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# COUNTRY SURVEY: TAKING SECURITY OVER CIS REAL ESTATE

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# Contents

# Introduction

Secured loans in CIS member-states (including Russia, Ukraine, Kazakhstan and Azerbaijan) often include real estate as a key element of the security package, whether loans are granted for general corporate purposes, specific projects (e.g., commercial real estate and infrastructure) or otherwise. As the local ground rules can change rapidly, lenders are well-advised to keep abreast of developments.

**Dentons** are committed to ensuring our lender-clients are kept well-informed of these changes and receive comprehensive, state-of-the-art advice on the host of issues affecting loans secured by real estate.

We hope you and your colleagues will find the current Country Survey useful. It was prepared by Dentons' corps of experts in Russia, Ukraine, Kazakhstan and Azerbaijan, specialised in banking and finance, insolvency, real estate, tax and other relevant fields. It represents an in-depth analysis of the rules which we have tried to put into plain, user-friendly language for bankers and in-house counsel in key strategic client organisations. We ask that you kindly refrain from circulating the Country Survey to the general public - but by all means feel free to circulate it within your organisation.

We also welcome your questions and comments, particularly if you have experienced practice diverging from that described herein. Please feel free to contact us – we are here for you.

**Dentons – Know the Way.**

# Russia

| I LENDING | |
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| **A Legal Ability to Originate Loans** | |
| What licenses will a foreign lender need to lead or grant one-off or occasional loans secured by real estate? What if the lender starts to make loans more frequently? | The RF Law on Banks and Banking Activity generally regulates banking in Russia. As the primary threshold for the need to obtain a license is the taking of deposits (not lending), a foreign lender does *not* need a license to make loans into Russia (including if secured by real estate). That said, a foreign lender's secured loan may be treated less favourably in a bankruptcy of a Russian borrower or other security-giver. In particular, Russian law generally distinguishes between ordinary 'loans' and bank 'credits'. Only a licensed bank may grant credits. Credits are entitled to a larger share of enforcement proceeds when enforcing security in a bankruptcy (80% as opposed to 70%). It is still unclear under Russian court practice whether a loan granted by a foreign lender will be afforded the same treatment as a 'credit' in Russian bankruptcy proceedings. |
| Are there currency (e.g., exchange control or similar) issues in respect of the loan? Does local law require payment of commissions and fees in local currency? | Transactions between purely domestic entities must generally be carried out in Russia's national currency (the *Rouble* or RUR). Cross-border transactions (including the granting of loans by a foreign lender, as well as the payment of commissions and fees to it) can be carried out with payment in foreign currency. |
| **B Loan Documentation** | |
| Does local law provide for a standard form of loan document, or is one used in practice (e.g., LMA)? | No. However, the law requires certain elements to be included in loan documentation. Over the last decade, modified LMA documents (particularly English-law) have become frequently used for Russian commercial real estate financings, particularly where a cross-border structure is used, including by the larger Russian banks. More simplified local loan documentation is widely used by smaller Russian lenders. |
| What types of security may be obtained? Are there standard types of security taken in practice? | Various types of security are used in commercial real estate financings, including most frequently:<br>• a mortgage over real property (land and/or buildings) and/or real property rights (e.g., lease rights);<br>• a pledge over movables;<br>• a pledge of shares in the borrower and/or holding company(ies) (e.g., for purposes of obtaining control in an event of default ('**EOD**'));<br>• a pledge of rights (e.g., construction contract(s), parent company guarantee(s) and/or performance bond(s); insurance and/or re-insurance policies; tenant lease(s) and the like);<br>• a pledge of bank account;<br>• where available, bank guarantees; and<br>• suretyships (i.e., corporate or individual guarantees).<br>No standard form documents exist – lenders ordinarily develop their own |

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| | forms with outside counsel. |
| Can the laws of another jurisdiction or country govern the loan and/or security documents? Is this common? | The choice of foreign law for a loan agreement is admissible in a cross-border transaction. In the last decade, it has become fairly common to see medium-sized and large commercial real estate loans governed by English law. Security over collateral located in Russia cannot be governed by any substantive law other than Russian law. |
| Do special issues arise in syndication, such as limitations on the use of a security trustee and/or the need for a parallel-debt structure? Are these structures common, and do they work under local law? | Russian civil law has been recently amended to accommodate for syndicated lending at a purely domestic level; these amendments took effect on 1 July 2014. A pledge or mortgage may now be created in the name of a 'security agent' (who may or may not be a creditor) acting on behalf of the creditors under an agreement for the management of pledged property. |
| Are there local-law usury rules that may affect the terms of a commercial loan? | Generally, no. This is purely contractual. However, tax law may limit deductibility. |
| What is the effect of a negative pledge covenant under local law and court practice, and what remedies are available if the covenant is breached? | Russian law now (finally) recognises the concept of a 'waiver of rights'. At the same time, as a general rule, Russian law does not allow the prohibition of establishment of subsequent pledges *inter partes*. The parties may only set out the terms on which such subsequent pledges may be established (the **Terms**). In case a subsequent pledge is established in violation of the Terms:<br>• the pledgee may claim damages against the pledgor; and<br>• claims of the subsequent pledgee (who knew or is deemed to know about the Terms) shall be satisfied subject to the terms of the preceding pledge. |
| Do stamp duties or similar charges arise in respect of loan, security and/or other credit-support (e.g., guarantee) documentation? Are there customary and accepted ways for legally deferring, minimizing or eliminating them? | There are generally no stamp duties or charges on a loan or guarantee. If mortgage/pledge documentation is subject to notary certification (or such certification is sought, e.g., to ease extrajudicial enforcement via a bailiff on the basis of a notarial executive endorsement later on), then notary's fees must be paid. There are also (relatively nominal) charges for state registration of mortgages and registration of notification of movable property pledges by Russian notaries. |
| Can property-specific needs be addressed by means of pledged cash reserves and escrows funded from the loan proceeds, and are these means common? | Historically and until very recently, there were a number of challenges to creating account security, since Russian civil law did not recognize the ability to pledge funds in an account. Similarly, Russian civil and banking laws did not expressly recognize the institution of escrows.<br>In December 2013, as part of broad reform of the Russian Civil Code, the concepts of (i) an escrow account and (ii) the pledge of a bank account were introduced and adopted in Russia.<br>The new rules for escrow accounts and pledge of bank accounts took effect on 1 July 2014.<br>With respect to escrow agreements, the new Civil Code provisions follow general international custom: a depositor enters into an escrow account agreement with a bank (the escrow agent) for the purpose of transferring funds to another person (the beneficiary). Disposal of the funds held in the escrow account is significantly restricted: during the term of the agreement neither the depositor nor the beneficiary may dispose of the funds in the account. Escrow accounts are exempt from general rules on freezing accounts. Therefore neither tax authorities nor court bailiff services have access to them.<br>The new rules on pledge of rights over bank accounts allow creation of |

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| | security over a flat amount of funds or over the entire account (akin to a floating charge). Thus, starting from 1 July 2014 account security can be created over a Russian bank account. However, due to many uncertainties in the regulation of this new instrument, this novelty has still not been widely implemented by Russian banks.<br><br>The possibility of creating a security over a foreign bank account of a Russian borrower will remain. Note, Russian tax authorities will need to be notified about a bank account opened by a Russian company in a foreign jurisdiction. Also, the Russian account holder will need to report quarterly and observe other Russian foreign exchange control rules in connection with the use of such foreign account. |
| Is it common to structure property financings using offshore holding companies, and if so what forms of foreign-law security are commonly encountered? What benefits do such security structures provide? | Major commercial real estate loans in Russia are commonly structured with a variety of offshore companies. Typically, the direct borrower will indeed be an offshore holding company ('**Finco**'), which on-lends to a Russian project company owning the property ('**Rusco**'). Rusco is usually owned by another offshore affiliate of the borrower ('**Holdco**'). Previously, the primary benefits of this offshore structure were that Russian thin-capitalization tax rules applicable in the related party transactions (which limit deductibility or re-characterise interest as dividends) could have been formally avoided. However, starting from 2011 there was some movement on the part of Russian courts who appeared to be limiting the availability of this loophole (which, as of the date of publication, generally remains lawful). Finally, Federal Law No.25-FZ of 15.02.2016 extended the scope of thin capitalization rules to qualifying foreign-sister-company intra-group loans. At the same time certain loans (e.g., the loans extended by Russian or foreign banks or by qualifying Russian affiliated companies of the borrower) are exempt from thin capitalization rules, subject to certain conditions. The latest amendments will become effective starting from 1 January 2017.<br><br>Security is ordinarily taken over the shares of both Finco and Holdco, as well as over those of Rusco. One main advantage of having the offshore security structure is that in case of default, the lender can act quickly and effectively to enforce over the pledges of shares in Holdco and Finco (to prevent possible confrontations of Rusco and its creditor Finco) and ensure smooth cooperation in the enforcement process. Another benefit of such structure is that Russian lenders, by lending directly to a foreign company (Finco), may use foreign-law (typically English) LMA lending documentation. They would otherwise be obliged to use Russian law loans under Russian conflict of laws principles. |
| Is arbitration available? | Russia is a member of the 1958 New York Convention, and foreign arbitral awards are generally enforceable in Russia, subject to prevailing court practice.<br><br>Recent court practice has recognised the possibility of including arbitral clauses in mortgages of real property in Russia.<br><br>Asymmetrical arbitration clauses (i.e., clauses where one party retains the right to choose either arbitration or litigation) would not be upheld by Russian courts on the basis that one party's unilateral contractual right to choose either judicial dispute resolution or arbitration gives it a more advantageous position, violates the balance of interests of the contracting parties and hence contradicts the fundamental principle of equality under Russian constitutional law and international human rights law. |
| **C Limitations on Borrowing** | |
| What corporate approvals are needed | Depending on the loan size, value of assets of the borrower or security |

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| for a company to borrow or provide security? | giver and relations between the borrower and security giver, a loan or security may require approval by the board of directors and/or shareholders as a 'major' and/or 'interested-party' transaction. Additional special approval requirements may also be envisaged in the charter. Where such approvals have not been obtained, the transaction may be challenged as invalid. |
| Are there financial limits relevant to a company (e.g., as to the amount it can borrow and/or as to the security for its borrowings or the borrowings of other companies)? | Generally no statutory financial limits exist other than in respect of borrowings by banks. Insolvency considerations should be checked. Thin capitalization rules may apply in related-party transactions, and financial limits on borrowing and/or giving security may be imposed under existing financing documentation. |
| Are there legal restrictions on 'financial assistance' or 'upstream guarantees' that must be considered? | No formal restrictions as such exist in Russia in the companies laws or the Civil Code. However, the granting of any form of credit support for another person's obligations (whether a suretyship, guarantee, pledge or other security) risks challenge within a 3-year hardening period if the security giver enters insolvency proceedings. (There is also a separate one-year undervalued transaction rule.) This is due to the lack of a clear carve-out in the RF Bankruptcy Law for group transactions, even when there is a material benefit to the security giver and irrespective of whether the support is given on a downstream, cross-stream or upstream basis. See *Open Joint-Stock Company Metallurgical Plant Red October,* RF VAS Decree No. BAC-9876/11 of 3 July 2012. The Russian High Commercial Court has endeavoured to limit the effect of this case by issuance of RF VAS Decrees 59 and 60 of 30 July 2013, and it appears that the Supreme Court has also taken the position (though not in a manner which is binding on the lower courts) that companies in one group are deemed to have benefit in providing security for each other. However, still it remains uncertain whether the test on interested parties (as relevant to the rule) will be confined solely to transaction counterparties (as per the statute) or will be applied to any parties benefiting from security, i.e., borrowers (as per the expanded judicial doctrine of Red October). Lenders should take advice on a case by case basis. |
| Are there lawful and reliable means of overcoming any limitations (e.g., whitewash)? | Given the absence of express statutory carve-outs in the RF Bankruptcy Law (and the lack of further high court practice following the *Red October* case), there are no 100% reliable means of whitewashing as regards this risk. However, certain steps can probably be taken to mitigate risks. |
| Can a company or individual give security for the obligations of a third party? Are there any limitations here? | Subject to applicable insolvency rules, yes, security may be given for third-party obligations. No special statutory restrictions apply other than limitations on certain types of corporate transactions (see above) or related party transactions (see below). For individuals, certain limitations may also apply (e.g., under marital, guardianship and/or consumer protection laws).<br><br>In respect of Russian legal entities and individuals (subject to the RF Law on Bankruptcy), there is always the risk that the security may be found invalid in an insolvency proceeding of the security giver during a three-year hardening period (see discussion above). |
| Can a company give security for financing being provided to a shareholder, a director or a related party? Must any special approval requirements be met? | Yes, such structures are possible. Such transactions must be approved, depending on the size of the loan/value of security, by the board of directors or shareholders of the borrower or security giver. There is, however, a risk of any such security's being voided in light of the *Red October* case (see above). Furthermore, related-party security will invariably involve a higher degree of risk. |

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| What investigations should be made about the security-giver (whether an individual or a company)? | Appropriate legal due diligence should be made on capacity (due existence, authority and absence of insolvency), including various of the above matters, as well as title and encumbrances over any collateral. Where the security is critical to the credit risk analysis, a formal legal opinion from local counsel on these matters should be sought. In light of the *Red October* case (see above) the lender needs to be rigorous in investigating the security-giver's solvency and documenting the security. |
| **D Validity of Security** | |
| Are there any general prohibitions or limitations on taking security? | Generally, no. However, some limitations may arise. For example, Russian law prohibits foreigners' ownership of land in border areas of Russia, so foreign lenders taking a mortgage of land must bear this in mind. Also, unfinished construction of real estate (which is not registered as a separate object of property in the State Immovable Property Register, with a distinctive cadastral number) may not be mortgaged. |
| Is there ever a risk of claw-back and/or fraudulent transaction in the taking of security? | Yes. See 'Bankruptcy / Insolvency,' below. Note also, in certain cases Russian bankruptcy law can penalize creditors in claw-backs by statutorily subordinating their claims. |
| Does local law distinguish as between the 'creation' and the 'perfection' of security? | Russian law has not historically distinguished between 'creation' and 'perfection' of security (these terms are often used interchangeably on the market). However, as of July 2014 a new unified registration system for pledges of movable property came into effect, which effectively establishes such a system (see discussion below). |
| Can security be taken over 'future' property (e.g., property not yet owned by the security-giver and/or not yet even in existence), and/or future earnings from existing or future property? | Under Russian law, the pledge of 'future' movable or immovable property is theoretically possible, provided the parties can identify such future property in sufficient detail in the pledge document. This tends to be the key challenge to creating future security and, especially, with respect to immovable property. The amended provisions of the Civil Code which took effect on 1 January 2015 simplified the rules for identifying a 'future' property and provided for the possibility of pledging all property (or a certain type of property) of the pledgor (this rule only applies to commercial (entrepreneurial) relations), however there is no clarity whether the same approach may be used with respect to immovable property. Pledge of 'future' movable property is a new concept for Russian law and has not yet been tested in Russian courts . At the same time, there may be ways structurally to overcome the problem with respect to immovable property (e.g., by taking security over the underlying land rights and relying on a statutory mortgage (*ipoteka v silu zakona*) to cover a building being constructed on such land). |
| Can security be given by individuals, and are there special limitations/requirements for such security (e.g., consumer-protection rules)? Do any special issues arise here? | Security can be given by individuals subject to capacity, consumer-protection and matrimonial rules. The collateral pledged by an individual can only be sold at public auction. |
| Are loans generally structured (or may they be structured) as 'recourse' loans whereby the security-giver always remains personally liable, or as 'non-recourse' whereby after default the lender may seize the collateral but its recovery is limited to the collateral? | Loans may be structured as full recourse, limited recourse or non-recourse. |

