



**COUNTRY
COMPARATIVE
GUIDES 2021**

The Legal 500 Country Comparative Guides

United States

LENDING & SECURED FINANCE

Contributing firm

Latham & Watkins LLP

LATHAM & WATKINS LLP

Daniel Seale

Partner | daniel.seale@lw.com

Alfred Xue

Partner | alfred.xue@lw.com

Nicole Fanjul

Partner | nicole.fanjul@lw.com

Preeta Paragash

Counsel | preeta.paragash@lw.com

This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in United States.

For a full list of jurisdictional Q&As visit legal500.com/guides

UNITED STATES LENDING & SECURED FINANCE



1. Do foreign lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

There is no US federal regulatory framework applicable to foreign non-bank lenders that are engaged in commercial lending in the US, a few US states require non-bank lenders to obtain a license prior to engaging in commercial lending activities (i.e., lending activities engaged in between corporate lenders and corporate/institutional borrowers for business or commercial purposes) under certain circumstances. The commercial lending licensing requirements of some of these states are generally triggered only when a commercial loan is secured by real property located in one of such states. However, in California, commercial lending license requirements may be implicated regardless of whether a commercial loan is secured by real property located in the state. As such, California is the state that is most often implicated in the commercial lending context due to the broad scope of California's commercial lender licensing requirement. The US states that may impose commercial lending licensing requirements (unless an exemption from such licensing requirements applies), generally include, but are not limited to: California, Florida, Nevada, North Dakota, South Dakota and Vermont.

While New York does have a commercial lending licensing requirement, such requirement is only applicable to business and commercial loans in a principal amount of US\$ 50,000 or less.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

Federal law does not regulate the amount of interest that can be charged by lenders; instead usury laws are primarily regulated and enforced at a state level. Such usury limits typically take into consideration the size of

the loan, the type of loan and the nature of the lender or issuing institution; for example, many states exclude commercial loans from state laws regulating usury limits to the extent such loan complies with certain conditions such as the minimum threshold principal amount or the purpose of such loan. State laws governing usury limits also regulate the calculation of interest for the purposes of determining compliance with such restrictions (in particular, whether certain fees or other charges incurred in connection with a loan should be treated as interest and therefore subject to the usury limits).

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

Federal law does not impose any restrictions or controls on either the disbursement of loan proceeds in foreign currencies or the payment of interest or fees (or repayment of principal) in a foreign currency. Rather, such restrictions will often depend on the ability of individual lending institutions to provide loans in a particular foreign currency or otherwise to receive payments in such foreign currency. Lenders should take into account federal sanctions and anti-money laundering laws which 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.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction.

In the US, a lien may be created over real property — land and improvements — by execution of a mortgage or

deed of trust, under the applicable state law where the real property is located, and recordation of such document in the county land records where the real property is located. In the case of a deed of trust, the trustee is an independent third party, often the title company involved in the transaction or an individual associated with the title company involved in the transaction, that is granted legal title to the property and whose primary responsibility is to sell the property at a public auction if there is an event of default under the loan which permits foreclosure of the lien of the deed of trust. In the case of a mortgage, the secured party or its agent would be the mortgagee. The creation and enforcement of the security interest in real property is governed by the law of the state where the property is located so engagement of counsel in the jurisdiction where the real property is located is important to ensure the necessary local law requirements are included in the security instrument.

Security interests in fixtures attached to the real property are governed by the Uniform Commercial Code (UCC) in the jurisdiction where the fixtures are located. To perfect and ensure the priority of a security interest in fixtures, a fixture financing statement must be filed in the land records in the county where the property is located. In nearly all jurisdictions, a mortgage/deed of trust may act as a fixture filing if applicable provisions are included in the mortgage/deed of trust. It is common practice to rely on the mortgage/deed of trust as a fixture filing in transactions where the real estate is not the sole or primary collateral in lieu of filing a separate fixture filing.

To create a valid security interest in equipment, inventory, receivables and shares in companies (as well as the other categories of collateral governed by the UCC, (i) a security provider (the grantor) must execute or authenticate a written or electronic security agreement that provides an adequate description of the collateral, (ii) the grantor must have rights in the collateral or the power to transfer such rights, and (iii) value must be given. The security agreement is typically governed by US law and is usually the law of the state that governs the loan agreement, although the assets intended to be covered by such security agreement may be located outside of such state (it is uncommon for security over US assets to be created under a foreign law governed document as this might trigger issues with enforceability and perfection).

