the mortgage must be expressly documented and registered with the relevant public registry for the acquiring lender to become a mortgagee of record. Furthermore, stamp duty is levied based on the commitment being transferred.

The mortgage deed must include the Spanish tax identification numbers of all parties to enable the Spanish authorities to identify each party thereto.

Pledges

As stated above, Spanish law does not expressly regulate the possibility of creating a single global pledge to secure several obligations. However, Royal Decree 5/2005 allows the creation of single financial collateral interest to secure several obligations and global real estate mortgages (*hipotecas de máximo*) are expressly regulated by Article 153 *bis* of the Spanish Mortgage Law dated 8 February 1946. In this sense, based on the acceptance of the application by analogy of the mentioned regulations, it is a widespread market practice to grant a single global pledge to secure several obligations, which is generally considered acceptable in Spanish academic literature.

There are two main types of pledges under Spanish law: pledges with transfer of possession and pledges without transfer of possession.

Pledges with transfer of possession

Pledges with transfer of possession require the possession of the pledged asset to be transferred to the creditor or to a third party for the purposes of perfecting the pledge. For assets that are not physically transferable, there are presumptions that certain actions (e.g., granting the pledge as a Spanish deed and delivering notices) are equivalent to transferring possession of the relevant asset.

Under certain circumstances, pledges with transfer of possession may be subject to RDL 5/2005,^[28] which incorporated the European Financial Collateral Directive^[29] into Spanish law and aims to facilitate the enforcement of financial collateral arrangements. To benefit from this regime, the following requirements, among others, must be met:

1. at least one of the parties must be a public entity, a central bank, a credit institution, an investment services company, an insurance company, a real estate collective investment undertaking or any of its management companies, mortgage securitisation funds, asset securitisation funds or any of the management companies of a securitisation fund, pension fund or other financial institution, as defined in Article 3(22) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 or secondary market bodies and management companies of those secondary markets, clearing system companies, entities

referred to in Law 41/1999, and equivalent entities operating in the options, futures and derivatives markets;

2. the pledged asset must be cash (i.e., the money credited to an account in any currency), marketable securities^[30] and other financial instruments, or specific receivables (i.e., money claims arising out of an agreement whereby a credit institution grants credit in the form of a loan agreement or a credit line); and
3. the financial collateral arrangement must have been formalised in writing.

The main advantages of RDL 5/2005 for lenders are as follows:

1. no formalities (e.g., registration and notices) are required other than documenting the arrangement in writing, the provision of the collateral, to either the beneficiary or any person acting on its behalf, and constancy of such provision in writing or in a legal equivalent manner;
2. it allows for the direct sale or appropriation of the pledged asset;
3. it provides certain protections against insolvency, given that the initiation of insolvency proceedings is not considered sufficient grounds to declare null or to rescind or to suspend the enforcement of a financial collateral arrangement; and
4. set-off agreements subject to RDL 5/2005 will not be affected by a declaration of insolvency.

In light of a judgment issued by the CJEU on November 2016,^[31] there is a risk that a pledge over bank accounts may not qualify as a financial collateral arrangement if the account holder may freely dispose of the monies deposited in the account. This does not mean that pledge would become null or unenforceable, but that the relevant beneficiary would not benefit from the advantages provided by the RDL 5/2005 for the financial collateral arrangements.

Finally, certain Spanish regional rules may apply depending on where the pledged assets are located.

Pledges without transfer of possession

Pledges without transfer of possession do not require the possession of the pledged asset to be delivered. However, they must be registered in the relevant movable assets registry as a perfection requirement.

Unlike mortgages, provided the pledge is granted as a Spanish commercial deed and not as a notarial deed, no stamp duty will be levied, but it attracts certain other costs such as notarial and registration fees. However, the deed of pledge must still include a reference to the maximum amount of obligations that is secured by the pledge without transfer of possession. Spanish tax identification numbers are required to have the pledge registered.