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| What claims or other liens can prime an earlier security interest? | Secured claims are generally satisfied in non-bankruptcy enforcement following (i) claims for compensation for harm to life or health (tort), and (ii) certain employee remuneration, severance payments and author's emoluments.<br><br>In bankruptcy enforcement, secured claims are generally satisfied after (i) court expenses; (ii) the administrator's remuneration; (iii) current maintenance and utility payments of the debtor; (iv) claims of creditors arising after the court's acceptance of the bankruptcy petition and prior to declaration of the debtor insolvent, as well as claims of creditors arising during the bankruptcy procedure; (v) outstanding amounts of wages arising after the court's acceptance of the bankruptcy petition and employee remuneration during the bankruptcy procedure; (vi) other expenses with respect to the bankruptcy procedures; (vii) compensation for harm to life or health and punitive damages (but only if they arose prior to creation of the security) (tort); and (viii) certain employee remuneration, severance payments and author's emoluments (but only if they arose prior to creation of the security).<br><br>Notably, in Russia tax claims do not prime security.<br><br>For certain types of organisations (notably, credit institutions) Russian law envisions special liquidation and bankruptcy procedures, where priority in satisfaction of claims may be different from that described above. |
| What benefits does an earlier security interest enjoy over second-ranking security? | Claims under earlier-ranking security are satisfied from proceeds of sale of the collateral in priority over second-ranked security. If a second-ranking mortgage/pledge is enforced and the lender holding the first-ranking security does not join in the enforcement, the property will be sold subject to the first-ranking mortgage/pledge. However, if the first ranking mortgage/pledge is enforced and a junior lender does not join in the enforcement, the second-ranking security is extinguished unless there will be enough pledged property to satisfy claims of the junior lender after enforcement performed by the senior lender. |
| Are there any relevant time periods (e.g., as to the length of validity of security or as to the time in which the lending must take place)? | As a general rule, security remains valid as long as the underlying obligation is valid. At the same time, it should be noted that a suretyship is valid until a certain date (or the occurrence of inevitable circumstances) set out in the suretyship agreement. If a suretyship agreement does not specify a certain date or such circumstances (for example, if it is merely indicated that the suretyship is valid until the main obligation is valid), such suretyship shall be deemed to extinguish after one (1) year from the due date of the main obligation unless the lender files a claim against the surety within such one (1) year period; if the main obligation does not specify its due date or such due date may not be determined or determined as 'on demand', the suretyship shall extinguish within two (2) years from the date of the suretyship agreement unless the lender files a claim against the surety within such two (2) year period. The same rule applies to pledges from third-party pledgors unless application of this rule is carved out by agreement between the pledgor and the pledgee. |
| What would a typical time period be for entering into and perfecting a straightforward secured transaction? | This largely depends on various factors, e.g., the form of security, type of collateral and enforcement mechanism chosen by the lender. Russia is quite bureaucratic, and in practice individual registration authorities exercise wide discretion in determining whether to register or reject security.<br><br>As discussed below, where a lender chooses to have security certified by a notary to take advantage of self-help enforcement procedures via bailiff services, additional time should be allowed for negotiating the text |

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| | of security with the notary. Depending on the notary and complexity of security documents and transaction structure, this process may take 2 to 3 weeks.<br><br>Registration of mortgages usually takes 3 business days (if the mortgage agreement is certified by the notary) to 15 business days (if the mortgage agreement is not certified by a notary) excluding time needed to compile the application.<br><br>Registration of pledges over a participation interest in a limited liability company takes about 7 business days (2 business days for the notary to file the pledge application to the tax authorities and 5 business days for the tax authorities to process such application).<br><br>The parties to certain security documents are required to provide relevant corporate documents (i.e., articles, certificates of directors, extracts from the companies register etc.) to the notary, the registrar or the relevant state authorities (as applicable) where such security is certified or registered. For the foreign counterparty such documents must be apostilled and translated into Russian by a certified translator. It is advisable to obtain the list of such documents from the relevant authority in advance and consider the time which shall be required to prepare all of these. |
| What obligations may be secured (e.g., specific debts, all present and future debts, guarantee obligations, interest, fees and expenses)? | Generally, any monetary obligations can be secured, including guarantee obligations, interest and default interest payments, fees and expenses, provided however that secured obligations are sufficiently described and identified in the security document. Russian law on pledges/mortgages mandates that the pledge/mortgage instrument contains information on nature, size and tenor of the secured obligation. The amendments to the Civil Code clarified that these conditions relating to secured obligations can be identified by simple reference to the contract creating the underlying secured obligation.<br><br>It is now expressly allowed to secure 'all debt' of a debtor to a creditor up to a specified monetary amount. |
| What fees (excluding legal fees) and taxes are payable (e.g., for searches, notaries and registration, as well as enforcement)? | Notary's fees may be as high as RUB 500,000 (approximately EUR 5,600 at current exchange rates) per pledge/mortgage document (depending on the type of security and value of the collateral).<br><br>Registration fees are generally rather nominal. Fee for registration of a commercial mortgage is RUB 4,000 (approximately EUR 45 at current exchange rates). |
| How do lenders perfect a security interest in cash reserves? | A pledge of bank account is considered created upon notification of the account bank and provision to the bank of a copy of the pledge agreement. If a pledgeholder is the account bank itself, the pledge will be deemed created as of the date of the pledge agreement.<br><br>Until recently, lenders frequently required tripartite direct debit agreements, with the borrower and its account bank, although this is not a security *per se*, but rather a payment mechanism. It is not clear yet if lenders will continue to use this instrument alongside the new pledge of bank accounts. |
| Are there any limitations on a lender's ability to charge interest on portions of the loan advanced into escrow with the lender? | Russian law has only recently introduced the concept of escrow accounts. The relevant provision of the RF Civil Code took effect on 1 July 2014. These new provisions only deal with the concept of escrow bank accounts and do not contain any explicit regulation in connection with loan transactions. In our view, the charging of interest would not be prohibited. |

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| Is a lender required to pay interest on reserves in escrow with that lender? Are taxes levied on the interest paid on such reserves, and if so who pays those taxes? | No, this is a purely commercial matter. In case interest on reserves is agreed, taxes are levied on the interest paid on such reserves. The person entitled to receive the reserves, i.e., the eligible person, is indebted for such taxes. |
| Address encumbrance of shares, movable property / fixtures, etc. Are there filing or registration requirements? | Information on the pledges of movable assets should be registered in the Unified Information Notary System (or 'UINS'). Such registration establishes priority of pledges in a manner equivalent to 'perfection', i.e., the registration of a pledge of movables is generally not mandatory, but registration bears directly on bona fide purchaser rights as well as priority. Thus, it is critical that existing pledges which remain in effect be registered as soon as possible.<br><br>A pledge of shares in a joint-stock company is subject to mandatory registration in the company's register of shareholders or depository account (depending on the place where the rights over such shares are registered). The pledge is only deemed created upon such registration.<br><br>A pledge of participation interest in a limited liability is subject to mandatory registration in the unified state register of legal entities (EGRUL).The pledge is only deemed created upon such registration.<br><br>A pledge of goods in circulation (akin to a floating charge) is subject to registration in the 'pledge book' (*kniga zapisi zalogov*) maintained by the pledgor. The failure to record a pledge into the pledge book does not affect the validity of the pledge, nor does it 'perfect' the pledge. |
| **E Creation of Mortgage** | |
| How is a mortgage of real estate established? | A mortgage can be created either contractually or statutorily (e.g., by operation of law).<br><br>The establishment of a contractual mortgage requires the following steps: (i) execution of a simple written contract establishing the mortgage; and (ii) registration of the mortgage interest in the State Immovable Property Register (the pledge of certain types of assets recognized as real property such as seacraft, aircraft, etc. is registered in different registers).<br><br>A statutory mortgage arises with respect to newly-constructed buildings on mortgaged land (provided the mortgage over the land plot has been duly created and registered). As a general rule, the establishment of a statutory mortgage requires the following steps: (i) registration of ownership title to the mortgaged property with the State Immovable Property Register; and (ii) registration of the mortgage interest with the Register, which is done automatically and simultaneously with the registration of the ownership title to the mortgaged property.<br><br>Mortgages may also be created in favour of an unsecured creditor on the basis of a court decision (judgment lien). This type of mortgage requires registration in the same manner as a contractual mortgage. From the date of its registration that unsecured creditor's claims will gain priority over the claims of other unsecured creditors, and the mortgage will have priority over any other mortgages created thereafter and be subsequent to the mortgages created before. |
| Does the mortgage have to be in any special form? | A contractual mortgage must be in written form. If a mortgage agreement envisages an out-of-court enforcement procedure via notarial executive endorsement, it must be certified by notary. |
| What are rules on priority? | If two or more mortgages are established over the same property, the |

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| | mortgage which is registered first in the State Immovable Property Register takes priority. This statutory priority can be changed by agreement between the mortgagor and mortgagee(s). The agreement can also 'fix' the ranking of security interest between mortgagor and mortgagee, in which case release of a prior mortgage will not bear on a low-ranking mortgage (it will not upgrade to the vacant higher rank). |
| Are construction mortgages achievable over buildings and other structures to be built in the future on a land plot? Are there special statutory provisions on these and/or are special provisions required in the mortgage agreement? | As a rule, a mortgage over a land plot extends to buildings or structures which are being built thereon (this is called a 'statutory mortgage'). Independent of this rule, if construction of a building or structure is wholly or partially financed by a loan, a statutory mortgage over such building or structure will arise (unless the financing agreement makes an explicit exclusion) in favour of the lender upon state registration of the mortgage. Mortgages cannot be established over so-called 'unfinished construction' (*nezavershennoe stroitelstvo*) unless such construction has been registered as an independent object of immovable property with its own cadastral number. |
| Can mortgages be granted to more than one named lender? | Yes. A mortgage (pledge) can be granted to several (joint and several or only several) lenders. Russian Law recognises *pari passu* rankings in such security.<br><br>The Civil Code also expressly allows creditors (pledgees) to conclude an agreement on 'management of pledged property' with one of the creditors or with a third party, effectively creating a security agent structure for syndications of creditors. |
| **F Foreclosure & Enforcement** | |
| Who may act in enforcement? (Are there restrictions on the type of parties that may exercise remedies?) | All creditors may act. The laws set forth no restrictions. |
| Can the lender buy the mortgaged property or otherwise become its owner? | If the mortgagor is a legal entity the lender may retain title to the mortgaged property in both judicial and non-judicial foreclosure if a mortgage agreement so envisages.<br><br>If the mortgagor is a natural person, we believe the lender may retain title to the mortgaged property in judicial foreclosure if a mortgage agreement so envisages. This said we note that Russian law is unclear whether this option is indeed available for a lender in relations with individuals. |
| What are the steps involved in judicial foreclosure? | The major steps in judicial foreclosure are:<br>• filing a lawsuit with a court to officially commence a foreclosure;<br>• seizure of the real property by a court bailiff (formal notification to the debtor and record of the commencement of foreclosure proceedings in the State Immovable Property Register);<br>• determination of the method of disposal of collateral (except with respect to individuals) and the sale price based on the parties' agreement;<br>• disposal of the property; and<br>• distribution of the sale proceeds. |
| Is non-judicial foreclosure (i.e., self-help) available? Are there special rules for ensuring that this right exists and | Non-judicial foreclosure is possible if the security agreement so envisages. If a security agreement providing for non-judicial enforcement is certified by a notary (i.e., signed in the presence of a notary), the mortgagee can count upon the assistance of the bailiffs if the mortgagor |

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| on how it may be exercised? | impedes out-of-court enforcement provided it obtains a notarial executive endorsement.<br><br>In non-judicial foreclosure the lender can either (i) organize an open auction to sell the mortgaged property; (ii) sell the asset to a third party (for movable property only); or (iii) retain title to the mortgaged property (options (ii) and (iii) are not available for pledgors who are natural persons).Non-judicial foreclosure may also not be available for certain types of immovable property (for example, if the mortgaged property is residential premises belonging to a natural person) and in certain other specific scenarios (for example, if the senior ranking and junior ranking security contemplate different enforcement procedures). |
| Address the pros and cons of judicial vs. non-judicial foreclosure and self-help remedies. What are the types and main features? | Historically, the main disadvantages of judicial enforcement in Russia used to be (i) full discretion of a court in determining and appointing an auctioneer and independent appraiser involved in disposal of the collateral, and (ii) public sale governed by strict mandatory legal rules as the only possible way to dispose of the property. Recent amendments to security law significantly liberalized rules on judicial foreclosure. Now parties can contractually agree (in a security agreement) on various aspects of disposal of collateral, including the method of disposal (via auction, retention of title by lender or direct sale to a third party (for movable property only)), identity of the auctioneer, starting sale price (or formula for its calculation), and others. Effectively, in judicial foreclosure the involvement of a court is minimized and limited to acknowledging the fact that a lender is indeed entitled to enforce a mortgage/pledge.<br><br>The main advantage of non-judicial foreclosure is that it theoretically saves on time and court expenses. However, in practice this may be doubtful as the parties may still need to go to court if the borrower challenges enforcement. |
| What would a typical time period be to enforce a mortgage? | Foreclosure in Russia is a relatively lengthy process which can take from a few months up to several years. |
| What are the typical timeframes involved in foreclosure? | There are no typical timeframes for mortgage enforcement. Obviously, a friendly non-judicial foreclosure where the lender retains title to the property is less time consuming than a hostile judicial foreclosure via an open auction. |
| What are the typical costs involved in foreclosure? | The costs of foreclosure will depend on the type of foreclosure (judicial or non-judicial), length of proceedings and the value of the claim and the foreclosed asset. |
| What are the requirements for exercising remedies? | Any default which resulted in acceleration of the loan will allow the lender to exercise remedies. |
| Is the right to exercise remedies restricted to monetary defaults only, or may a lender also call a default and foreclose for violations of covenants? | Any default which resulted in acceleration of the loan will allow the lender to foreclose against the mortgaged property. The answer to this question also depends on the terms of the relevant financing documentation as well as the choice of applicable law. |
| Are there *de minimis* defences against foreclosure, and if so may these be contractually overridden? | Judicial foreclosure is not allowed if the borrower's default is insignificant and disproportionate to the value of the collateral. Default is deemed to be insignificant if the following conditions are met:<br><br>the overdue amount is less than 5% of the collateral value; and<br><br>the overdue period is less than 3 months. |
| Are any remedies exclusive of any | Generally no, but each issue should be addressed on a case-by-case |