A security interest in most types of collateral governed by the UCC (including receivables, equipment and inventory) generally may be perfected by the filing of a notice filing under the UCC, referred to as a UCC financing statement. For debtors that are "registered

organizations" (which term includes most domestic corporations, limited liability companies and limited partnerships) the UCC financing statement would be filed in the jurisdiction in which the grantor was formed, although there are exceptions for certain entities and certain collateral.

In addition, with respect to receivables, if the receivable is evidenced by an instrument or chattel paper, 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 (although it would be common to also perfect by the filing of a UCC financing statement in addition to perfection by possession or control). Certain collateral such as accounts (basically receivables that are not evidenced by an instrument or chattel paper) and general intangibles (basically any intangible collateral that does not fall into another UCC category) may only be perfected by the filing of a UCC financing statement.

Finally, with respect to shares in a company, the UCC provides separate perfection rules for each of the three methods by which a grantor may hold securities (i.e. certificated securities, uncertificated securities or through a securities account maintained by a financial institution referred to as a securities intermediary). 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. Perfection of a security interest in uncertificated securities and securities maintained in a securities account can be accomplished by either the filing of a UCC financing statement or by the secured party obtaining control thereof (i.e., by entering into an agreement whereby the issuer or securities intermediary (as applicable) agrees that it will comply with the transfer instructions originated by the secured party without further consent by the grantor or, less commonly, by registration of the shares or the securities account in the name of the secured party). Generally, in each of the foregoing methods, perfection by possession or control is preferable to perfection by a UCC financing statement as this entitles the secured party to higher priority and may protect the secured party from third parties acquiring better rights in the collateral.

5. Can a company that is incorporated in your jurisdiction grant security over its

future assets or for future obligations?

Yes, a company incorporated in the US can grant security over its after-acquired assets; this is achieved by including express language in the security agreement that the security interest will also apply to cover any future assets acquired by the applicable company to the extent such assets fall within the scope of the pledged collateral. Upon the inclusion of such language, the security interest will automatically attach to future assets of the company, without the requirement for any further action by such company. However, depending on the type of asset involved, there may be certain additional measures required to be performed by the security provider in order to perfect the security interest created over such after-acquired property. Note, however, that any assets acquired after the filing of a petition for bankruptcy would be cut-off by applicable bankruptcy law.

Similarly, a company incorporated in the US can also grant security to secure future obligations by including express language in the security agreement that the secured obligations definition therein would also extend to cover any obligations incurred after the date the security agreement is originally entered into. To the extent such future advances are reasonably identified and determinable under the terms of the security agreement as being secured obligations, the security interest in the pledged collateral will automatically secure any such future obligations.

6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

Security interests in the US are commonly taken over substantially all personal property assets (i.e. all assets other than real property) in a single security agreement. Such personal property 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.

As noted above, interests in real property, whether owned or leased, need to be addressed in a separate mortgage or deed of trust enforceable under the state in which such real property is located.

7. Are there any notarisation or legalisation requirements in your**jurisdiction? If so, what is the process for execution?**

With respect to security agreements in respect of personal property, state law does not generally have any notarisation or legalisation requirements.

However, as noted in Question 4 above, the creation of the security interest in real property is governed by the law of the state where the property is located and each state and certain counties have specific requirements to be complied with as to the form of the security instrument (including items such as required margins, required cover pages or specific property information to be included) as well as required or recommended provisions, so engagement of state specific counsel in the jurisdiction where the real property is located is important to ensure the necessary local law requirements are included in the security instrument. In addition to any state specific provisions to ensure compliance with statutory requirements of the applicable state, each document must be executed by the property owner, as mortgagor/trustor, and notarized by a notary public in the state where the documents are being executed, using the appropriate form of acknowledgment. If the mortgage/deed of trust is being signed outside the US, we recommend consulting with the title company managing the recordation of the security instrument to determine if an apostille or other formalities are required in order to successfully submit and record the document in the land records of the relevant jurisdiction.

8. Are there any security registration requirements in your jurisdiction?

See Question 4 above.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement?