As regards assignments between lenders, similarly to mortgages, the assignment of a lender's position under a pledge without transfer of possession must be expressly documented and registered with the relevant public registry.^[32]

Similar to pledges with transfer of possession, Spanish regional rules may apply depending on where the pledged assets are located.

Market participants structure pledges over credit rights as pledges with transfer of possession to avoid registration requirements.

Promissory mortgage

Promissory mortgages are not unusual in Spanish finance deals. A promissory mortgage does not create an *in rem* right of mortgage, but rather an obligation for the grantor in relation to the relevant lenders party thereto to create an *in rem* right of mortgage upon the occurrence of the agreed trigger event.

Promissory mortgages are typically used when the amount of stamp duty that would be levied on the relevant mortgage deed is too large compared with the risk of default or, generally, with the benefit of creating a mortgage upon closing a deal.

In any case, lenders should bear in mind that the conversion of the promissory mortgage into a legal mortgage requires the payment of the stamp duty that was initially avoided, and that it may entail significant insolvency limitations and a rescission risk.

Irrevocable powers of attorney

It is usual in the Spanish market to have the mortgagor or pledgor grant a special power of attorney in favour of the security agent (or even the secured parties) to carry out certain actions on its behalf. Pursuant to an irrevocable power of attorney, the security agent is typically authorised to carry out perfection, further assurance and enforcement actions on behalf of the relevant mortgagor or pledgor with respect to the relevant security documents. To ensure that the mortgagor or pledgor may not unilaterally revoke the power of attorney, the security agent is usually party to the deed of power of attorney, and certain specific language is included.

It is worth mentioning that the scope of the powers granted in favour of the security agent or secured parties should be carefully defined to avoid their potential classification as shadow directors in an insolvency proceeding of the grantor.

Finally, under Spanish common law, powers of attorney, appointments or authorisations granted, regardless of whether they are stated to be irrevocable, are generally revocable by the grantor, provided that the revocation is in good faith. Moreover, irrevocable powers of attorney become unenforceable in insolvency.

Priority of claims

Types of claims

Once insolvency has been declared, the court receiver draws up a list of acknowledged claims and classifies them according to the following categories.

Claims against the insolvency estate

These claims are payable when due according to their own terms (and, therefore, are paid before all other claims under insolvency proceedings – see below). Claims against the insolvency estate include:

1. a certain amount of the employee payroll;
2. the costs and expenses of the insolvency proceedings;
3. certain amounts arising from services provided by the insolvent debtor under reciprocal contracts and outstanding obligations that remain in force after insolvency proceedings are declared, and certain amounts deriving from obligations to return and indemnify in cases of voluntary termination or breach by the insolvent debtor;
4. amounts deriving from the exercise of a clawback action during the insolvency proceedings regarding certain acts performed by the insolvent debtor and corresponding to a refund of consideration received by it (except in cases of bad faith);
5. certain amounts arising from obligations created by virtue of law or from tort after the declaration of insolvency and until its conclusion;
6. 50 per cent of the funds lent under a refinancing arrangement entered into in compliance with the requirements set forth in Article 614 et seq (restructuring plans) of the Spanish Insolvency Act;^[33] and
7. certain debts incurred by the debtor following the declaration of insolvency.

Insolvency claims

Insolvency claims are subject to the insolvency proceedings and, unlike the claims against the insolvency estate, are paid in accordance with the waterfall set forth in the Spanish Insolvency Act. In principle, the insolvency waterfall applies mandatorily; that said, the waterfall may be altered among the creditors that are party to a contractual subordination agreement to the extent the debtor is party to such agreement and it does not cause any prejudice to any third parties.