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| other remedies? | basis. Please also see the impact of bankruptcy, as described below. |
| Do any governmental regulatory consents arise in the sale or other transfer of collateral on foreclosure (e.g., in certain jurisdictions there may be restrictions on foreign ownership of real property and/or strategically important assets; competition law restrictions; etc.)? | Non-judicial foreclosure is not available in respect of agricultural lands and/or state-owned real estate. Furthermore, sale of collateral in foreclosure may be subject to Russian antimonopoly rules and legislation on investments in strategically important assets. There is also a variety of other possible restrictions which may apply in case of sale of shares in certain licensable businesses (such as banking, insurance, etc.). |
| Are judgments rendered in civil matters recoverable against an entity's real estate interests? Are judgments junior or senior to previously recorded claims? | Yes, judgments rendered in civil matters may be recoverable against an entity's real estate interests. A foreclosure proceeding may generally be performed on the basis of a court ruling or a notarial endorsement. Where there are several mortgages over the same property (including the judgment lien), the first mortgage duly registered in the State Immovable Property Register will be senior to subsequent mortgages and judgments of unsecured creditors. |
| Can a lender choose which security to enforce first (e.g., can it go after a guarantor or share pledgor before enforcing a mortgage)? Will the choice or order of enforcement affect the lender's rights to enforce additional security later on? | Yes, generally, the lender is free to choose which security to enforce first. However, each issue should be addressed on a case-by-case basis (for instance, if the borrower's default is minor, a lender may not be permitted to enforce a mortgage but can make a demand under the guarantee). The lender will retain rights to enforce additional security to the extent and in the amount of overdue and unpaid debt. |
| **G Bankruptcy / Insolvency** | |
| What risks does the lender or security recipient face if, at the time of the grant of security, the borrower or security-giver is insolvent/subject to insolvency proceedings or becomes insolvent/subject to insolvency proceedings after the security is taken? | The main risk here is that collateral given by an insolvent debtor can be challenged during a certain 'hardening' period (ranging from 1 month to 3 years) as a 'suspect' or 'preferential' transaction. As a result of a successfully challenged security transaction, a lender may lose secured-creditor status.<br>Also in insolvency proceedings, a creditor secured by collateral is entitled to up to 70% (if secured obligations arise from a non-bank loan) or 80% (if secured obligations arise from a bank loan) of the proceeds from the sale of collateral. The remaining part is divided among super-priority creditors. |
| Is it possible to verify whether at the time of the grant of security the borrower or security-giver is insolvent/subject to insolvency proceedings? | Yes, information on commencement of official bankruptcy procedure is public. However, the above discussed risks remain if the borrower or security-giver met the insolvency criteria at the time of granting security even if formal bankruptcy procedure has not been yet commenced. |
| What is the impact of insolvency or an insolvency proceeding on the foreclosure process? | Upon declaration of bankruptcy, foreclosure proceedings are automatically suspended by operation of law. |
| What is the process? | Bankruptcy proceedings are judicial proceedings conducted by the court and supervised by the bankruptcy manager (who is appointed by the court). They may be initiated by creditors or authorized state executive authorities, as well as by the debtor himself. |
| Is an insolvency/bankruptcy proceeding about liquidation or re-organization? | Bankruptcy proceedings under current Russian bankruptcy law encompass (i) declaration of bankruptcy and winding-up, or (ii) settlement agreement with creditors, or (iii) financial rehabilitation for restoration of a debtor's solvency. |

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| How, if at all, can liens or security (and/or earlier foreclosures) be voided or extinguished during insolvency proceedings (e.g., as creditor preferences or as suspect transactions)? | As noted, in bankruptcy liens or security can be invalidated as 'preferential' or 'suspect' transactions by a bankruptcy court at the request of the bankruptcy manager (instructed by the creditors' committee or on its own initiative).<br><br>A bankruptcy manager will always have the right to initiate an action requesting that the court void the following types of transactions:<br><br>• transactions of the debtor with an interested party, if as a result of their performance creditors or the debtor have suffered or may suffer losses,<br><br>• transactions of the debtor with a specific creditor or other entity after the court accepts a suit on recognizing the debtor bankrupt, and<br><br>• transactions concluded or performed within six months preceding the filing of the suit on recognizing the debtor bankrupt, if the transactions entail preferential satisfaction of the demands of specific creditors before other creditors.<br><br>Over the period of financial recovery during a bankruptcy procedure, the debtor is not entitled, without the consent of the bankruptcy manager, to perform transactions which: (i) increase the debtor's accounts payable by more than 5% of the amount of the creditors' demands, or (ii) are associated with the possible alienation, directly or indirectly, of the debtor's property. Otherwise, such transactions may be declared void by a suit of entities involved in the bankruptcy case. |
| Who controls real-property-generated cash-flow during an insolvency proceeding? | The creditors' committee and the bankruptcy manager. |
| Are there statutes or regulations governing the conduct of receivers, security trustees or other security agents while in possession of real property? | No. |
| Is mortgage enforcement for the lender better (e.g., faster, better advertised, better process, less chance of delays) in insolvency or in 'normal' foreclosure? | For the reasons stated above (i.e., 70-80% limit of the value of sale proceeds), the lender will be better-off in a 'normal' foreclosure. |
| **H Enforceability Opinions** | |
| Are enforceability opinions available and customary from counsel and relied upon by international lenders? | Yes. However, they are usually rather heavily qualified. |
| Who normally gives the opinion? | Lender's counsel. |
| **II MORTGAGE LOAN TERMS** | |
| **A Prepayment Issues** | |
| Can the rate of prepayment be controlled through contractual restrictions in loan documents? | Yes. |

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| **B Cash Management** | |
| How can the lender assure itself that the cash-flow from a given property is duly applied (i.e., lock box)? | A lock box account clause may be used in loan documents. With legalization of escrow arrangements in the amended Civil Code, an escrow account may be used for this purpose. |
| Can a local borrower open accounts in foreign banks and subject those accounts to corresponding foreign security? | As discussed above, a Russian borrower is free to open accounts in foreign banks (subject to notification of tax authorities) and subject them to foreign security. |
| **C Are Restrictions on Additional Indebtedness Enforceable?** | |
| Are there any limitations on the enforcement of restrictions in loan documents against the borrower's incurring additional indebtedness? | These clauses can generally be included in loan documents, and damages may accrue for breach of contract (or the breach may trigger an event of default). Such restriction may also be effectively incorporated into the mortgage. |
| **D Insurance** | |
| Can lenders obtain a lien on insurance proceeds or otherwise obtain the benefit of casualty, liability and/or other insurance maintained by the security-giver with respect to the property? Is there a difference between being listed as a payee under, and/or taking security over, the policy? | Generally, yes. A lender/mortgagee is entitled to satisfy outstanding debt owed to it from insurance proceeds in respect of the mortgaged property, regardless of whether or not the lender is listed as a payee under the relevant policy. |
| Is political risk insurance available? | Yes, although they are not widely used and premiums are relatively high. |
| Is insurance coverage available for natural disasters? | Yes. |
| Is business interruption insurance available? | Yes. |
| Do lenders have the ability to evaluate the insurer and its claims record? | Yes. |
| **E Casualty/Condemnation** | |
| Does applicable law mandate the application of insurance proceeds or condemnation awards in any particular manner? | If a mortgaged real property is insured, the insurer may pay compensation for the restoration of a destroyed property and related damages without the mortgagee's consent.<br>The law explicitly states that the mortgagee is entitled to satisfaction of its claims in priority to other creditors from the value of the collateral, including from the insurance proceeds or condemnation awards in respect of the mortgaged property. |
| **F Late Charges/Default Interest** | |
| Does applicable law permit the imposition of default interest or late charges? | A contractual penalty (in the form of default interest) may be imposed in case of default (whether payment or non-payment). A court can decrease the default and/or penalty interest if the latter is disproportionate to the consequences of default. |
| Can 'interest on interest' be charged? | No, although, as noted above, a default interest rate is not prohibited. |

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| **G Alterations** | |
| Are restrictions on the borrower's ability to alter mortgaged property enforceable? | Generally, a security-giver is free to use the mortgaged property pursuant to its intended purpose, though a mortgage may limit use as well as the right to alter the property. A lender is also generally entitled to foreclose on the mortgage in the event of loss, improper use, damage and/or similar alterations of mortgaged property which would threaten the safety and value of the collateral. Civil law also provides for the lender's right to accelerate repayment of the loan in the event of loss of or damage to the collateral. |
| **H Defaults** | |
| Does the law provide any statutory mandatory notice or cure rights? | No, except for retail loans in the manner described below. |
| Are there any other restrictions on the ability of a lender to call a default? | No, except for retail loans in which the lender cannot call a default unless a payment is overdue for more than 60 days during a 180-day period. |
| Are there issues regarding the enforceability of transfer restrictions, both of asset and ownership interests? | Russian civil law, as a general principle, does not enforce transfer restrictions regarding rights that are generally transferable by operation of law, subject to certain exceptions. It is possible to restrict the right to transfer immovable assets under a mortgage agreement. In such case, the alienation of the asset may be found invalid by a court, if challenged by the mortgagee. |
| Are transfer taxes payable upon foreclosure, the sale of the property or upon the sale of the loan? | Tax matters are discussed in detail in section IV below. |
| **I Title Insurance** | |
| Is title insurance available? If available, is it commonly used? | Title insurance is available in Russia. Since it is quite a new insurance instrument it is not commonly used, but if required can be easily obtained. In practice, encumbrances, claims, good title, and the like are usually addressed by a thorough legal due diligence. Title insurance is usually used by rather sophisticated owners. |
| Is lender's coverage available? If available, is it commonly used? | Generally, lender's coverage is possible under insurance law. However, in practice it is not very developed and therefore not commonly used, with the lender's risk instead normally being covered by security instruments and the borrower's insurance. |
| **J Environmental** | |
| Do lenders commonly conduct environmental due diligence? | Foreign lenders commonly conduct an environmental due diligence of the mortgaged property. However, the practice of conducting an environmental due diligence is not common for Russian lenders. |
| Are there lender liability issues to be considered? | Having become the owner of the mortgaged real property as a result of foreclosure, the lender will be liable for the proper environmental condition of the property. The lender may be held liable for pollution on the property (even if pollution resulted from the misconduct of the previous owner). |
| **K Leasing Issues** | |
| Are there laws or regulations | Tenant leases are generally regulated by the Civil Code, although most |

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| governing lease terms and rental rates? (Note, this question applies solely to tenant leases of premises in commercial development, and not land leases.) | of the terms (including rates) are subject to contract. |
| Are tenant estoppels (e.g., certificates signed by tenants confirming certain acts) available and what is their legal relevance and are they enforceable? | Russian law does not generally recognize the concept of estoppel (with certain exceptions). So even if included in a contract, estoppels may be found to be unenforceable. |
| Is a lock-box arrangement available? | Subject to contract, escrow accounts can be used. |
| Are there laws governing the transfer and/or the application of security deposits? | No. |
| Are subordination, non-disturbance and attornment agreements (SNDAs) generally available? | Under Russian law, a change in ownership of real property (as in the case of a lender's foreclosure on a mortgage) does not normally affect the tenant's continued rights to possession under the lease, though this can be otherwise agreed in a tenant lease. |
| Can the lender affect changes in property management? | Yes, subject to contract. |
| Are leases terminated or terminable when the mortgage is enforced? Does the answer change if the lease predates the mortgage? | As noted above, change in the ownership of real property (including the case of a lender's foreclosure on a mortgage), as a general rule, does not entail termination of leases (regardless of whether lease agreement was entered into before or after the mortgage). |
| **L Servicing** | |
| Does the applicable legal system permit the effective splitting of the servicing of a loan from the ownership of the loan? | Yes, however certain bank secrecy and confidentiality requirements may be an issue. |
| **III OWNERSHIP OF REAL PROPERTY** | |
| **A Types of Real Property Interests** | |
| Free Ownership. | Ownership interests in real estate are registered in the State Immovable Property Register. |
| Leasehold Ownership. | Depending on the conditions of a contract, a lease can be long-term (more than a year) or short-term. Long-term lease agreements are subject to mandatory state registration. The Lessee has a preferential right to conclude a lease agreement for a new term, unless otherwise provided by the agreement or applicable law.<br>A lease agreement may contain the right to purchase leased property (save for forest lands and other instances directly set forth by the law). |
| **B Foreign Ownership** | |
| Can foreign investors own property outright and/or through subsidiaries? What local restrictions apply to foreign ownership (direct or indirect)? | Foreign entities can now freely acquire title to real property on the same basis as Russian entities, except as follows: (i) foreign entities may not own land plots in border areas and in other specially established areas of Russia, (ii) with respect to agricultural lands, foreign entities and |

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| | Russian entities more than 50% owned by a foreign entity/entities may possess land plots or interests in general ownership rights to land plots only under a lease. |
| **C Title Due Diligence** | |
| What special factors might arise in title due diligence? | The main issues are connected with verifying the title of the owner and identifying encumbrances and other restrictions of the ownership title, as well as the proposed activity in connection with the real property. |
| Does title registration constitute reliable evidence of ownership? Can a registration be unwound? | The title can be verified by requesting an official extract from the State Immovable Property Register, which is presumed to be accurate. However, if title is successfully challenged in court the registration authority will be required to make relevant records based on the court decision. There are numerous grounds in civil law for invalidating purchases and sales, and the applicable statute of limitations is generally three years. Thus, there is no substitute for a thorough due diligence investigation and title search by counsel. Typically, counsel for the buyer or lender performs title searches. |
| **D Other Issues; Restitution** | |
| Does the local law allow for restitution and on what grounds? | Russia's historic legacy (as part of the former USSR) and its legal system have not provided the setting for restitution to the same degree as other parts of Central and Eastern Europe. Some religious organisations (in particular, those enjoying broad public support such as the Russian Orthodox Church) have met success in the return of their churches and other property seized after the 1917 Bolshevik Revolution. Counsel must therefore always check in title due diligence whether property may have played a historical religious communal role (e.g., as a church, synagogue or mosque). All real property in Russia following 1917 and prior to WWII was state-owned, so claims arising from takings during this period (as is seen in other parts of Europe) are thus impossible. The restitution of real property to *private* (i.e., non-religious) owners before 1917 has not developed in Russia's legal system. To our knowledge, no such cases exist. Potential restitution to such owners is thus generally not a material risk. |
| **IV TAXES** | |
| Describe all national and local transactional and income taxes imposed on a transfer of real property. Who typically pays (i.e., buyer, seller, negotiated?)? | There are no special transactional taxes on transfer of real property in Russia. However, transfer of ownership to real property triggers state registration of the ownership right to the new owner. Such registration is subject to a state duty which amounts to approximately EUR 270 for legal entities.<br><br>Sale of real property by legal entities is subject to 18% VAT on the sales price (except residential property and land plots, which are VAT exempt) and a 20% corporate income tax ('**profit tax**') (there is no special capital gains tax in Russia). The profit tax is calculated on the difference between the sales price and the net tax book value of the property. Foreign companies (which do not carry on activities in Russia through permanent establishments) selling real property located in Russia are subject to withholding tax at 20% of the difference between the sale price and the acquisition cost of the real property, provided that the foreign seller submits to the purchaser the documents confirming the amounts of the acquisition cost. Otherwise the applicable withholding tax amounts to 20% of the sale price without any deductions.<br><br>VAT on the sale of real property is charged by the seller to the purchaser on top of the sale price. The purchaser can generally fully recover |