These material costs are primarily real estate related. There are nominal recording fees for mortgages / deeds of trust which vary by jurisdiction and depend on the number of pages of the documents being recorded. In addition, certain states impose a mortgage recording tax on the amount secured by the mortgage/deed of trust. In those jurisdictions, the rate varies by state and by city/county and is based on the applicable tax rate multiplied by the secured amount of the mortgage. As an

example, the mortgage tax imposed on mortgages secured by commercial properties in New York City is currently 2.80% of the secured amount. On transactions where the real estate collateral is only a portion of the collateral package, to limit the amount of mortgage tax that must be paid, lenders often agree to cap the secured amount of the mortgage at a percentage of the fair market value of the property, often ranging from 110-125% of the value at the time of the granting of the mortgage, rather than securing the entire loan amount. This formulation avoids paying mortgage tax on amounts far exceeding the value of the property, but is intended to provide lender protection over potential appreciation of the property value during the term of the loan, as the amount of mortgage tax paid will cap the recovery upon a foreclosure unless additional mortgage tax is funded on or prior to the time of foreclosure. It is important to consult with counsel in the jurisdiction where the property is located or a title company to determine the amount of any applicable mortgage recording tax.

Although not required by law, it is customary for a lender to require the borrower to deliver a lender's title insurance policy insuring the enforceability and priority of the mortgage lien as well as a survey of the property. The title policy insures the priority of the mortgage as of the date of recording, subject only to the identified title exceptions. The cost varies based on the location of the property, as in some states the title insurance rates are regulated whereas in other states they are negotiable. However, the costs of title insurance and surveys are typically paid by the borrower as part of the transaction costs.

There are filing costs for financing statements and intellectual property security interests, but these tend to be fixed fees and are nominal in relation to typical deal sizes.

With respect to personal property, the State of Tennessee is the only state that imposes material taxes in connection with the filing of UCC financing statements.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard?

Yes, in the US, guarantees fall into three categories, namely (i) "downstream" guarantees whereby a parent company guarantees the debt of its subsidiary, (ii) "upstream" guarantees whereby a subsidiary guarantees the debt of its parent entity, and (iii) "cross-stream" guarantees whereby a subsidiary guarantees the debt of a sister company. Hence, a company

incorporated in the US is generally permitted to guarantee and secure the obligations of another group member, subject to certain considerations and limitations. In order to be enforceable, the guarantee will need to comply with certain general principles such as the receipt and sufficiency of consideration and in some states, the guarantee must be in writing and duly executed by the guarantor in order to comply with the Statute of Frauds.

11. Are there any issues that lenders should be aware of when requesting guarantees (for example, financial assistance or lack of corporate benefit)?

As noted in Question 10 above, a guarantor will be required to ascertain and confirm that it has received valuable consideration in connection with providing a guarantee for another group member. However, the guarantor does not need to demonstrate direct corporate benefit to the guarantor in order to determine the sufficiency of consideration where such intercorporate guarantee that benefits the group as a whole. The corporate benefit consideration would also be relevant in insolvency proceedings, specifically in determining whether such guarantee can be challenged as a fraudulent transfer under the US Bankruptcy Code (as discussed in Question 24 below).

12. Are there any restrictions against providing security to support borrowings incurred for the purposes of acquiring shares: (i) of the company; (ii) of any company which directly/indirectly owns shares in the company; or (iii) in a related company?

Generally, unlike in certain other jurisdictions, the US does not have any restrictions on "financial assistance" that would prohibit providing guarantees or security to support borrowings to finance the acquisition of a target company (or its direct or indirect parent or any related company). However, depending on the type of entity being acquired or that is required to provide the guarantee or security, there may be regulatory issues to consider when the guarantee or security provider is a specialized or regulated entity. Nevertheless, the fraudulent transfer issues noted in Question 24 below would also be relevant in a scenario where guarantees and/or security are being provided to support borrowings to acquire the shares of another company and accordingly, the applicable company and the lenders will need to be comfortable with the solvency of the

guarantors and security providers prior to entering into such guarantees and/or security (hence the loan documentation will include a solvency representation to this effect).

13. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

Yes, the lenders in a syndicate can and almost always do appoint an agent to act on behalf of the lenders as a whole. The agent will administer the loan and in this capacity, the agent will hold security on behalf of the syndicate, including to manage the enforcement of collateral securing the loan and to apply any enforcement proceeds towards satisfaction of the obligations.

In terms of process, the syndicate will appoint the agent to act as administrative and/or collateral agent in the loan documentation thereby conferring upon the agent the right to take various actions in respect of the guarantee and collateral package on behalf of the syndicate. The appointment of the agent will also preclude the lenders in the syndicate from acting directly in their individual capacities in respect of any enforcement of the lenders' rights, instead, they can only do so by instructing the agent to take certain actions on their behalf (and such instructions will typically require majority lender consent). Pursuant to the agency appointment, the guarantors and security providers would provide the guarantees and grant security solely in favor of the agent (acting on behalf of all the lenders) . Given the expansive role of the agent, when assuming the agency role, agents will typically include in the loan documentation fulsome indemnity provisions to protect their interests in carrying out this agency function.

14. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

N/A (See above).

15. Does withholding tax arise on (i) payments of interest to domestic or foreign lenders, or (ii) the proceeds of enforcing security or claiming under a guarantee?

The United States federal government generally imposes a 30% 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 US). For this purpose, payments with respect to any original issue discount, if not otherwise considered less than de minimis, are also treated as interest income and subject to said withholding tax.

If the lender is qualified for the benefits of an applicable double taxation treaty between the United States and the country in which a lender receiving interest is resident, the aforementioned withholding tax may be reduced or eliminated the relevant provisions of such treaty.

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, 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 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 is only available for debt that is in "registered form" for US federal income tax purposes. Portfolio interest 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.

In order to claim an exemption or reduction available under an applicable double taxation treaty or the portfolio interest exemption, the beneficial owner of interest must generally submit a properly completed IRS Form W-8BEN-E (or, if an individual, IRS Form W-8BEN).

If interest paid to a non-US lender is effectively connected with such lender's trade or business in the United States, such interest will not be subject to US federal withholding as long as such lender submits a properly completed IRS Form W-8ECI, but will generally be subject to net income tax in the United States and,

for foreign corporations, branch profits taxes.

Other exemptions may be available for foreign governments or governmental entities assuming they provide the applicable properly completed IRS Form W-8EXP.

Additionally, withholding taxes may arise in other circumstances, including the payment of amounts to a US person that does not demonstrate exemption from US backup withholding tax by providing an applicable properly completed IRS Form W-9, the payment of US source interest and certain other amounts to entities treated as "Foreign Financial Institutions" that are not eligible for an exemption from FATCA withholding tax, the payment of various fees (such as letter of credit fees), modifications to debt obligations, and various adjustments on debt obligations that are convertible into stock.

Payments under a guarantee are generally treated consistently with the discussion above, with the source of payments for US federal income tax purposes generally determined by reference to the residence of the relevant borrower. If the lender is receiving proceeds of security, such transaction may generally be treated as a payment on the loan. Under certain circumstances, the lender may be treated as the owner of the foreclosed property, which may result in adverse tax consequences (especially in the case of US real property held by a foreign lender).

16. If payments of interest to foreign lenders are generally subject to withholding tax, what is the standard rate and what is the minimum rate possible under double taxation treaties?

The standard rate for regular withholding tax on interest payments is 30%. If the interest payment is subject to multiple withholding tax regimes (e.g., if both standard withholding tax and FATCA withholding tax apply), the maximum withholding tax rate nevertheless remains at 30%. Double taxation treaties may reduce the withholding tax rates to as low as 0%.

17. Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?

If a foreign lender originates loans to US borrowers with continuity and regularity, US government may consider such person as engaged in a US trade or business, which may in turn require the lender to file a US tax return and

pay income taxes on its income attributable to such trade or business. Generally speaking, any activities that can be considered secondary trading are exempted from such rules, irrespective of continuity or regularity. As such, foreign lenders should take care to limit the extent and scope of their origination activities. If any foreign lender that is engaged in extensive origination activity is also qualified for the benefits of a double taxation treaty and does not have a permanent establishment in the United States, the foreign lender may be protected under the rules of such treaty.

18. Are there any tax incentives available for foreign lenders lending into your jurisdiction?

No, the United States does not currently provide tax incentives for foreign lenders.

19. Is there a history in your jurisdiction of financing structures being challenged by tax authorities, and if so, can you give examples.

US federal government and other US tax authorities regularly audit and make tax assessments on borrowers and lenders to ensure compliance with the various rules around deductibility of interest, withholding tax, income tax rules and to ensure taxpayers do not utilize structures that may result in tax avoidance.

As an example, US tax authorities may perceive certain borrowing structures where a third party lender has lent to a foreign borrower, which has in turn on-lent a substantial portion of the loan proceeds to a US entity as a US "conduit" arrangement that is put in place to avoid US withholding tax. US tax authorities have challenged such structures in court and also enacted anti-conduit regulations. Parties to such transactions take care to ensure the structure does not raise any concerns under the aforementioned US conduit regulations.

20. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

The courts in the US generally give effect to the choice of law (including English law) that the parties have contractually agreed will govern, provided that such

choice of law bears a reasonable relation to the transaction. However, such decisions will also depend on various overriding considerations (such as the applicable court determining that it has jurisdiction to resolve the matter at hand or that the application of such choice of foreign law would be not be contrary to public policy).

21. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Yes, the US is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards, which has been incorporated as Chapter 2 of the Federal Arbitration Act, 9 USC. § 200 et seq. The US is not a party to any treaties for reciprocal recognition of foreign judgments, hence foreign judgments are enforced pursuant to the applicable state statutes, which generally follow the Uniform Foreign Money-Judgments Recognition Act, the Uniform Foreign-Country Money Judgments Recognition Act, or common law principles of international comity. Final and binding money judgments that are enforceable in the country where they were rendered are generally enforced.

22. What (briefly) is the insolvency process in your jurisdiction?

The Bankruptcy Code is the primary corporate insolvency law in the US, which provides alternative regimes for reorganization under chapter 11 or liquidation under chapter 7. Each state also has statutes that provide rules for of receivership or assignment for the benefit of creditors, which can vary substantially by state.

Chapter 11 is a court-supervised process used to restructure a company's debts. Generally speaking, the process is designed so that the company continues to operate in the ordinary course, should emerge with a stronger balance sheet, and management and the board remain in control of operations, subject to court oversight and the rights of parties in interest to be heard. The company is characterized as a "debtor-in-possession." The goal of a chapter 11 is for the company to develop a plan of reorganization with major stakeholders to restructure its debts.

Chapter 7, as opposed to chapter 11, is a court-supervised process used to liquidate a company in an orderly manner. A chapter 7 bankruptcy case does not

involve the filing of a plan of organization. Instead, a bankruptcy trustee marshals and sells the debtor's non-exempt assets and uses the proceeds of such assets to pay holders of claims in accordance with the provisions of the Bankruptcy Code. Typically, secured creditors will be paid from the value of their collateral, subject to the potential to surcharge for the costs of preserving and realizing the collateral.

23. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

The filing of a bankruptcy case under the Bankruptcy Code will result in an automatic stay that prevents lenders (and all creditors) from enforcing any security without prior relief from the bankruptcy court. Relief from the stay is available upon application and a showing of cause, including based on the lack of adequate protection of a lender's interests in its collateral. Lack of "adequate protection" means a lack of security to protect against the diminution in value of the secured lender's collateral during the bankruptcy case - (i.e., the debtor's use/dissipation of that collateral). As noted above, property acquired after the date of the filing of a bankruptcy petition is not subject to a secured party's after-acquired property provisions of its security agreement and the security interest will not attach to such property.

Secured lenders may be "undersecured" or "oversecured" in a chapter 11 bankruptcy. An oversecured creditor (i.e., value of creditor's collateral exceeds the amount of its debt) is entitled to interest, fees, and related charges as part of its allowed secured claim in a bankruptcy case - whereas an undersecured creditor (i.e., value of creditor's collateral does not exceed the amount of its debt) is not.

In a chapter 11 bankruptcy, post-petition financing ("DIP financing") may be available, including on a basis that is "priming" or senior to all prepetition liens. As with use of cash collateral, a debtor is required to provide adequate protection to the relevant secured lenders as a condition to DIP financing that is secured by liens that are senior to or pari passu with the liens of such lenders, or obtain the consent of such lenders.

24. Please comment on transactions voidable upon insolvency.

The types of voidable or challengeable transactions upon the filing of a bankruptcy case include:

a) Preference: Transfers on account of an antecedent debt made within the 90 days prior to the bankruptcy filing when the debtor was insolvent are avoidable if they permit the creditor to receive more than they would in a hypothetical liquidation under chapter 7 of the Bankruptcy Code. The 90 day period is extended to one year for insiders. There are a variety of statutory defences and safe harbours to preference claims.

b) Fraudulent Transfers: Transfers of an interest in property of the debtor may be avoidable if they are (a) made with actual intent to defraud or deprive creditors of value or (b) made (i) when the debtor is insolvent or that render the debtor insolvent and (ii) for which the debtor receives less than reasonably equivalent value.

c) In addition to preference and fraudulent transfer claims, the chapter 11 estates would have the right to pursue any claims of the debtor, including claims for breach of fiduciary duty claims against directors and officers, such as for approving of fraudulent transfers (to the extent available under applicable law).

d) Proceeds of avoidance actions are unencumbered assets available for unsecured creditors. As a matter of practice, an unsecured creditors committee will seek to prevent a post-petition DIP lender, especially one that is a prepetition secured creditor, from obtaining DIP liens over avoidance actions, and bankruptcy judges will often side with the creditors committee on this point.