Insolvency claims, in turn, are classified as follows:

1. special privilege claims, referring to claims that benefit from security interest on certain assets (essentially *in rem* security, to the extent secured by *in rem* security);^[34]
2. general privilege claims, referring to, among others, certain labour debts and debts with public administrations corresponding to tax debts and social security obligations (recognised as generally privileged for half of their amount), and debts held by the creditor applying for the corresponding insolvency proceedings (to the extent such application has been approved) up to 50 per cent of the amount of such debt. Up to 50 per cent of the amount of either any interim financing^[35] or new financing^[36] provided within the framework of a sanctioned (*homologa*-

do) restructuring plan also qualify as general privilege claims, to the extent that the claims affected by the relevant plan represent at least 51 per cent of the total liabilities of the insolvent debtor. In the same line, if the interim financing or new financing is provided by parties who are specially related to the debtor, 50 per cent of the amount of such financings will also benefit from general privileges to the extent that the claims affected by the relevant restructuring plan represent at least 60 per cent of the total liabilities of the insolvent debtor (deducting the claims held by any specially related person to the insolvent debtor to calculate the aforementioned majority);

3. ordinary claims (unsubordinated and non-privileged claims); and
4. subordinated claims; debts subordinated by virtue of law include, among others, claims that have been notified late by the creditors (other than claims of mandatory recognition), fines, profit participation loans, claims related to accrued and unpaid interest unless and to the extent they are secured by an *in rem* right, as well as, in particular, credit rights held by parties that are specially related to the debtor (discussed further in Section IV.ii).

Subordination

Credit rights may be subordinated by virtue of law, by contractual agreement or as a result of the structure of the debt. Contractual subordination must be accepted by all of the creditors whose claims are affected by the relevant subordination.

Contractual subordination agreements are now recognised within insolvency proceedings provided that the insolvent debtor is party to those agreements and they do not cause prejudice to any third parties. Contractual subordination agreements are binding to the insolvency administrators, who will make the payments in accordance with the relevant rules or waterfalls set out in the agreements. Contrary to what happens in an insolvency scenario, contractual subordination agreements have not been expressly recognised for the purposes of class formation to vote the approval of a restructuring plan.

Pursuant to the Spanish Insolvency Act, credit rights held by parties that are specially related to the debtor are subordinated. In the case of individuals, this includes their relatives. In the case of legal entities, this includes:

1. shareholders, group companies and their common shareholders, provided that:
 - they are personally liable for the debtor's debts;
 - they owned directly or indirectly over 5 per cent (for companies that have issued securities listed on an official secondary market) of the entity's share capital when the relevant debt was incurred; or
 - they owned directly or indirectly over 10 per cent (for companies that have not issued securities listed on an official secondary market) of the entity's share capital when the relevant debt was incurred; and
2. directors and de facto (shadow) directors, liquidators and attorneys holding general powers of attorney, as well as those who held such positions within the two years immediately preceding the initiation of insolvency proceedings.

In addition to the above, there is a presumption that any persons who have acquired credit rights from the specially related persons described above within the two years immediately preceding the initiation of insolvency proceedings are also specially related to the debtor. Therefore, their claims will become subordinated.

Notwithstanding the above, it is noteworthy that creditors who have capitalised all or part of their claims pursuant to a sanctioned (*homologado*) restructuring plan in accordance with Article 635 et seq of the Spanish Insolvency Act are not deemed specially related persons as a result of said restructuring, and any creditors who are party to a sanctioned (*homologado*) restructuring plan are deemed not to be de facto directors because of the obligations assumed by the debtor pursuant to the restructuring plan (although evidence to the contrary may be admitted).

Jurisdiction

Choosing the laws of any jurisdiction other than Spain will generally be given effect by the Spanish courts subject to, among other things, the terms of the Rome I and Rome II Regulations^[37] and in accordance with the exceptions and provisions of the laws of Spain, provided that the relevant applicable law is evidenced to the Spanish courts pursuant to Article 281 of the Spanish Civil Procedure Act,^[38] and pursuant to Article 33 of the Act on International Legal Cooperation in Civil Matters.^[39]

Furthermore, the recognition and enforcement of a final judgment obtained against any debtor or guarantor in a country other than Spain is subject to:

1. Regulation (EU) No. 1215/2012^[40] if the judgment was rendered by a court of a member state of the European Union;
2. the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters if the judgment was rendered by a court of a non-EU member state having signed such convention;
3. the Hague Convention of 30 June 2005 on Choice of Court Agreements or the Hague convention of 2 July 2019 on the recognition and enforcement of foreign judgments in civil or commercial matters, if the judgment was rendered by a court of a non-EU member state having signed the referred conventions, where applicable;
4. any other applicable bilateral or international treaty relating to the mutual recognition and/or enforcement of judgments if the judgment was rendered by a non-EU member state court of a state having signed such treaty with the European Union or Spain; and
5. the Act on International Legal Cooperation in Civil Matters^[41] if the judgment was rendered by a court of a state to which none of the foregoing applies.

The party seeking enforcement should initiate the recognition proceedings in Spain before the relevant court of first instance or commercial court, as the case may be. According to Article 46 of the Act on International Legal Cooperation in Civil Matters, 'a final foreign judgment would not be recognised:

(a) if the judgment contravenes Spanish public policy rules (*orden público*); (b) if the judgment was rendered infringing the rights of defence of either party. If the judgment was rendered by default, it would be understood that the rights of defence have been clearly infringed provided that the defendant was not served with the document that instituted the proceedings in a timely manner that allowed for adequate defence; (c) if the judgment addresses a matter over which Spanish courts have exclusive jurisdiction or, in relation to other matters, if the jurisdiction from the court of origin over the matter is not clearly connected to said country of origin in which the judgment was rendered; (d) if the judgment is irreconcilable with a judgment rendered in Spain; (e) if the judgment is irreconcilable with an earlier judgment rendered in any other State provided that such judgment complies with the applicable conditions to be recognised in Spain; (f) if there is judicial proceeding outstanding in Spain between the same parties and in relation to the same issues in Spain, instituted before the foreign proceeding.

The Act on International Legal Cooperation in Civil Matters expressly prohibits that a foreign judgment is reviewed as to its substance by the Spanish competent court.

Finally, any judgment obtained against a debtor or guarantor in any country bound by the provisions of Regulation (EU) No. 1215/2012 would be recognised and enforced in Spain in accordance with the terms set forth therein. In addition, pursuant to Article 25 of Regulation (EU) No. 1215/2012, if the parties to an agreement have agreed to submit to the jurisdiction of the courts of an EU member state, such courts would have jurisdiction and such jurisdiction would be deemed exclusive (as currently interpreted by the European Court of Justice). To date, there is no Spanish case law issued by the Spanish Supreme Court confirming the validity and effectiveness of the possibility of non-exclusive or asymmetric jurisdiction clauses.

Acquisitions of public companies

Loans financing tender offers are not that different from non-public acquisition finance deals, although lenders need to focus on the bank guarantees that the Spanish National Securities Market Commission (CNMV) requires as evidence that the relevant acquirer will be able to comply with its obligations under the public offer to purchase, to make sure that these are adequately integrated in the financial documents and to consider the unconditional nature of these guarantees at the time issued. That said, there are a series of specific provisions that are normally included in this kind of financing, such as:

1. undertakings related to the offer that could prevent the bidder from amending certain terms or conditions to which voluntary offers may be subject to;
2. a mechanism regulating the replacement of the aforementioned guarantees if additional lenders join the original guarantee providers once the aforementioned guarantees have been deposited with the CNMV;
3. a 'deemed-utilisation' mechanism by means of which the enforcement of the guarantees by the CNMV would constitute an automatic drawdown under the financing for the relevant claim amount; and
- 4.

the obligation of the bidder to pledge the target shares in favour of the lenders once the offer is settled.

The offer prospectus must give details about how the tender offer is going to be financed, and therefore certain details of the relevant debt instruments will need to be made public.