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| | (credit) this VAT ('**input VAT**') if the real property is used for a VATable activity in Russia. By law, the credit can be obtained through an offset against VAT on the purchaser's own VATable supplies ('**output VAT**'), or a refund if there is no sufficient output VAT for the offset. However, refunds from Russian tax authorities may sometimes be rather problematic. If the purchaser uses the real estate for non-VATable activity (e.g., most banking services), the VAT paid upon the acquisition of real property ('**input VAT**') is, as a general rule, added to the cost of the real estate and, hence, deducts the taxable profit through the depreciation charge (which is obviously less efficient from a tax standpoint).<br><br>Many commercial property transfers in Russia take place in the form of sales of shares of offshore companies. It should be noted that sale of a Russian or foreign company rich in Russian real property (i.e. where the book value of Russian situs real property constitutes more than 50 percent of the total value of the assets of the Russian or foreign company directly or indirectly) is not subject to Russian VAT[*], but would generally be subject to profit tax at the rate of 20% under Russian domestic tax law, whether the seller is a Russian or foreign legal entity. Although some double tax treaties may still prevent the Russian Federation from imposition of this tax (where the seller is a foreign legal entity), Russia currently renegotiates its treaties to ensure enforcement of its domestic provisions regarding taxation of capital gains from alienation of Russian property-rich companies.<br><br>Finally, it should be noted that controlled foreign companies (CFC) rules were adopted in the autumn of 2014, which target undistributed profits of foreign subsidiaries (both bodies corporate and non-corporate structures, such as trusts, foundations etc.) ultimately controlled by Russian resident companies and individuals. The CFC profits are subject to 13% personal income tax in the hands of qualifying Russian resident individuals or 20% corporate income tax in the hands of qualifying Russian legal entities controlling such CFCs. |
| Describe all national and local taxes imposed on the financing of real property. Who typically pays? | There are usually no special taxes on equity of unsecured financing of real property. Equity financing (contributions to charter capital) are ordinarily tax-free for both the contributor (shareholder/participant) and the recipient party (the company). Debt financing is ordinarily tax-free on the principal of the loan and subject to a 20% profits tax on the profits (difference between interest income and relevant expense) derived from the lending due from the lender where it is a Russian entity. VAT does not apply to monetary debt financing. Debt financing arrangements between affiliated entities are subject to Russian transfer pricing rules. However, Russian tax law provides for several safe harbours, which make deductibility of interest more predictable. For example, interest accrued under EUR-denominated loans should be deductible if the applicable interest rate falls within a range of between EURIBOR + 4% and EURIBOR + 7. Similar safe harbours exist for loans denominated in other currencies. As pointed out above, in Russia, so-called 'thin capitalization' rules may also apply, which may further limit deductibility of the interest based on debt-to-equity ratio as applies to a Russian borrower. These rules must be carefully checked in each transaction.<br><br>Where the lender is a foreign resident, interest payable to the foreign lender will usually be subject to a 20% withholding tax on the amount of interest which may be reduced or eliminated by an applicable tax treaty |

[*] There is a risk that the tax authorities may re-classify such sale into a VATable sale of the underlying real property itself.

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| | (subject to certain conditions).<br><br>Note that any secured debt financing of real property will trigger filing fees for the mortgage, which are now generally nominal. |
| What proven methods exist to avoid or defer transfer taxes resulting from the sale or transfer of real property? | A common mechanism for avoiding VAT on sale of real property is structuring it through a sale of shares in a company owning the real property ('**real property holding company**'). This arrangement also allows a step-up in the book value of the real property to be avoided, which is the base of a 2.2% annual property tax (this, however, would be irrelevant for those real properties which are subject to taxation based on their cadastral value – there are new rules for property tax calculation for some types of buildings/premises that are taking effect in 2014). At the same time, however, this mechanism, since it excludes the step-up, disallows the increase of the base for tax-deductible depreciation expense. These latter two issues (property tax and depreciation deduction) are not relevant for land and natural resources, which are not subject to property tax and are not depreciable. Land is subject to Land Tax (up to 1.5% of the cadastral value of the land plot).<br><br>The profit tax cost on the sale of real estate can also be reduced by structuring the sale of real property through a sale of shares in a real property holding company. With regard to sale by a foreign parent company of shares in a Russian or foreign subsidiary company with real property located in Russia constituting more than 50% of its assets, Russian domestic law provides for taxation of such sales at 20% (see above comments on the sale of real estate by foreign companies). Some tax treaties concluded by Russia (e.g., those with the UK and the US) do not provide exemption from such Russian tax, while some others (e.g., the treaties with the Netherlands and Cyprus ) do provide such exemption (however for Cypriot companies this exemption will be abolished starting from 2017). Structuring the sale of real property through a sale of shares in a Cypriot real property holding company can allow the tax cost on the sale to be minimized.<br><br>Russian tax authorities currently scrutinize and more and more often attack real property holding company sales, as they believe that these sale are mostly tax driven. Therefore, careful planning is required from both sides (the seller and the buyer) to minimize the risk of reclassification of sale of a real property holding company into the alienation of the underlying Russian real property. |
| **V DE-LEVERAGING** | |
| Must the seller or the purchaser notify the debtor of the sale of the receivables in order for the sale to be effective against the debtor and/or creditors of the seller? | Generally, notice is required. However, absence of a notice does not bear on the validity or effectiveness of assignment. |
| More generally, what formalities are required for perfecting (i.e., making enforceable against other creditors of the seller) the sale of a mortgage loan? | Assignment of a mortgage to a new lender shall be registered in the State Immovable Property Register and takes effect upon such registration. |
| Must the seller or the purchaser obtain the debtor's consent to the sale of the receivables in order for the sale to be effective against the debtor? | Consent of the debtor is not required, unless an agreement provides otherwise. |

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| Are there any governmental regulatory consents or filings required in relation to such sales (e.g., exchange control rules and/or banking monopoly)? | In certain circumstances such sales may trigger antimonopoly filing/post-transaction notification. Generally, prior consent of the Russian antimonopoly service is required for sale of assets of an organization (the **Target**) if:<br>• the balance sheet value of a buyer's and its group assets aggregated with the balance sheet value of the Target's and its group assets exceeds RUB 7 billion (approximately EUR 80 mio at current exchange rates) or if the value of their aggregate sales proceeds exceeds RUB 10 billion (approximately EUR 115 mio at current exchange rates), and<br>• the balance sheet value of the Target's and its group assets exceeds RUB 250 million (approximately, EUR 3 mio at current exchange rates).<br>If the Target is a financial institution (for example a credit organization, an insurance company, etc.) prior consent of the Russian antimonopoly service is required if the balance sheet value of such Target's assets exceeds a certain limit set out by Russian law (the limit for credit organisation, for example, is RUB 29 billion (approximately EUR 335 mio at current exchange rates).<br>If the Target is a credit organization prior consent of the Central Bank of the Russian Federation is required for sale of assets of such Target irrespective of the value of the assets. |

# Ukraine

| I LENDING | |
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| **A Legal Ability to Originate Loans** | |
| What licenses will a foreign lender need to lead or grant one-off or occasional loans secured by real estate? What if the lender starts to make loans more frequently? | The Law On Banks and Banking Activity generally regulates banking activity in Ukraine. Under the rules of the National Bank of Ukraine ('**NBU**') 'On the Procedure for Residents' Receipt of Non-Resident Loans and Credit Facilities in a Foreign Currency,' a foreign lender does not need a license for one-off or occasional loans. Whether collateral (such as real estate) is given to the lender is immaterial. However, cross-border loans may be made only in foreign currency and must be registered with the NBU. |
| Are there currency (e.g., exchange control or similar) issues in respect of the loan? Does local law require payment of commissions and fees in local currency? | Absent a special foreign exchange license, transactions between purely domestic entities must be carried out in Ukraine's national currency (*Hrivnas* or '**UAH**'). Ukrainian banks having a general license from the NBU for carrying out currency transactions are entitled to extend loans to domestic legal entities in foreign currency and UAH and to individuals in UAH only. Cross-border transactions (including the granting of loans by a foreign lender, as well as the payment of commissions and fees to it) must be-performed in foreign currency. |
| **B Loan Documentation** | |
| Does local law provide for a standard form of loan document, or is one used in practice (e.g., LMA)? | No. But the law does require certain elements to be included in loan documentation. Foreign lenders generally use English-law or other civil-law (e.g., German-law) loan precedents (often LMA-derived), though more simplified local forms are usually seen with Ukrainian lenders. |
| What types of security may be obtained? Are there standard types of security taken in practice? | The following types of security are commonly seen in Ukrainian commercial real estate financings:<br>(a) mortgage over real property (land and/or buildings) and/or real property rights (e.g., lease rights) (certain other rights may also constitute the subject of a mortgage); note – there are some restrictions to pledge/assign land lease rights and mortgage of agricultural land,<br>(b) pledge over movables or property rights (e.g., construction contract(s), performance bond(s), insurance and/or re-insurance policies etc.);<br>(c) pledge of shares/ participation interest in a company;<br>(d) bank guarantee;<br>(e) suretyship (corporate or individual).<br>Security is structured on a case-by-case basis. No standard form documents exist – lenders ordinarily develop their own forms with outside counsel. |
| Can the laws of another jurisdiction or country govern the loan and/or security documents? Is this common? | Yes, the choice of a foreign law by the parties is allowed in cross-border transactions. Irrespective of the governing law of the respective agreements, mandatory provisions of the laws of Ukraine which have a |

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| | strong connection to the respective legal relationships may apply.<br><br>For foreclosure purposes, it is advisable that Ukrainian law govern security over collateral located in or created under the laws of Ukraine; moreover, it is mandatory for Ukrainian law to govern mortgages. |
| Do special issues arise in syndication, such as limitations on the use of a security trustee and/or the need for a parallel-debt structure? | The security trustee concept is not recognized as such under Ukrainian domestic legislation, and this issue is thus commonly addressed by the use of 'joint and several creditors' rights. It is common to see a cross-border English-law parallel-debt structure used to overcome these uncertainties, though the structure remains untested in Ukrainian courts. |
| Are these structures common, and do they work under local law? | Different structures are used in practice. Such structures are not sufficiently tested in Ukrainian courts yet and different interpretations/outcomes are possible. |
| Are there local-law usury rules that may affect the terms of a commercial loan? | No. However, there is a mandatory limitation on the aggregate permissible interest rate (including fees, default charges etc.) for cross-border loans, and the position of Ukrainian authorities is that no tax gross-up provisions are permissible. |
| What is the effect of a negative pledge covenant under local law and court practice, and what remedies are available if the covenant is breached? | No specific remedies. Breach of a respective covenant would trigger an event of default, but would be unlikely lead to the invalidation of a security taken in breach of the covenant (i.e., would be treated as binding only *inter partes*). |
| Do stamp duties or similar charges arise in respect of loan, security and/or other credit-support (e.g., guarantee) documentation? Are there customary and accepted ways for legally deferring, minimizing or eliminating them? | No stamp duties as such exist. However, for lenders there are insignificant charges for registration of the encumbrances created under security documents with respective encumbrance registers.<br><br>Notary fees would be charged upon notarisation of a mortgage (such notarisation is mandatory). Notary fees are negotiable with the notary. |
| Can property-specific needs be addressed by means of pledged cash reserves and escrows funded from the loan proceeds, and are these means common? | Ukrainian law does not recognise escrow arrangements in favour of a lender.<br><br>Normally, to create a security over funds the parties enter into a pledge of property rights with respect to bank accounts and a direct debit arrangement entitling the account bank to write-off funds upon a payment demand of the lender.<br><br>The efficiency of such security heavily depends on the practice and cooperation of the servicing Ukrainian account bank. |
| Is it common to structure property financings using offshore holding companies, and if so what forms of foreign-law security are commonly encountered? What benefits do such security structures provide? | Yes. In loan structuring, it is common to involve an offshore holding so as to be able to exceed the NBU interest rate cap and minimise tax, and in security structuring so as to gain a pledge of shares at the holding level (since enforcement of pledges of shares and participatory interests in Ukrainian companies is complicated). Payment and performance guarantees from offshore holding companies are also commonly used. |
| Is arbitration available? | Ukraine is a member of the 1958 New York Convention, and foreign arbitral awards are generally enforceable in Ukraine, subject to prevailing court practice. The Law On International Private Law grants exclusive competence to Ukrainian courts over disputes involving real estate located in Ukraine. |

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| | Asymmetrical arbitration clauses (i.e. clauses where one party retains the right to choose either arbitration or litigation) are sometimes seen in Ukraine cross-border financings. Given the several recent legal Russian law cases and Ukraine's common legal heritage with Russia, the legal community is watching Ukraine courts' reactions and qualifying legal opinions. So far we are not aware of any court precedents in Ukraine in which such clauses have been invalidated or undermined based solely on their asymmetry. However, parties are well-advised to use a symmetrical arbitration clause. |
| **C Limitations on Borrowing** | |
| What corporate approvals are needed for a company to borrow or provide security? | Depending on the type of the legal entity (JSC, LLC or other), the value of the underlying assets subject to the relevant agreement and the substance of the transaction a loan or security may require approval by the director/board of directors, management board, supervisory board or/and shareholders'/participants' meeting (majority or qualified majority of votes). Additional requirements should be checked in the charter documents. In the absence of the requisite approvals, the transaction may be challenged as invalid. |
| Are there financial limits relevant to a company (e.g., as to the amount it can borrow and/or as to the security for its borrowings or the borrowings of other companies)? | Generally no such statutory financial limits exist other than in respect of borrowings by banks. Insolvency considerations should be checked. No thin capitalization rules apply. For some issues related to semi-thin capitalization, see 'Taxes' below. |
| Are there legal restrictions on 'financial assistance' or 'upstream guarantees' that must be considered? | A public company may not give a loan in relation to an acquisition of shares in it or provide surety securing the repayment of a third party's loan committed for shares acquisition in such public company. For LLCs and other forms of companies (save for public companies and private enterprises), charter capital formation with borrowed, pledged money is prohibited. There are also restrictions on transactions which reduce the capital of a company. 'Upstream guarantees' are allowed (where payment is to be made abroad, these must be in line with currency control and licensing requirements). Please also see 'Bankruptcy/Insolvency' with respect to avoidance of certain types of agreements. |
| Are there lawful and reliable means of overcoming any limitations (e.g., whitewash)? | N/A |
| Can a company or individual give security for the obligations of a third party? Are there any limitations here? | Subject to applicable insolvency rules, yes, security may be given for third-party obligations. No special statutory restrictions apply other than limitations on certain types of corporate transactions (see above) or related party transactions (see below). For individuals, certain limitations may also apply (e.g., under marital, guardianship and/or consumer protection laws). Again, note that exchange-control limitations and individual licensing for payments to be made abroad are critical. In Ukraine only financial institutions and banks with the appropriate license are entitled to issue guarantees, i.e. obligations that function as primary obligations irrespective of the validity of the underlying principal obligation. |
| Can a company give security for financing being provided to a shareholder, a director or a related party? Must any special approval | There may also be special corporate approval requirements for transactions with related parties (e.g., officers of managing bodies, major shareholders etc.). Corporate benefits rules should also be checked. |