25. Is set off recognised on insolvency?

Yes, the doctrine of setoff is recognized in bankruptcy cases generally speaking, provided that there is a general prohibition on the setoff of prepetition claims against post-petition obligations.

US federal bankruptcy law does not affect a creditor's setoff rights and does not create a right of setoff, but preserves rights of setoff that may exist under applicable non-bankruptcy law. Therefore, any setoff rights between parties that exist under a contract or under state law will continue to exist in a bankruptcy.

26. Can you comment generally on the success of foreign creditors in enforcing their security and successfully recovering their outstandings on insolvency?

Foreign creditors are generally treated equally to domestic creditors in US bankruptcy cases. The Bankruptcy Code does not distinguish a foreign creditor from a domestic one.

27. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

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 to its direct or indirect US shareholders. In addition, to avoid such deemed dividend, no assets of a controlled foreign corporation have been 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 would 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 United States shareholders. A United States shareholder in this context means a shareholder that is a United States person and owns at least 10 per cent of the foreign corporation.

The US tax reform at the end of 2017 and subsequent guidance issued by the Treasury, however, open possibilities for obtaining credit support from a controlled foreign corporation. 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 when the foreign subsidiary guarantees or provides certain pledges in support of debt of a related US borrower provided certain conditions are met.

These rules are expected to make lending to the US for all lenders (including foreign lenders) easier by expanding the available foreign entity guarantee and other credit support with respect to debt obligations of US borrowers.

28. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

The US loan market has seen a significant uptick in the proportion of lending provided to companies by alternative credit providers (including private credit and direct lending providers, investment funds, specialty

finance firms, hedge funds, CLOs and business development companies). Whilst traditional bank lenders still generally dominate the market for larger, broadly syndicated loan transactions and indeed often arrange syndicated transactions where the bulk of the debt facility is provided by CLOs, borrowers have recently turned to alternative credit providers (including on larger scale financings) in the loan market to avail themselves of the better pricing and deal terms that alternative credit providers are sometimes able to deliver (particularly for better rated credits) in an increasingly competitive market. We see direct lenders able to provide sole underwrites or club deals for large multi-billion dollar transactions on terms that are competitive.

29. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as (i) Brexit (ii) LIBOR transition and/or (iii) COVID 19

With LIBOR scheduled to be phased out completely by June 30, 2023, borrowers and lenders have begun incorporating alternative benchmark rates intended to replace LIBOR in loan documentation in the US. Many US lenders and borrowers are adopting the hardwired fallback recommended by the Alternative Reference Rates Committee (ARRC) convened by the Federal Reserve Bank of New York which provides that if LIBOR stops or is declared to be non-representative, then the replacement rate will be determined by reference to a waterfall of choices consisting of (i) the forward-looking term Secured Overnight Financing Rate (SOFR) plus the

spread adjustment recommended by the ARRC; or (ii) if such term SOFR rate is not available, daily SOFR rates calculated in arrears using simple interest for the relevant interest period plus the spread adjustment recommended by the ARRC.

Separately, recent loan documentation have also generally been updated to account for Brexit, particularly with respect to the contractual recognition of bail-in powers of EEA and non-EEA financial institutions. The updated bail-in language now expressly refers to the bail-in powers of UK financial institutions (in addition to EEA financial institutions) and also features recognition of the write down and conversion powers under the UK’s bail-in regime in respect of the in-scope liabilities of UK financial institutions entering into non-UK law agreements.

Finally, the COVID-19 pandemic has also triggered a number of changes to loan documentation to address the economic impact of COVID-19 and the resulting disruptions to businesses. In particular, the material adverse effect representation in credit agreements has been heavily negotiated between lenders and borrowers to determine whether the impact of the COVID-19 should be excluded from the making of this representation. Another consideration for borrowers is whether COVID-19 related costs and expenses could be categorized as an extraordinary, non-recurring EBITDA addback in order to avoid breaching financial covenants as a result of declining revenues. The uncertainty surrounding the COVID-19 pandemic and its ongoing impact has made it all the more important for US lenders and borrowers to collaboratively strategize on the best way to navigate these uncharted waters.

Contributors

Daniel Seale
Partner

daniel.seale@lw.com



Alfred Xue
Partner

alfred.xue@lw.com



Nicole Fanjul
Partner

nicole.fanjul@lw.com



Preeti Paragash
Counsel

preeta.paragash@lw.com