Spanish stock corporations are governed by the Spanish Securities Market Act^[42] and Royal Decree 217/2008 of 15 February on the legal regime applicable to investment services companies. The Spanish authority responsible for approving any takeover bid launched is the CNMV.

When someone directly or indirectly acquires control over a publicly listed company (i.e., has at least 30 per cent of the voting rights), a tender offer for all outstanding shares in that company is mandatory. The mandatory takeover bid will also be triggered when someone does not hold more than 30 per cent of the voting rights but has appointed, within 24 months following the acquisition, a number of directors that together with those already appointed by the bidder, if any, represents more than half of the members of the board of directors.

The aforementioned threshold can be obtained:

1. by means of an acquisition of shares or other securities that confer, directly or indirectly, voting rights in the company;
2. through shareholders' agreements; or
3. as a result of indirect or unexpected takeovers.

Without prejudice to the above, the Spanish Securities Market Act provides for certain exceptions for the launching of a mandatory offer upon gaining control of a listed company; for instance, creditors acquiring the control of a listed company as a result of the capitalisation of their debt within the context of a sanctioned (*homologado*) restructuring plan that is favourably informed by an independent expert will not be obliged to launch a mandatory tender offer without the necessity of getting an exemption from the Spanish Stock Exchange Commission.

Mandatory takeover bids must be made at an 'equitable price'; that is, an equal price to the highest price that the party required to launch a takeover bid (or those persons acting in concert with it) has paid for the same securities during the 12 months prior to the announcement of the bid. Contrary to this, in a voluntary takeover bid, the bidder is free to offer whatever price it wishes.

Outlook and conclusions

Spain is poised for significant economic expansion, fuelled by a robust tourism sector and substantial EU investments enhancing its infrastructure and renewable energy capabilities. These developments are positioning the country as a key player in the European economy. To fully capitalise on this potential, Spain must address challenges such as political

gridlock and unemployment. The European Central Bank's projection of inflation stabilising at 1.9 per cent by 2026 further supports a favourable economic outlook.

In the acquisitions and leveraged finance sector, Spain is undergoing a transformation. There is a resurgence in mergers and acquisitions, particularly in mid-sized and minority investments, alongside a strategic shift towards increased debt financing in leveraged buyouts. This shift is driven by active private equity investment in sectors such as telecommunications, technology and healthcare.

The volume of merger and acquisition (M&A) and leveraged buyouts (LBOs) transactions remains moderate, but emerging sectors offer promising opportunities for growth. With a focus on innovation and sustainability, Spain's financial landscape is set for a dynamic future, offering substantial opportunities for investors looking to leverage the country's economic strengths and strategic position.

Endnotes

- 1 Europe's brightest spot? — Assessing Spain's LevFin market (9fin) ^ [Back to section](#)
- 2 Please refer to the Resolution dated 16 July 2012, issued by the Spanish General Directorate for Taxes. ^ [Back to section](#)
- 3 In fiscal year 2023, the ability to offset current-year tax losses incurred by a group member entity for purposes of the tax group's consolidated CIT was limited to 50 per cent of stand-alone tax losses, by virtue of a temporary tax measure. We cannot rule out that such measure becomes definitive and, therefore, becomes applicable in respect of fiscal year 2024 and subsequent fiscal years. ^ [Back to section](#)
- 4 Sponsored by the OECD and sanctioned by the G20. ^ [Back to section](#)
- 5 Regulated financial institutions and insurance companies (and their holding companies, to the extent they are subject to the oversight of the financial or insurance regulators) may not be subject to the interest-stripping rules and the anti-LBO rule (described below). ^ [Back to section](#)
- 6 Financial income may be fully offset against current-year financial expenses, without limitations. ^ [Back to section](#)