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| requirements be met? | |
| What investigations should be made about the security-giver (whether an individual or a company)? | Appropriate legal due diligence should be made on capacity (due existence, authority and absence of insolvency), including various of the above matters, as well as title and encumbrances over any collateral. Where the security is critical to the credit risk analysis, a formal legal opinion from local counsel on these matters should be sought. |
| **D Validity of Security** | |
| Are there any general prohibitions or limitations on taking security? | Generally, no, though some limited prohibitions do exist. For example, Ukrainian law prohibits the mortgaging of agricultural land (save for banks). |
| Is there ever a risk of claw-back and/or fraudulent transaction in the taking of security? | Yes. See, e.g., 'Bankruptcy / Insolvency' below. Security may also be clawed back if taken fraudulently or otherwise in violation of law (see, e.g., 'Limitations on Borrowing,' above). |
| Does local law distinguish as between the 'creation' and the 'perfection' of security? | Ukrainian laws do not use the term 'perfection' of security. The law, however, distinguishes between 'creation' of security and 'registration' of an encumbrance under such security, which registration establishes priority of respective creditor's claims with respect to the collateral. A mortgage and its priority become effective starting from its registration with the State Register of Property Rights to Real Estate. Pledges of movable assets become effective from the moment of signature; the registration of the pledge with the State Register of Encumbrances over Movables is carried out by a pledgee and is voluntary but highly recommended as it gives priority ahead of third parties. |
| Can security be taken over 'future' property (e.g., property not yet owned by the security-giver and/or not yet even in existence), and/or future earnings from existing or future property? | Generally yes, but the contractual provisions should be carefully drafted so that the collateral is duly identified and there is an agreement between the parties as to the value of such collateral. |
| Can security be given by individuals, and are there special limitations/requirements for such security (e.g., consumer-protection rules)? Do any special issues arise here? | Security (except for guarantees – see above) can be given by individuals subject to capacity, consumer-protection and matrimonial rules. |
| Are loans generally structured (or may they be structured) as 'recourse' loans whereby the security-giver always remains personally liable, or as 'non-recourse' whereby after default the lender may seize the collateral but its recovery is limited to the collateral? | Loans may be structured as full recourse, limited recourse or non-recourse. All options are commonly used in financing transactions in Ukraine. |
| What claims or other liens can prime an earlier security interest? | The general rule is that an earlier registered security interest over any kind of property has priority over later or unregistered liens (including in bankruptcy proceedings). |
| What benefits does an earlier security interest enjoy over second-ranking security? | Claims under earlier-ranking security are satisfied from proceeds of sale of the collateral in priority over second-ranked security. |
| Are there any relevant time periods | As a general rule the security remains valid as long as the underlying |

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| (e.g., as to the length of validity of security or as to the time in which the lending must take place)? | obligation is valid. Meanwhile, the pledge registration records (for pledges over movables and property rights) have a limited validity term – 5 years – and may need to be renewed in case of longer maturity.<br><br>A cross-border loan must be disbursed into Ukraine within 180 days after it is registered with the NBU. |
| What would a typical time period be for entering into and perfecting a straightforward secured transaction? | This depends largely on the negotiation process; if the documentation is agreed between the parties, it usually takes 2 – 3 business days to enter into agreements and register the respective security; if a foreign lender is involved, registration of a respective loan agreement with the NBU takes 7 (seven) business days from submitting the relative documents (the term may be extended if the NBU has objections/comments or requested additional documents). In certain cases (such as, *inter alia*, in case of a change of the lender or the borrower), the NBU will require an extended set of documents to be provided prior to the registration and the review of such documents may take up to 30 days. |
| What obligations may be secured (e.g., specific debts, all present and future debts, guarantee obligations, interest, fees and expenses)? | Any actual existing or future obligation (in respect of mortgages, future obligations stemming from a valid and effective underlying agreement) can be secured.<br><br>Under Ukrainian law, only the obligations of an actual creditor may be secured (i.e., a person having monetary claims against the borrower). Therefore, 'parallel debt' and 'trust' structures are normally qualified in Ukrainian legal opinions. |
| What fees (excluding legal fees) and taxes are payable (e.g., for searches, notaries and registration, as well as enforcement)? | The following fees may be payable in the course of registration and enforcement of the security:<br><br>(a) fee for registration of an encumbrance (minor in amount);<br><br>(b) notary fee (primarily in case of mortgage, the amount payable is subject to negotiation with the notary);<br><br>(c) court charge (in case of enforcement of security through court, the amount is equal to 1.5% of the amount of the claim, but the minimum amount should be not less than 1 (one) minimum salary. As of February 2016, one minimum salary equalled UAH 1378.00, but that amount will most likely change in the future). |
| How do lenders perfect a security interest in cash reserves? | Security over cash reserves is not particularly efficient in Ukraine, due to ambiguities of NBU regulations; registration of an encumbrance created by a pledge of pledgor's monetary claims against the account bank can give some comfort vis-a-vis other creditors.<br><br>A pledge over rights to bank accounts is normally accompanied by a separate tripartite direct debit agreement between the pledgee, the pledgor and the account bank (not subject to registration). A direct debit arrangement may also be envisaged in a bank account agreement with respect to the relevant bank account, though this depends on the account bank's policies. Direct debit allows the account bank to write-off funds from the relevant accounts immediately following a default and a payment demand by the creditor. The utilization of this instrument heavily depends on cooperation of the account bank. |
| Are there any limitations on a lender's ability to charge interest on portions of the loan advanced into escrow with the lender? | The concept of escrow agreements as such is as of yet unknown to Ukrainian law. An owner of a bank account would be able freely to dispose of funds standing to the credit on such account. Contractual limitations may be imposed; however, their enforcement in Ukraine is questionable. Quasi-escrow structures may be developed. |
| Is a lender required to pay interest on | As noted above, escrow arrangements are not normally used. A bank |

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| reserves in escrow with that lender? Are taxes levied on the interest paid on such reserves, and if so who pays those taxes? | deposit may be used to allocate certain funds. Interest on such deposited funds is subject to commercial agreement with the account bank. In case interest on reserves is agreed, taxes are levied on the interest paid on such reserves. The person entitled to receive the reserves, i.e., the eligible person, is indebted for such taxes. |
| Address encumbrance of shares, movable property / fixtures, etc. Are there filing or registration requirements? | No specific requirements, save for registration of encumbrances as discussed herein. As for pledge of shares (if kept on a custodial account), a respective blocking arrangement is usually utilized in addition. |
| **E Creation of Mortgage** | |
| How is a mortgage of real estate established? | A mortgage may be created either contractually, by operation of law or by court decision. The establishment of a mortgage by contract requires the following steps: (i) execution of a written contract establishing the mortgage subject to notarization; (ii) registration of the mortgage in the State Register of Property Rights to Real Estate (registration is performed upon notarization, by the notary). Given that the State Register of Property Rights to Real Estate is quite new, there are some implementation problems, and practical questions can arise depending on the type of property and its location. In the event two or more mortgages are established on one property, their respective dates of entry in the Register will determine their priority.<br><br>A statutory mortgage arises with respect to newly-constructed buildings on mortgaged land (provided the mortgage over the land plot has been duly created and registered). |
| Does the mortgage have to be in any special form? | A mortgage agreement must be in writing, notarized by a Ukrainian notary and registered with the State Register of Property Rights to Real Estate. |
| What are rules on priority? | Priority of mortgage claims is defined based on the time of registration in the State Register of Property Rights to Real Estate (the earlier the higher). |
| Are construction mortgages achievable over buildings and other structures to be built in the future on a land plot? Are there special statutory provisions on these and/or are special provisions required in the mortgage agreement? | In general, yes. It is possible to mortgage an unfinished construction located on a leased land plot. Once construction is finished, the relevant amendments must be introduced into the mortgage agreement with respect to mortgage of the completed construction.<br><br>Any unfinished construction located on a mortgaged land plot will be considered mortgaged by law.<br><br>The requirements for the mortgage agreement itself do not differ. |
| Can mortgages be granted to more than one named lender? | Yes, provided that the persons are co-lenders (under Ukrainian law, only a creditor in a secured obligation can stand as the mortgagee). |
| **F Foreclosure & Enforcement** | |
| Who may act in enforcement? (Are there restrictions on the type of parties that may exercise remedies?) | All creditors may act. The right to take enforcement action may be limited by insolvency law where the borrower is subject to insolvency proceedings. |
| Can the lender buy the mortgaged property or otherwise become its owner? | Yes, subject to the mortgage foreclosure rules or otherwise agreed between the mortgagor and mortgagee (see below). Taking title over the collateral will discharge the secured obligations in full, and the lender will have no right to provide any further claims to the borrower in connection |

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| | with fulfilment of such obligations in case of the deficiency. |
| What are the steps involved in judicial foreclosure? | The major steps in judicial foreclosure are:<br>(a) filing a lawsuit with a court to officially commence a foreclosure;<br>(b) seizure of the real property by a court bailiff (formal notification to the debtor and record of the commencement of foreclosure proceedings in the Register);<br>(c) the court decision becoming effective (appeal terms expire);<br>(d) evaluation of the seized property;<br>(e) sale of the property by public auction; and<br>(f) distribution of the proceeds collected from the foreclosure. |
| Is non-judicial foreclosure (i.e., self-help) available? Are there special rules for ensuring that this right exists and on how it may be exercised? | Non-judicial foreclosure proceedings are available. Terms and conditions of non-judicial foreclosure should be reflected in a notarized mortgage agreement or in a separate notarized agreement on discharge of the mortgagee's claims.<br>In non-judicial foreclosure the lender may either sell the collateral at public auction or to a third party (at the market value) or retain the title to the collateral.<br>No non-judicial foreclosure is allowed in relation to real property belonging to state or municipal companies or companies in which the state owns more than 50% of shares (equity or participation interest). |
| Address the pros and cons of judicial vs. non-judicial foreclosure and self-help remedies. What are the types and main features? | A main advantage of a non-judicial foreclosure is that theoretically it may save time and costs. However, either method of non-judicial enforcement would usually require cooperation or at least no obstruction on the mortgagor's part which may be important for the new owner's title registration. In practice, non-judicial foreclosure is frequently challenged by security-givers, and the parties often end up running the judicial proceedings in any event.<br>A foreclosure under the mortgage agreement may be done by way of a notarial writ. The notarial writ procedure is obviously an easier way of enforcement of the mortgage compared to the enforcement through courts. A notarial writ can be executed by a notary on a notarized mortgage agreement. The mortgagor would be entitled to contest the notary writ in a court, whereby the enforcement proceedings can be delayed or even interrupted. In practice, this is generally the case, and the writ may have little practical advantage over judicial proceedings. |
| Are there lender-in-possession (mortgagee-in-possession) laws? | The laws of Ukraine do not specifically reference a lender-in-possession (mortgagee-in-possession) although the law does contemplate this possibility. |
| What would a typical time period be to enforce a mortgage?<br>What are the typical timeframes involved in foreclosure? | Foreclosure in Ukraine is a relatively lengthy process which can take from a few months up to several years. |
| What are the typical costs involved in foreclosure? | The costs of foreclosure will depend on the type of the foreclosure (judicial or non-judicial), the length of the proceedings, the value of the claim and the foreclosed property. |
| What are the requirements for exercising remedies? | Any default under a loan agreement or security documents will allow the lender to exercise remedies subject to certain mandatory regulations of |

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| | law (such as *a* 30 day cure period for performance of the secured obligations before the lender may proceed with a non-judicial foreclosure). |
| Is the right to exercise remedies restricted to monetary defaults only, or may a lender also call a default and foreclose for violations of covenants? | No statutory restrictions. The lender may commence a foreclosure in case of any default, unless otherwise agreed in the transaction documents. |
| Are there *de minimis* defences against foreclosure, and if so may these be contractually overridden? | There are no de minimis limits. |
| Are any remedies exclusive of any other remedies? | Generally no, but each issue should be addressed on a case-by-case basis. |
| Do any governmental regulatory consents arise in the sale or other transfer of collateral on foreclosure (e.g., in certain jurisdictions there may be restrictions on foreign ownership of real property and/or strategically important assets; competition law restrictions; etc.)? | Foreclosure over certain types of property (including, *inter alia*, agricultural land, residential property where under-aged is/are residing, objects of cultural heritage) may generally be prohibited, restricted or subject to special authorization.<br><br>Foreclosure over shares/participatory interests may require a prior approval of the Antimonopoly Committee of Ukraine, provided that such actions will result in a pledgee or third party obtaining or exceeding 25% or 50% of the voting rights in the respective Ukrainian company and if a number of other criteria/thresholds specified in the law are satisfied.<br><br>Foreclosure against certain types of state-owned and strategically important assets (such as, for example, gas pipelines) is prohibited.<br><br>The applicable restrictions should be checked on a case-by-case basis. |
| Are judgments rendered in civil matters recoverable against an entity's real estate interests? Are judgments junior or senior to previously recorded claims? | Yes, judgments rendered in civil matters may be recoverable against an entity's real estate interests. A foreclosure proceeding may generally be performed on the grounds of a court ruling, a foreclosure notarial writ or a mortgagee's claims satisfaction agreement (or similar clause in a mortgage agreement). Where there are several mortgages over the same property, the first mortgage duly registered with the State Register of Property Rights to Real Estate will be senior to other mortgages and judgments of unsecured creditors. |
| Can a lender choose which security to enforce first (e.g., can it go after a guarantor or share pledgor before enforcing a mortgage)? Will the choice or order of enforcement affect the lender's rights to enforce additional security later on? | A lender can choose the order in which it wishes to enforce and it may proceed against any and all of its security until it has been repaid (within the general term of statutory limitation which is three years). |
| **G Bankruptcy / Insolvency** | |
| What risks does the lender or security recipient face if, at the time of the grant of security, the borrower or security-giver is insolvent/subject to insolvency proceedings or becomes insolvent/subject to insolvency proceedings after the security is taken? | Apart from apparent economic risks (unavailability of funds to repay the loan), the insolvency of either borrower or security giver imposes significant legal risks (e.g., possibility of voiding contracts in a bankruptcy proceeding, moratorium on foreclosure), some of which are described below. |
| Is it possible to verify whether at the | There are publicly available sources regarding bankruptcy of Ukrainian |

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| time of the grant of security the borrower or security-giver is insolvent/subject to insolvency proceedings? | entities. However, these refer only to court proceedings that have been initiated regarding bankruptcy (which may or may not proceed further), not to solvency or insolvency per se. |
| What is the impact of insolvency or an insolvency proceeding on the foreclosure process? | Upon initiation of a bankruptcy proceeding by court, foreclosure over assets of the debtor shall be ceased and further sale of the assets shall be carried out only within the bankruptcy proceeding (save for cases where foreclosure is at the stage of distribution of funds, i.e., the asset is already sold prior to the initiation of the bankruptcy proceeding) |
| What is the process? | The basic stages of bankruptcy proceedings are:<br>a) filing an application with the relevant commercial court (by creditor/creditors jointly or debtor),<br>b) court hearing re initiation of bankruptcy, introduction of moratorium, management over debtor's property etc.,<br>c) filing claims by all creditors, approval of register of creditors' claims, formation of creditors' committee,<br>d) court hearing re introduction of rehabilitation or liquidation procedure, or approval of an settlement agreement,<br>e) termination of proceeding upon consummation of either rehabilitation or liquidation procedure. |
| Is an insolvency proceeding about liquidation or re-organization? | Both liquidation and re-organization (should the rehabilitation plan so provide) are possible. |
| How, if at all, can liens or security (and/or earlier foreclosures) be voided or extinguished during insolvency proceedings (e.g., as creditor preferences or as suspect transactions)? | Transactions of the debtor (agreements and 'proprietary actions') entered into during one year prior to initiation of the bankruptcy proceeding may be invalidated by court.<br>There are a number of grounds for such termination provided by law.<br>As a result of invalidation, the creditor shall be obliged to return all it received from the debtor under the transaction, and shall have discretion to demand either discharge of a debt in the first rank of priority of creditors' claims, or discharge by the debtor in kind after termination of the bankruptcy proceeding.<br>The bankruptcy manager within three months after a court ruling on rehabilitation may refuse to perform an agreement executed before the opening of the bankruptcy proceedings provided that the agreement satisfies certain requirements and its execution may prevent financial rehabilitation, or where the debtor may incur losses. In case of refusal by the sequester to perform an agreement, a counterparty under such agreement may within 30 days claim recovery of damages related to the non-performance. |
| Who controls real-property-generated cash-flow during an insolvency proceeding? | The bankruptcy manager and the creditors' committee. |
| Are there statutes or regulations governing the conduct of receivers, security trustees or other security agents while in possession of real property? | The Bankruptcy Law contemplates that the self-regulated association of bankruptcy managers shall adopt codes of conduct mandatory for a member's bankruptcy managers. However implementation of this rule in practice is still untested. Besides this, the law merely requires that a bankruptcy manager acts in compliance with the applicable laws and with due care. |

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| Is mortgage enforcement for the lender better (e.g., faster, better advertised, better process, less chance of delays) in insolvency or in 'normal' foreclosure? | There are pros and cons for each. Based on our experience, in practice 'normal' foreclosure is usually faster and associated with less impediments. However depending on specific circumstances bankruptcy might prove preferable. |
| **H Enforceability Opinions** | |
| Are enforceability opinions available and customary from counsel and relied upon by international lenders? | In general, such opinions are requested, though heavily qualified. |
| Who normally gives the opinion? | Lenders' counsel. |
| **I NBU Emergency Rules** | |
| What measures have been taken aimed at stabilizing the currency market, and avoiding devaluation of the Hryvnya and capital flight from Ukraine? | As a result of the financial crisis in Ukraine, Ukrainian authorities continue adopting measures aimed at stabilizing the currency market, preventing devaluation of the Hryvnia and capital flight from Ukraine. Such measures may have a retrospective effect and may affect convertibility, transferability and payment obligations.<br><br>In particular, the NBU Resolution No. 140 dated 3 March 2016 (the '**Resolution**') implies, amongst other things, that:<br><br>- subject to certain exemptions, purchase and transfer of foreign currency abroad under individual licenses of the NBU are prohibited;<br><br>- a premature repayment of cross-border loans is prohibited; and the registration by NBU of amendments to loan agreements that would attempt to reduce repayment terms and duration of borrowings is not allowed;<br><br>- repatriation of proceeds from foreign investments and cross-border payments of dividends to foreign investors is not possible; and<br><br>- a foreign lender may not be able to repatriate the proceeds from foreclosure abroad.<br><br>The Resolution is effective until 8 June 2016 but is likely to be extended by the NBU for a further period. |
| **II MORTGAGE LOAN TERMS** | |
| **A Prepayment Issues** | |
| Can the rate of prepayment be controlled through contractual restrictions in loan documents? | In general yes, though in addition to respective covenants a respective contractual arrangement with the account bank is advisable. Under effective NBU restrictions, prepayment of cross-border loans is prohibited; and the registration by NBU of amendments to loan agreements that would attempt to reduce repayment terms and duration of borrowings is not allowed. |
| **B Cash Management** | |
| How can the lender assure itself that the cash-flow from a given property is duly applied (i.e., lock box)? | By respective covenants and contractual arrangement with the account bank (by way of direct debit). |
| Can a local borrower open accounts in foreign banks and subject those accounts to corresponding foreign | No, unless a respective license is obtained from the NBU (which is difficult though possible). |

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| security? | |
| **C Are Restrictions on Additional Indebtedness Enforceable?** | |
| Are there any limitations on the enforcement of restrictions in loan documents against the borrower's incurring additional indebtedness? | Such restrictions would trigger a default, but no special remedies in case of breach (compensation of damages, if a contract is governed by foreign law).<br>A subsequent mortgage in the absence of the existing mortgagee's consent may be invalidated. |
| **D Insurance** | |
| Can lenders obtain a lien on insurance proceeds or otherwise obtain the benefit of casualty, liability and/or other insurance maintained by the security-giver with respect to the property? Is there a difference between being listed as a payee under, and/or taking security over, the policy? | Generally yes. In practice, the security over insurance proceeds is established in form of a pledge of property rights under the relevant insurance contracts.<br>A third party can be appointed as a beneficiary, and this does not prejudice the execution of an assignment agreement or agreement on pledge over insurance proceeds. |
| Is political risk insurance available? | The law does not prescribe limitations, although such policies are not widely used. |
| Is insurance coverage available for natural disasters? | Yes. |
| Is business interruption insurance available? | Yes. |
| Do lenders have the ability to evaluate the insurer and its claims record? | Yes. |
| **E Casualty/Condemnation** | |
| Does applicable law mandate the application of insurance proceeds or condemnation awards in any particular manner? | If a mortgaged real property is insured, the insurer may pay compensation for the restoration of a destroyed property and related damages without the mortgagor's consent.<br>There are special provisions governing compensation for real estate condemnation by governmental authorities. |
| **F Late Charges/Default Interest** | |
| Does applicable law permit the imposition of default interest or late charges? | Ukrainian law provides for a 'penalty' (which may be expressed as a percentage of the overdue amount) rather than 'default interest.'<br>In cross-border loan agreements governed by foreign law, a default interest is normally used. |
| Can 'interest on interest' be charged? | A penalty for overdue interest can be charged. |
| **G Alterations** | |
| Are restrictions on the borrower's ability to alter mortgaged property enforceable? | Yes. The mortgagor cannot deteriorate the mortgaged property's condition and must take steps to prevent a decrease in its value. A mortgagee's consent is required, *inter alia*, for performing capital repairs of a building or major reclamation of a mortgaged land plot, leasing, use of the mortgaged property, and use of the property as a contribution to joint activity without establishing a legal entity. A mortgagee may check |

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| | the status of the mortgaged property upon prior notice. |
| **H Defaults** | |
| Does the law provide any statutory mandatory notice or cure rights? | As a general rule, the law requires that a respective notice from a lender indicates no less than 30 days cure period before enforcement over a pledge/mortgage starts. |
| Are there any other restrictions on the ability of a lender to call a default? | No. |
| Are there issues regarding the enforceability of transfer restrictions, both of asset and ownership interests? | A transfer restriction should be created and registered as an encumbrance/mortgage in the respective state registry, otherwise enforcement of the restriction is questionable. |
| Are transfer taxes payable upon foreclosure, the sale of the property or upon the sale of the loan? | This depends on the structure of the sale transaction, asset type and parties involved. |
| **I Title Insurance** | |
| Is title insurance available? If available, is it commonly used? | As far as we are aware there are a few examples. However, their use is uncommon. |
| Is lender's coverage available? If available, is it commonly used? | As far as we are aware there are a few examples. However, their use is uncommon. |
| **J Environmental** | |
| Do lenders commonly conduct environmental due diligence? | This mostly depends on the asset type and the lender's own internal policies. |
| Are there lender liability issues to be considered? | If the lender acquires ownership of or other rights (e.g., lease rights) to contaminated land or other real property posing environmental threats, it could be declared liable. |
| **K Leasing Issues** | |
| Are there laws or regulations governing lease terms and rental rates? (Note, this question applies solely to tenant leases of premises in commercial development, and not land leases.) | Tenant leases, including terms and rates, are generally unregulated and subject to contract. |
| Are tenant estoppels (e.g., certificates signed by tenants confirming certain acts) available and what is their legal relevance and are they enforceable? | Tenant estoppels are available if required and set forth in a lease agreement. However, the laws of Ukraine do not entirely support the doctrine of estoppel. |
| Is a lock-box arrangement available? | Yes, subject to contract. |
| Are there laws governing the transfer and/or the application of security deposits? | No, and such terms are subject to contract. |
| Are subordination, non-disturbance and attornment agreements (SNDAs) generally available? | A change in ownership of real property does not automatically affect the tenant's continued rights under the lease, though this is often established otherwise in tenant leases. |

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| Can the lender affect changes in property management? | Yes, subject to contract. |
| Are leases terminated or terminable when the mortgage is enforced? Does the answer change if the lease predates the mortgage? | As a general rule, leases survive enforcement. Specific contractual arrangements (usually involving the tenants) might be used to address the issue. |
| **L Servicing** | |
| Does the applicable legal system permit the effective splitting of the servicing of a loan from the ownership of the loan? | Yes, but respective contractual arrangements must comply with banking/regulatory rules. |
| **III OWNERSHIP OF REAL PROPERTY** | |
| **A Types of Real Property Interests** | |
| Free Ownership. | Ownership interests in real estate are registered in the State Register of Property Rights to Real Estate, which is performed locally by Bodies of State Registration of Rights or by notaries when notarizing real estate transactions.<br>There are some implementation problems, and practical questions can arise depending on the type of transaction and the location of the property. |
| Leasehold Ownership. | Agreements for leased buildings or premises for a term of three years or longer must be notarized and registered in the State Register of Property Rights to Real Estate.<br>Land lease rights are registered in the State Register of Property Rights to Real Estate. Land plots may be leased for up to 50 years. The Lessee has a preferential right to conclude a lease agreement for a new term, unless otherwise provided by law or contract.<br>A lease agreement may contain the right to purchase leased property. |
| **B Foreign Ownership** | |
| Can foreign investors own property outright and/or through subsidiaries? | Foreign entities can freely acquire title to buildings, constructions and premises.<br>A foreign person is permitted to take title to a non-agricultural land plot, subject to applicable law restrictions as described below. |
| What local restrictions apply to foreign ownership (direct or indirect)? | Foreign companies or nationals may hold land plots or interests in general ownership rights to land plots of agricultural lands only on lease.<br>Foreign nationals may own non-agricultural land plots provided they also own the buildings located on such plots.<br>Foreign legal entities may own non-agricultural land plots in case of purchase of a real estate object on such land and for construction of objects in connection with business activity in Ukraine. |
| Title Due Diligence | Ownership title and other rights or encumbrances with respect to real estate are recorded in the State Register of Property Rights to Real Estate. The title to buildings or premises can be verified by requesting an informational request from the State Register of Property Rights to Real Estate. The title to a land plot is verified by requesting a registered |

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| | sale-purchase agreement, registration with the State Register of Property Rights to Real Estate and other similar evidence. Records from the previous registers (which were in effect until 1 January 2013) are also ordinarily requested and checked as a matter of practice, since not all entries have yet migrated to the new registry. |
| **C Title Due Diligence** | |
| What special factors might arise in title due diligence? | While there is a legal presumption of accuracy in the official ownership title records, this does not totally guarantee title or actual possession. For example, there are grounds in civil law for invalidating purchases and sales, and the applicable statute of limitations is three years. Thus, there is no substitute for a thorough due diligence investigation and title search by counsel. Typically, counsel for the buyer or lender performs title searches.<br><br>The registration of title or other rights or claims may take from several days to a month (depending on the region, the correctness and completeness of documents submitted for registration, the prior title history and the complexity of the transaction). |
| Does title registration constitute reliable evidence of ownership? Can a registration be unwound? | Registration of title to real estate is the due confirmation of ownership. A registration may be unwound by a court decision. However, please note that the new law 'On Registration of Property Rights to Real Estate and Their Encumbrances' contains a provision which effectively stipulates the priority of data contained in the registrar's files (which is not publically available) over the public data contained in the registry. Hence, although we are not aware of discrepancies between the files and the registry, a certain degree of uncertainty still exists. |
| **D Other Issues; Restitution** | |
| Does the local law allow for restitution and on what grounds? | Ukrainian law contains no specific rules regarding restitution (in the sense of the possibility for reclamation of property by former owners on the grounds relating to World War II, nationalization during the communist period and the like). Still, there are general grounds for unwinding title to property (such as illegality of transfer of the title at the time of its effectuation) which can be applied subject to the relevant statute of limitations. |
| **IV TAXES** | |
| Describe all national and local transactional and income taxes imposed on a transfer of real property. Who typically pays (i.e., buyer, seller, negotiated?)? | There are no special transactional taxes on transfer of real property in Ukraine.<br><br>Sale of real property by a legal entity registered in Ukraine is subject to:<br><br>• Corporate profits tax ('**CPT**') at the current rate of 18%. CPT on sale of real property is calculated on the difference between the sales price and the net book value of the property;<br><br>• Value added tax ('**VAT**') at the current rate of 20%. VAT is charged by the seller on the sales price, except for sale of land plots and the sale of a residential property (save for the first sale of a residential property), which are VAT exempt.<br><br>The sale of real property in Ukraine by a non-resident legal entity not registered in Ukraine is generally subject to withholding tax<br><br>The standard rate of withholding tax is 15%, though this may be reduced or eliminated by tax treaty. Withholding tax is withheld by a tax agent (e.g., the Ukrainian buyer or Ukrainian bank in some cases). Transactions on sale of real property situated in Ukraine must be carried |

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| | out at 'arm's length,' i.e., real property must be transferred at market value if the seller and buyer are deemed 'related parties' for the purposes of applicable Ukrainian tax law, and fall, therefore, within the scope of the applicable Ukrainian transfer pricing restrictions.<br><br>Additionally, the following duties and charges are applicable upon the direct disposal of real property:<br><br>(a) State duty at 1% of the contract price. Ukrainian law does not specify who is responsible for payment of state duty (i.e., buyer or seller). In practice the parties to the transaction usually agree to a 50:50 split); and<br><br>(b) Pension fund charge at 1% of the contract price which is payable by the buyer. Pension fund charge is not applicable upon the sale of land. |
| Describe all national and local taxes imposed on the financing of real property. Who typically pays? | Equity financing (cash contributions to the charter capital of a legal entity registered in Ukraine) do not trigger any tax liabilities for both the contributor (i.e., the shareholder or participant) and the recipient (i.e., the legal entity to which such contribution is made). Cash contributions to the charter capital of a legal entity registered in Ukraine are not subject to VAT.<br><br>The following issues should be considered with respect to debt financing of a real property in Ukraine:<br><br>• from the point of view of taxation, loans received by legal entities registered in Ukraine from creditors (both residents and non-residents) and repayment of the loans do not impact the tax liabilities of the borrower; accrued interest is, as a general rule, tax deductible; While there is no thin capitalization rule in Ukraine in its commonly accepted meaning, a quasi-thin capitalization rule is applied to Ukrainian tax residents if their debts to non-resident related entities are 3.5 times (10 times for financial institutions and leasing companies) greater than their equity. The rule stipulates that the interest expense deduction for such taxpayers is limited to 50% of earnings before interest, taxes, depreciation and amortization (EBITDA). Non-deductible interest can be carried forward indefinitely, but with an annual reduction of 5% of the residual amount. attraction and return of funds loaned in accordance with loan agreements are not subject to VAT;<br><br>• Interest payments are deemed to be income sourced from Ukraine and, therefore, are subject to 15% Ukrainian withholding tax, unless this is reduced or eliminated by tax treaty. |
| What proven methods exist to avoid or defer transfer taxes resulting from the sale or transfer of real property? | Contrary to an 'asset deal' (i.e., a direct sale of real property) structuring a real property sale via a 'share deal' allows the payment VAT on such sale to be eliminated, as a sale of shares/corporate rights is not subject to VAT if payment is made in monetary form.<br><br>Operations of sale and purchase of shares (corporate rights) are taxed on the difference between the sale value of the shares (corporate rights) and the purchase value of the shares (corporate rights) ('**Capital gains**') as confirmed by the relevant documents (e.g., the sale-purchase agreement).<br><br>If a non-resident legal entity sells shares (corporate rights) in a Ukrainian legal entity, then the capital gain is subject to a 15% withholding tax (withheld by the buyer). Most tax treaties with Ukraine also allow Ukraine to tax the capital gains on the sale of shares (corporate rights) in a Ukrainian company if such shares (corporate rights) derive their value or |