- 7 The Spanish tax authorities, in binding tax ruling V1664-15, dated 28 May 2015, have addressed certain queries made by a private equity firms association regarding the practical applicability of the anti-LBO rule. According to the tax authorities, the fulfilment of the second requirement should be tested on an annual basis, by comparing the level of indebtedness of the bidco at the end of each fiscal year with the acquisition debt. Even if the acquisition debt accounted for less than 70 per cent of the purchase price, its principal amount should be nevertheless reduced proportionally on annual basis over an eight-year period until it reaches 30 per cent. Nonetheless, if in a given year the acquisition debt is reduced at an amount exceeding the minimum amount required to be amortised as per the amortisation schedule of the anti-LBO rule, the taxpayer may not be required to reduce it further in subsequent years until the remainder of the debt catches up with the amortisation schedule. [^ Back to section](#)

- 8 See binding tax ruling V1664-15. The failure to meet the mandatory amortisation requirements in a given fiscal year does not jeopardise the taxpayer's ability to deduct interest on the debt in future fiscal years, provided that the taxpayer catches up with the amortisation schedule in the subsequent years. [^ Back to section](#)

- 9 In the context of LBOs, it may be possible to refinance existing acquisition debt deemed to be 'tainted' by operation of the anti-LBO rules without running afoul of the anti-LBO rules, although this possibility should be analysed on a case-by-case basis and bearing in mind the legal ramifications of refinancing. In binding tax ruling V4487-16, dated 18 October 2016, the Spanish tax authorities concluded that the swapping of tainted acquisition debt by refinancing debt used to finance a 'dividend recap' distribution to shareholders might, in some circumstances, not be tainted for purposes of anti-LBO rules. Should the transactions performed involve the performance of several interconnected steps, an analysis of the transaction as a whole, bearing in mind its ultimate economic purpose, must be carried out (see binding tax ruling V1854-24). [^ Back to section](#)

- 10 In that regard, there are good grounds to defend (as per the criterion set forth by the Spanish tax authorities in certain binding tax rulings – such as V0775-15, dated 10 March 2015) that there are 'sound business reasons' where the leveraged intra-group acquisition is performed in a connection with a post-acquisition debt push-down plan (e.g., following the acquisition of a multinational group, partly financed with bank debt, the purchaser group sets up a structure that would allow a portion of such acquisition debt to be allocated to Spain), provided that the portion of the debt pushed down to Spain is reasonable. [^ Back to section](#)

- 11** The Spanish CIT Act provides for an anti-hybrid rule transposing the contents of the ATAD 2 Directive (Council Directive (EU) 2017/952, dated 29 May 2017, amending Council Directive (EU) 2016/1164 as regards hybrid mismatches with third countries). In a nutshell, the ATAD 2 regime aims at, among others, avoiding situations where deductions may be claimed by a Spanish CIT taxpayer and by another person in a different jurisdiction (a double deduction outcome) or where deduction does not lead to the inclusion of matching income in another jurisdiction, as a consequence of a conflict in the characterisation of financial instruments, payments or entities. The scope of ATAD 2 is generally limited to related-party transactions, although such measures may apply in respect of third-party arrangements that are deemed to be 'structured arrangements' (i.e., an arrangement where the tax mismatch is priced into its terms or that was designed to produce such an outcome). These rules apply in respect of all tax years ending after 11 March 2021. [^ Back to section](#)
- 12** Several Supreme Court decisions ruled in favour of taxpayers in cases where the tax audit challenged the deductibility of interest accruing in connection with loans taken to finance distributions to shareholders, on the grounds that the interest was incurred for the benefit of the recipient shareholder and was unrelated to the business activity of the borrower. The courts rejected this view. Nonetheless, an anti-abuse report issued by the Spanish tax authorities in July 2022, addressing a structure where loan financing funded a share premium repayment following an intra-group reorganisation, suggests that the tax authorities may scrutinise certain leveraged distributions on anti-abuse grounds, through the application of general anti-abuse rules. [^ Back to section](#)
- 13** Except for EU- and EEA-based lenders resident in or obtaining interest through a permanent establishment located in Spain or in a non-cooperative (i.e. tax-haven) jurisdiction. Currently, no EU or EEA member states are blacklisted from a Spanish tax perspective, but the Spanish tax authorities may revisit the blacklist depending on certain factors (e.g., where there is no effective exchange of tax information, or where the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes identifies a jurisdiction as a tax haven). [^ Back to section](#)
- 14** The Spanish Economic-Administrative Court (TEAC), in a resolution dated 8 October 2019, involving a cross-border, shareholder loan structure (in which a Spanish entity was financed through back-to-back loans ultimately granted by an Andorran entity), echoed the Danish cases and concluded that the Spanish interest WHT exemption can only be claimed by the beneficial owner of the interest. This decision was later confirmed by the Spanish National Court in a decision dated 17 October 2024. The Spanish tax authorities, in binding tax ruling V1827-24, have also expressed the view that beneficial owner status is an implicit requirement that should be deemed to be embedded in the Spanish WHT rule providing for a WHT exemption on interest paid to EU/EEA lenders. It remains to be seen whether the criterion applied therein may ultimately be confirmed by the Spanish Supreme Court or whether it may be extended further to non-related party lending transactions. [^ Back to section](#)
- 15** Act 10/2014, dated 26 June, on the organisation, supervision and solvency of credit entities. [^ Back to section](#)