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| | most of their value directly or indirectly from real property situated in Ukraine. Only a few tax treaties provide protection in such instances (e.g., Slovakia). In practice, when a non-resident shareholder sells shares in a Ukrainian company to another non-resident with payments made abroad, the Ukrainian tax authorities face practical obstacles in collection of withholding tax.<br><br>The standard CPT rate of 18% applies to the capital gains of a Ukrainian company. |
| **V DE-LEVERAGING** | |
| Must the seller or the purchaser notify the debtor of the sale of the receivables in order for the sale to be effective against the debtor and/or creditors of the seller? | The borrower's consent to the sale is required only if it is so envisaged in the agreement. In other cases, under Ukrainian law, a debtor under an obligation must be notified on the change of the creditor of such obligation. The law does not specify who (i.e. the original creditor or the new creditor) must make such notification or when. The failure to provide such notification does not cause the change of creditor to be invalid, though the debtor's payment of the relevant obligation to the original creditor would be deemed due payment and discharge of the obligation (hence the onus is on the new creditor to ensure the notification is given). |
| More generally, what formalities are required for perfecting (i.e., making enforceable against other creditors of the seller) the sale of a mortgage loan? | Generally, the sale of receivables is subject only to an appropriate agreement between the seller (original creditor) and purchaser (new creditor). However, mortgages (i.e., security over immovable property) are subject to notarization in Ukraine and registration with the Register of Property Rights to Real Estate, and in order for rights under a notarized agreement to be transferred, an agreement on such transfer must also be notarized by a Ukrainian notary, and the respective change of the mortgagee registered with the Register of Property Rights to Real Estate must also be effectuated. |
| Must the seller or the purchaser obtain the debtor's consent to the sale of the receivables in order for the sale to be effective against the debtor? | Generally, no consent of the debtor is required for a change of creditor (including via sale-purchase of receivables), unless otherwise provided by contract. However, cross-border loans are subject to registration by the NBU. Where the purchaser is a non-resident of Ukraine, respective amendments to the loan agreement must be registered by the NBU so that any payments under the loan are permitted. Hence, effectively, sales of loan receivables to non-residents require cooperation on the debtor's side. |
| Are there any governmental regulatory consents or filings required in relation to such sales (e.g., exchange control rules and/or banking monopoly)? | In addition to the registration requirement outlined in the item above, loans to Ukrainian individuals by Ukrainian creditors are permissible in local currency (i.e., the UAH) only, though UAH loans cannot be assigned to non-residents of Ukraine. Ukrainian currency controls establish that payments between Ukrainian residents can be effected only in UAH (save for authorized banks with respect to transactions covered by a banking license), and payments between a Ukrainian resident and a non-resident can, as a general rule, only be effected in foreign currency. |

# Kazakhstan

| I. LENDING | |
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| **A Legal Ability to Originate Loans** | |
| What licenses will a foreign lender need to lead or grant one-off or occasional loans secured by real estate? What if the lender starts to make loans more frequently? | The Law on Banks and Banking Activities generally regulates banking activity in Kazakhstan. No licenses are required for a foreign lender to lead or grant one-off or occasional loans (irrespective of whether collateral such as real estate is given). The requirements will not change even if the foreign lender starts to make loans more frequently. |
| Are there currency (e.g., exchange control or similar) issues in respect of the loan? Does local law require payment of commissions and fees in local currency? | Transactions between purely domestic entities must be carried out in the national currency (the *Tenge*). Cross-border transactions (including the granting of loans by a foreign lender, as well as the payment of commissions and fees to it) can be carried out with payment in foreign currency. However, foreign-exchange loans may be subject to registration with or notification to the National Bank of Kazakhstan ('**NBK**'). |
| **B Loan Documentation** | |
| Does local law provide for a standard form of loan document, or is one used in practice (e.g., LMA)? | No, if a lender is not a resident of Kazakhstan. However, the law does require certain elements to be included in loan documentation. In practice, foreign lenders use standard English-law or civil-law (e.g., German-law) loan precedents (often based on LMA). More simplified local loan documentation forms are also widely used, particularly by domestic or other CIS-based lenders.<br><br>In the event a Kazakhstan bank becomes a co-lender under a foreign-law governed syndicated loan, the respective loan agreement will need to comply (or be modified to comply) with the provisions of Resolution No. 18 'On Adoption of a List of Mandatory Terms of Loan Agreements', adopted by the Kazakh Financial Regulator on 28 February 2011 ('**Resolution 18**'). Resolution 18 sets out an extensive list of the provisions that must be incorporated into a loan agreement to protect Kazakhstan financial service consumers. Such provisions *inter alia* include: (i) terms that need to be specified in the first 4 pages of the loan agreement; (ii) the requirement that the agreement be executed in the Kazakh language; (iii) an obligatory provision that a Kazakh bank may accelerate a loan only 40 days after the occurrence of a non-payment event, etc. |
| What types of security may be obtained? Are there standard types of security taken in practice? | Various types of security are used in commercial real estate financings, including most frequently:<br><br>- a mortgage over the property being financed;<br><br>- a pledge over movables or rights; and<br><br>- a pledge of shares in the borrower and/or holding company(ies) (e.g., for purposes of obtaining control in an event of default).<br><br>Also sometimes seen are bank guarantees, suretyships, letters of credit and contractual penalties. No standard form documents exist – lenders ordinarily develop their own forms with outside counsel.<br><br>The Competent Registration Body may request that a foreign pledgee obtain a Business Identification Number ('BIN') in Kazakhstan in order to |

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| | register the pledge in Kazakhstan.<br><br>Although applicable laws do not explicitly require this, recent practice shows that Kazakh registration authorities are often unable to process pledge registration applications if a pledgee does not have a BIN. |
| Can the laws of another jurisdiction or country govern the loan and/or security documents? Is this common? | Yes, the choice of a foreign law is permitted in cross-border transactions and /or in the event when the transaction is embedded with a foreign element.<br><br>Security over collateral located in Kazakhstan (e.g., mortgages of property) and, arguably, shares (participatory interests) in a Kazakhstan entity cannot be governed by any substantive law other than Kazakhstan law. Moreover, if registration of security interest is required by a party in Kazakhstan, it is generally recommended for Kazakhstan law to govern the underlying agreement, even though there may not be an overt mandatory requirement. |
| Do special issues arise in syndication, such as limitations on the use of a security trustee and/or the need for a parallel-debt structure? Are these structures common, and do they work under local law? | The concepts of a 'security trustee' or 'security agent' are undeveloped under Kazakhstan domestic law. While it is not entirely clear, some commentators argue that to be entitled to act as a security holder, the security trustee or agent must be the lender itself. It is therefore quite common to see cross-border English-law parallel-debt structures used to overcome these uncertainties, though the structures remain untested in the courts of Kazakhstan. |
| Are there local-law usury rules that may affect the terms of a commercial loan? | Generally, not for cross-border loans. However, domestically-registered banks, organizations conducting banking operations, micro-credit organizations, and credit companies in Kazakhstan may be restricted in what they can charge. |
| What is the effect of a negative pledge covenant under local law and court practice, and what remedies are available if the covenant is breached? | Negative pledge covenants are commonly seen in Kazakhstan. However, for such provision to be specifically enforceable, the contract must be registered (e.g., with land authorities for a mortgage). Where the covenant is breached, normally, this will give rise to acceleration and enforcement and a claim for damages. |
| Do stamp duties or similar charges arise in respect of loan, security and/or other credit-support (e.g., guarantee) documentation? Are there customary and accepted ways for legally deferring, minimizing or eliminating them? | No stamp duties exist as such. Registration charges will arise on the loan and pledge or mortgage agreements. No charges arise in relation to guarantees. In all cases, the duty is imposed on the Kazakhstan party to a contract. The registration charges are normally nominal. |
| Can property-specific needs be addressed by means of pledged cash reserves and escrows funded from the loan proceeds, and are these means common? | Kazakhstan law permits the pledging of monetary funds in an account opened in Kazakhstan. This is a common structure. Although Kazakhstan civil and banking laws do not expressly regulate the institution of escrow accounts, many banking institutions (mostly, local bank subsidiaries of foreign banks) in Kazakhstan are familiar with the concept and have on occasion attempted to implement it based on freedom-of-contract principles. |
| Is it common to structure property financings using offshore holding companies, and if so what forms of foreign-law security are commonly encountered? What benefits do such security structures provide? | This is not particularly common, though ownership up the chain of shareholders may be via offshore holding companies. Where the lenders require security up the chain, this will depend on the jurisdiction but will ordinarily include at a minimum pledges of shares in the offshore holding structure |

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| Is arbitration available? | Kazakhstan has recently adopted the new Code of the Republic of Kazakhstan No. 377-V 'The Civil Procedure Code of the Republic of Kazakhstan' dated 31 October 2015 ('**Civil Procedure Code**'). Article 501.1 of the code provides that decisions, awards, settlement agreements, and writs issued by foreign courts, as well as arbitral awards issued by foreign arbitrage, are recognized and enforced by Kazakhstan courts only if the recognition and enforcement of such acts are: (i) envisaged by (a) Kazakhstan Law and/or (b) an international treaty, which has been ratified by Kazakhstan, or (ii) based on the principle of reciprocity.<br><br>The principle of 'reciprocity' is usually dictated by existence of a bilateral treaty between Kazakhstan and another foreign state with respect to the reciprocal recognition and enforcement of court decisions. The latter is due to the fact that 'reciprocity' is a broad and vague concept, the 'application parameters' of which cannot be easily determined. In other words, in the absence of a respective treaty, it is very unlikely that a Kazakhstan court would recognise and enforce a foreign court decision based on reciprocity. For example, Kazakhstan and the United Kingdom have not concluded a bilateral treaty under which these countries would agree to recognise and enforce decisions issued by courts of the other country. We believe, therefore, that any decision rendered by an English court against a Kazakh counterparty would not be recognised and enforced in Kazakhstan.<br><br>At the same time, Kazakhstan has acceded to the New York Convention. This was done by means of the Decree No. 2485 'On accession of the Republic of Kazakhstan to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards issued by the Kazakhstan President on 4 October 1995 (the '**Presidential Decree 2485**'). Accordingly, a foreign arbitral award obtained in a state which is a party to the New York Convention should, in principle, be recognised and enforced by a Kazakhstan court, subject to (i) the terms of the New York Convention and (ii) compliance with (a) the rules of civil procedure of Kazakhstan and (b) the provisions of the Kazakhstan Law 'On International Arbitration' dated 28 December 2004, as amended, on recognition and enforcement of arbitral awards.<br><br>Having said this, we observe that Article 501.1 of the Civil Procedure Code specifically requires a 'ratification' of an international treaty in order for such treaty to become applicable to recognition and enforcement of foreign arbitral awards. Technically, the Presidential Decree 2485 is an 'accession' and not a 'ratification' act. It can be argued, therefore, that until the New York Convention is actually ratified by the Kazakhstan Parliament, a Kazakhstan court may refuse to recognise and enforce foreign arbitral awards. We are of the view, however, that this would be an unreasonable argument. In particular, we believe that it is a technical omission that Article 501.1 of the Civil Procedure Code – in addition to 'ratification' – does not refer to the other manners for an international treaty to become binding on Kazakhstan (e.g., 'accession', 'adoption' and 'approval'). The previous version of the Civil Procedure Code, which was effective until 31 December 2015, did not refer to any particular manner (including 'ratification') for an international treaty to be binding on Kazakhstan. Furthermore, to the best of our knowledge, the Republic of Kazakhstan has not taken any steps to denounce, or otherwise terminate its membership in, the New York Convention. To this end, until the technical omission is rectified, we believe it would be reasonable for a Kazakhstan court to continue applying the New York Convention for the purposes of recognition and enforcement of foreign |

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| | arbitral awards.<br><br>Nonetheless, we also observe that the number of cases related to the enforcement of foreign arbitral awards in Kazakhstan has been relatively small, and, as a consequence, Kazakhstan courts have limited experience in this regard. On a separate note, under Article 501.3 of the Civil Procedure Code, there is a three-year statute of limitations on the enforcement of arbitration awards in Kazakhstan. |
| **C Limitations on Borrowing** | |
| What corporate approvals are needed for a company to borrow or provide security? | Depending on the value of transaction and the form of the borrower or security giver, restrictions on capacity may apply either statutorily or under specific charter provisions. For example, a joint stock company (a '**JSC**') will require:<br><br>(c) Approval of the board of directors for 'decisions to increase…liabilities for a sum comprising 10% or more of…the company's own capital.' In the event of a violation of this requirement, a shareholder may demand invalidation of the transaction by court action, where the counterparty knew (or ought to have known) of the violation.<br><br>(d) Approval of the board of directors for a 'major transaction,' i.e., 'a transaction or several inter-related transactions as a result of which the company acquires or alienates property equalling 25% or more of the company's asset book value.' A company must publicly announce this board decision within five (5) business days, failing which an interested party (e.g., shareholder or creditor) may sue to invalidate the transaction.<br><br>A company's charter may also include stricter or additional approval requirements.<br><br>No similar statutory restrictions exist for limited liability partnerships (another common form of incorporation in Kazakhstan). However, the partnership's charter may include special approval requirements. |
| Are there financial limits relevant to a company (e.g., as to the amount it can borrow and/or as to the security for its borrowings or the borrowings of other companies)? | Generally no statutory financial limits exist other than in respect of borrowings or security given by banks. Insolvency considerations should be checked. Thin capitalization rules may apply, and financial limits on borrowing and/or giving security may be imposed under existing financing documentation. |
| Are there legal restrictions on 'financial assistance' or 'upstream guarantees' that must be considered? | No formal restrictions as such exist in Kazakhstan. There are no concepts of financial assistance or upstream guarantees as such under Kazakhstan law. However, solvency issue of Kazakhstan entity should be considered. A three-year hardening period will apply to assets transferred to the third parties (also including assets that form security or were leased out) free of charge, below market rates, or to the detriment of other creditors. The said three-year period will apply to any transaction, regardless if it is performed on an upstream, downstream or cross-stream basis. |
| Are there lawful and reliable means of overcoming any limitations (e.g., whitewash)? | There are no statutory carve-outs in the Kazakhstan Bankruptcy Law. In order to minimize the risk of a transaction's invalidity, due to the possible insolvency of the Kazakhstan counterparty, it is advisable to ensure that:<br><br>• the price and/or other terms of the transaction are not substantially worse than those of similar transactions, and the transaction does not and will not lead to a financial loss; |