- 16** Notes offerings carried out by non-Spanish issuer vehicles, where the offering proceeds are ultimately used in Spain, should be carefully reviewed in light of the criterion set forth in binding tax ruling V4139-15, dated 28 December 2015, where the Spanish tax authorities took the view that interest accrued under these notes could be deemed to be from Spanish sources for Spanish WHT purposes. In such cases, it would be crucial to ensure that the offering meets the criteria to be a qualifying note offering from a Spanish tax perspective, and that the applicable compliance obligations are duly met by the paying agent involved. [^ Back to section](#)
- 17** According to the CIT Act, a Spanish parent company (or permanent establishment) holding a direct or indirect participation in a Spanish subsidiary through intermediate holding companies resident in any country other than Spain could form a tax group including indirect Spanish subsidiaries, provided that the indirect shareholding of the Spanish parent company represents at least 75 per cent of the share capital of the Spanish subsidiary (70 per cent if the subsidiary has its stock listed in a regulated stock exchange) and the majority of the subsidiary's voting rights. Parent companies resident in a tax-haven jurisdiction or not subject to a corporate-level tax are not eligible to be an ultimate parent company for purposes of the tax group regime. [^ Back to section](#)
- 18** Temporary Provision 25, Subsection 2. This provision has been interpreted by the Spanish tax authorities in binding tax ruling V2037-15, dated 30 June 2015. The case described in the mentioned ruling was the case of two Spanish consolidated tax groups that had a common parent company resident in Luxembourg. According to the Spanish tax authorities, from the fiscal year 2015 both groups should be combined into a single tax group (as the qualifying parent company of both groups was the same Luxembourg entity). [^ Back to section](#)
- 19** See binding tax ruling V2037-15. This means the taxpayer may choose to terminate the pre-existing group that could trigger fewer de-grouping costs. [^ Back to section](#)
- 20** Several Spanish CIT rules ask for the fulfilment of requirements at the tax group level (for instance, the rules limiting the deductibility of interest), and the enlargement of a tax group may lead to unexpected tax inefficiencies (and to a greater tax compliance burden). [^ Back to section](#)
- 21** Entities belonging to a tax group are jointly and severally liable for the CIT debts of the group. In addition, the inclusion of entities in a tax group means that these entities may have accounts payable and receivable as regards other group entities, depending on whether an entity benefits from tax credits or attributes of another entity of the tax group. This aspect may also be troublesome from the perspective of the financial institutions involved. [^ Back to section](#)

- 22** For instance, the Spanish tax authorities have interpreted that certain investment structures with features designed to ensure that a 'master' holding company could not meet the requirements set out under the Spanish CIT Act to be regarded as a parent entity that could have the status of a head of a consolidated tax group (see, e.g., binding tax rulings V1813-16, dated 25 April 2016, and V1083-16, dated 17 March 2016). However, the use of these structures should be approached with caution and on a case-by-case basis. [^ Back to section](#)
- 23** In addition, the performance of a post-LBO merger requires analysis from a Spanish tax perspective, as it is key that the merger can be performed in a tax-neutral fashion (which requires, among other things, that the reorganisation is deemed to have been performed because of sound business reasons and not for tax-driven ones). These mergers have been contested by the Spanish tax authorities in the past (especially in structures where the merger could give rise to certain tax advantages, and given the potential implications of a busted reorganisation – that is, taxation at the merged company level in respect of the assets transferred to the merging entity – these transactions should be approached with caution). [^ Back to section](#)
- 24** Royal Legislative Decree 1/2020 of 5 May 2020, as amended by, among others, Law 26/2022 of 5 September (by means of which the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt was transposed into Spain. Law 26/2002, by virtue of which the restated Spanish Insolvency Act was approved to organise, harmonise and clarify the insolvency law, which had suffered numerous root-and-branch amendments. It does not include substantial amendments although, as mentioned above, the legislator has taken advantage of the recast to clarify certain provisions that could lead to false interpretations. [^ Back to section](#)
- 25** The share capital of an SL is represented by 'quotas', whereas the share capital of SAs is represented by 'shares'. This distinction is especially important in the application of RDL 5/2005 (see below). [^ Back to section](#)
- 26** Act 2/1981 of 25 March, on the regulation of the mortgage market. [^ Back to section](#)
- 27** Article 153*bis* of Spanish Mortgage Law dated 8 February 1946. [^ Back to section](#)
- 28** Royal Decree Law 5/2005 of 11 March on urgent reforms for boosting productivity and to improve public procurement. [^ Back to section](#)
- 29** Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements. [^ Back to section](#)
- 30** Quotas in an SL do not qualify for these purposes. [^ Back to section](#)

- 31** Judgment dated 10 November 2016 in the Matter No C-156/15 (*Private Equity Insurance Group (SIA) v. Swedbank AS*) in response to a request for a preliminary ruling from the Supreme Court of Latvia. ^ [Back to section](#)
- 32** See Section III.ii. ^ [Back to section](#)
- 33** From 2 October 2016, 50 per cent of the new funds under a formal refinancing are regarded as a claim against the insolvency estate and the remaining 50 per cent as a generally privileged claim. ^ [Back to section](#)
- 34** For the purposes of a composition or a restructuring plan, the special privilege will be limited only to the reasonable or fair value of the charged asset. The amount in excess of such reasonable or fair value will not be considered as a special privilege claim. This limitation does not apply to the right of the secured creditor to recover the amount secured or guaranteed by the relevant security interest or guarantee, as applicable. ^ [Back to section](#)
- 35** Interim financing is referred to in the Spanish Insolvency Act as any financing provided to the debtor while the debtor is negotiating a restructuring plan with its creditors, to the extent such financing is reasonably needed to ensure the continuity of the debtor's business or professional activity during negotiations or preserve or improve the value that the business, as a whole, or of one or several productive units, had at the time of the commencement of negotiations. ^ [Back to section](#)
- 36** New financing is referred to in the Spanish Insolvency Act as financing that is foreseen in the restructuring plan and is necessary for its fulfilment. ^ [Back to section](#)
- 37** Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). ^ [Back to section](#)
- 38** Act 1/2000 of 7 January on Civil Procedure. ^ [Back to section](#)
- 39** Act 29/2015 of 30 July on International Legal Cooperation in Civil Matters. ^ [Back to section](#)
- 40** Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. ^ [Back to section](#)
- 41** The Act on International Legal Cooperation in Civil Matters repealed Articles 951–958 of the former Spanish law civil procedural of 1881. ^ [Back to section](#)
- 42** Law 6/2023 of 17 March on securities markets and investment services. ^ [Back to section](#)

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