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| | • the transaction is not outside the limits of the debtor's business activities, as imposed by law or by the debtor's constitutive documents,<br>• the transaction is properly authorized by the debtor (e.g., the transaction required the approval of a management body of the debtor and such approval was timely received);<br>• the property under the transaction is not transferred free of charge (including for temporary use) or at a price significantly below market value and to the detriment of the creditors;<br>• the transaction does not preferentially benefit a certain creditor (or group of creditors); or<br>• the transaction is not a gift by the debtor provided outside of its ordinary business activities. |
| Can a company or individual give security for the obligations of a third party? Are there any limitations here? | Subject to applicable insolvency rules, yes, security may be given for third-party obligations. No special statutory restrictions apply other than limitations on certain types of corporate transactions (see above) or related party transactions (see below). For individuals, certain limitations may also apply (e.g., under marital, guardianship and/or consumer protection laws). In the event of insolvency any transaction may be challenged by the administrator on the grounds as stated above, as well as on general grounds as set out in the Kazakhstan Civil Code. |
| Can a company give security for financing being provided to a shareholder, a director or a related party? Must any special approval requirements be met? | Unless the charter of a company sets restrictions or special approval requirements for provision of security to a third-party for the obligations of a shareholder, a director or other related party, Kazakhstan law does not expressly stipulate any additional restrictions. Kazakhstan JSCs must undertake a special corporate approval procedure for transactions directly concluded with related parties. A detailed procedure must be specified in the charter of a JSC.<br>Without prior approval of the general participants meeting, Kazakhstan LLPs may not grant any property benefit to their directors or their close relatives.<br>Apart from the above, the law also establishes restrictions on banks' entry into related-party transactions.<br>Issues of solvency, as described above, should always be considered. |
| What investigations should be made about the security-giver (whether an individual or a company)? | Appropriate legal due diligence should be made on capacity (due existence, authority and absence of insolvency), including various of the above matters, as well as title and encumbrances over any collateral. Where the security is critical to the credit risk analysis, a formal legal opinion from local counsel on these matters should be sought. |
| **D Validity of Security** | |
| Are there any general prohibitions or limitations on taking security? | Generally, no. However, some limitations may arise depending on the type of a security. For instance, the pledge of such types of assets as strategic facilities or subsoil use rights may require prior approval from the competent state bodies. Certain property (i.e. state owned shares and participatory interests) may not be pledged. |
| Is there ever a risk of claw-back and/or fraudulent transaction in the taking of security? | Yes. See, e.g., 'Bankruptcy / Insolvency,' below. |
| Does local law distinguish as between | Kazakhstan law does not distinguish between 'creation' and 'perfection' |

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| the 'creation' and the 'perfection' of security? | of security (these terms are often used interchangeably in the market). |
| Can security be taken over 'future' property (e.g., property not yet owned by the security-giver and/or not yet even in existence), and/or future earnings from existing or future property? | In general, yes. In some cases, however, there may be certain issues related to determination of the value of 'future' property to be covered by such security. |
| Can security be given by individuals, and are there special limitations/requirements for such security (e.g., consumer-protection rules)? Do any special issues arise here? | Security can be given by individuals subject to capacity, consumer-protection and matrimonial rules. |
| Are loans generally structured (or may they be structured) as 'recourse' loans whereby the security-giver always remains personally liable, or as 'non-recourse' whereby after default the lender may seize the collateral but its recovery is limited to the collateral? | Loans may be structured as full recourse, limited recourse or non-recourse. |
| What claims or other liens can prime an earlier security interest? | An earlier security interest shall generally have a priority over all later (second) claims or liens. The Kazakh law on Rehabilitation and Bankruptcy dated 7 March 2014 (**'Bankruptcy Law**') provides that costs of the insolvency administrator are paid in super priority to the other creditors and satisfied out of the debtor's property. Claims resulting from personal injury damages, unpaid alimony, employee compensation, contributions to the National Social Insurance Fund, pension contributions and mandatory professional pension contributions, and compensation due under copyright agreements are paid following the payment of the costs of the insolvency administrator and also in priority to other creditors. Secured creditors will form the second order of creditor priority. In general, the contractual claims of unsecured creditors will be ranked *pari passu* to each other, unless such claims are contractually subordinated. Having said this, we note that contractual subordination in the event of insolvency has not been properly tested in Kazakhstan. There is a risk, therefore, that subordinated claims may be ranked equally with unsubordinated claims in the event of insolvency.<br><br>Kazakhstan law recognizes secured creditors as those creditors whose claims are secured only by way of a pledge governed by Kazakhstan law. |
| What benefits does an earlier security interest enjoy over second-ranking security? | Outside of an insolvency scenario, claims under earlier-ranking security are satisfied from proceeds of sale of the collateral in priority over second-ranked security. At this stage it is uncertain whether the same rule will be applied under conditions of insolvency. |
| Are there any relevant time periods (e.g., as to the length of validity of security or as to the time in which the lending must take place)? | No. |
| What would a typical time period be for entering into and perfecting a straightforward secured transaction? | It is always difficult to accurately predict the timing of any given transaction, but the more information that is available upfront, the more accurate any prediction will be. A straightforward secured transaction |

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| | may take several weeks; a more complex one a month or more. Transactions involving pledges of subsoil use rights and/or pledges of shares in a subsoil user may take up to 3-6 months. |
| What obligations may be secured (e.g., specific debts, all present and future debts, guarantee obligations, interest, fees and expenses)? | In general any types of obligations may be secured, including all present and future debts, interest, compensation of damages, fines, fees, etc. |
| What fees (excluding legal fees) and taxes are payable (e.g., for searches, notaries and registration, as well as enforcement)? | Security registration fees are payable upon the registration of a security. Notary fees are payable only if notarization of a security agreement is required. Notarization fees and fees for state registration of such transactions will vary depending on the type and value of collateral. In any event, the amount of registration and notarial fees will generally be nominal. |
| How do lenders perfect a security interest in cash reserves? | A simple security agreement between the lender and the cash owner is generally sufficient to establish a security interest over cash reserves. If cash is stored in a bank, then it is recommended to engage the account bank as a party to the respective security agreement. It is also advisable that the pledge of cash be registered with the Kazakhstan Ministry of Justice (although such registration is optional). |
| Are there any limitations on a lender's ability to charge interest on portions of the loan advanced into escrow with the lender? | No. |
| Is a lender required to pay interest on reserves in escrow with that lender? Are taxes levied on the interest paid on such reserves, and if so who pays those taxes? | No, this is a purely commercial matter. In case interest on reserves is agreed, taxes are levied on the interest paid on such reserves. The person entitled to receive the reserves, i.e., the eligible person, is indebted for such taxes. |
| Address encumbrance of shares, movable property / fixtures, etc. Are there filing or registration requirements? | The pledge of movable property (which includes shares, vehicles, securities, money, property rights, etc.) is subject to registration if (i) either party of the respective pledge agreement demands for such registration, or (ii) the pledge agreement contains a restriction on establishment of further pledge (second lien) over the property pledged under such pledge agreement.<br><br>Pledges of immovable property, of subsoil use rights and of shares (participation interests) in subsoil users are subject to mandatory registration. |
| **E Creation of Mortgage** | |
| How is a mortgage of real estate established? | A mortgage of real estate is established on the basis of a signed mortgage agreement. The security rights under the mortgage agreement arise as from their registration. |
| Does the mortgage have to be in any special form? | The mortgage agreement must be concluded in writing. Notarization is generally not compulsory. |
| What are rules on priority? | Claims of secured creditors shall generally have priority over claims of unsecured creditors.<br><br>In case of bankruptcy or rehabilitation, claims of a secured creditor (i.e., a mortgagee or a pledgee) shall form the second order of priority and be satisfied after: payments to the insolvency administrator and claims resulting from personal injury damages, unpaid alimony, employee |

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| | compensation, contributions to the National Social Insurance Fund, pension contributions and mandatory professional pension contributions, and compensation due under copyright agreements. |
| Are construction mortgages achievable over buildings and other structures to be built in the future on a land plot? Are there special statutory provisions on these and/or are special provisions required in the mortgage agreement? | In general, it is possible to establish security over buildings and other structures to be built in future. In some cases, however, issues may arise related to determining the value of 'future' collateral.<br>'Construction in progress' (i.e., unfinished construction) is classified under Kazakhstan law as 'movable property.' Consequently, a pledge of movable property must be signed to establish security over 'construction in progress.' Once construction is completed and the property is officially commissioned into operation, the parties must reclassify the original pledge of movable property agreement as a mortgage agreement and procure its registration. Priority of rights is established with the state registration of movable property. As soon as the construction is accomplished and the real estate is put into operation, the existing pledge shall be re-registered as a pledge of immovable property. Such re-registration will generally restart the relevant hardening period of the security giver. |
| Can mortgages be granted to more than one named lender? | Yes. |
| **F Foreclosure & Enforcement** | |
| Who may act in enforcement? (Are there restrictions on the type of parties that may exercise remedies?) | All creditors may generally act in enforcement. The laws set forth no explicit restrictions in this respect. However, if the collateral is sold at auction, then a third party nominated by a mortgagee/pledgee shall conduct such auction.<br>Kazakhstan law establishes certain extra rules for enforcement of pledges over subsoil use rights and shares in a subsoil user. |
| Can the lender buy the mortgaged property or otherwise become its owner? | Generally, mortgages are enforced either through judicial foreclosure or non-judicially through public auction.<br>If a public auction for a mortgaged property is declared invalid (e.g., if less than two potential buyers participate), then the mortgagee may either initiate a new auction or pay the market price as determined by an independent appraiser to acquire title over the mortgaged property.<br>Kazakhstan law establishes certain extra rules for enforcement of pledges over subsoil use rights and shares in a subsoil user. |
| What are the steps involved in judicial foreclosure? | The major steps in judicial foreclosure are as follows:<br>• mortgagee files a lawsuit with a court to officially commence foreclosure;<br>• mortgaged property is sold at a public auction conducted by law enforcement officers; and<br>• proceeds collected from the auction are distributed to satisfy the mortgagee's claims. |
| Is non-judicial foreclosure (i.e., self-help) available? Are there special rules for ensuring that this right exists and on how it may be exercised? | Non-judicial foreclosure is generally available if stipulated by the respective security agreement. No court judgment evidencing a mortgagee's claim is required to enforce the collateral in such cases.<br>The main steps a mortgagee/pledgee would need to take are as follows:<br>(a) appoint an agent to conduct a public auction; |

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| | (b) observe all Kazakhstan law pre-auction notification, publication and/or timing requirements;<br>(c) conduct the public auction; and<br>(d) distribute the proceeds of the auction.<br>In certain cases, however, the execution of non-judicial foreclosure is not permitted. In particular:<br>(a) the mortgage of the property required the consent or permission of another person or authority;<br>(b) the mortgaged property is of artistic, historical or other special cultural value;<br>(c) the mortgaged property is under common ownership and another owner does not agree to non-judicial foreclosure;<br>(d) there is a written and registered refusal of a mortgagor under a housing loan; or<br>(e) in certain cases when the loan is granted by a micro-credit organization. |
| Address the pros and cons of judicial vs. non-judicial foreclosure and self-help remedies. What are the types and main features? | Non-judicial foreclosure is generally preferable, as it may be conducted faster and more efficiently.<br>However, judicial foreclosure may be prudent where there is a high risk of a dispute arising between parties in regard to the merits or process of the foreclosure.<br>In addition, in accordance with Article 319.2 of Kazakhstan Civil Code and Article 37.2 of Kazakhstan Law on Mortgage of Immovable Property No. 2723 dated 23 December 1995, if proceeds, received from the sale (foreclosure) of mortgaged property (e.g., a mortgage created over a real estate object) are lower than the value of the secured obligation, then such obligation (as well as the respective mortgage) should nonetheless be deemed to be terminated (fully discharged) if (i) the sale (foreclosure) of the mortgaged property has been undertaken **in the out-of-court procedure** and (ii) the value of the mortgaged property had been sufficient to fully discharge the (secured) obligation at the moment when the respective mortgage had been established. |
| What would a typical time period be to enforce a mortgage? | Please see our comments below. |
| What are the typical timeframes involved in foreclosure? | On average, judicial foreclosures may take up to 5-6 months. However, complex cases may involve even longer timeframes.<br>Non-judicial foreclosures may be accomplished in 7-10 weeks, provided that the mortgagor does not challenge such foreclosure. |
| What are the typical costs involved in foreclosure? | Typical costs are the court fee for judicial foreclosure, or the agent fee for non-judicial enforcement. Certain other reasonable costs may be incurred in relation to use of postal services, printing publications in newspapers, etc.<br>Overall, in practice the costs of foreclosure mainly depend on the target of foreclosure, the length of the proceedings, and the value of claims. |
| What are the requirements for exercising remedies? | Any event of default under a loan or security agreement shall generally entitle the lender to exercise remedies subject to certain mandatory regulations. |

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| Is the right to exercise remedies restricted to monetary defaults only, or may a lender also call a default and foreclose for violations of covenants? | Establishment of diverse covenants as triggers of an event of default is widespread in Kazakhstan, although it remains relatively untested in courts. The answer to this question also depends on the terms of the relevant financing documentation as well as the choice of applicable law.<br><br>With respect to banking loan agreements governed by Kazakhstan law, lenders have the option to accelerate a loan upon the occurrence of any of the following events:<br><br>*(i)* ***inappropriate use of the loan proceeds;***<br><br>*(ii)* ***(subject to a 40-day grace period) occurrence of a non-payment event, in respect of either principal or interest;***<br><br>*(iii)* ***loss of the security under the loan agreement;***<br><br>*(iv)* ***other events specified in the loan agreement.***<br><br>Kazakhstan law does not provide for mandatory acceleration events. |
| Are there *de minimis* defences against foreclosure, and if so may these be contractually overridden? | The mortgagor is entitled to challenge the results of an auction in court. Such challenge may be brought *inter alia* if foreclosure procedures, as established by law, have been breached by the mortgagee.<br><br>In addition, the mortgagor is entitled to challenge the mortgage agreement itself in court.<br><br>Kazakhstan laws prohibit foreclosure on a pledge for *de minimis* breaches. Unfortunately this is just a general principle, and the law establishes no specific rule on what is considered *de minimis*.<br><br>These provisions of law cannot be contractually overridden. |
| Are any remedies exclusive of any other remedies? | Generally no, but each issue should be addressed on a case-by-case basis. |
| Do any governmental regulatory consents arise in the sale or other transfer of collateral on foreclosure (e.g., in certain jurisdictions there may be restrictions on foreign ownership of real property and/or strategically important assets; competition law restrictions; etc.)? | In certain cases consents may indeed be required if a transfer of collateral falls under banking, monopoly, competition, state property, or subsoil use law.<br><br>Kazakhstan law provides a list of strategic assets which can be pledged or alienated only with prior governmental approval.<br><br>Examples of strategic assets are railways, trunk pipelines, trunk electrical grids, oil-refining facilities, international airports and international sea ports, as well as shares in legal entities which own these assets or can influence the decisions of legal entities which own these assets.<br><br>In certain cases of foreclosure on strategic assets, the Kazakhstan Government will have a pre-emptive right to buy such assets. |
| Are judgments rendered in civil matters recoverable against an entity's real estate interests? Are judgments junior or senior to previously recorded claims? | Yes, judgment rendered in civil matters is generally recoverable against an entity's real estate interests. In general, judgments are junior to previously recorded claims.<br><br>However, if there is insufficient real estate, insolvency proceedings would be conducted and creditors' claims satisfied on the basis of priority rules. |
| Can a lender choose which security to enforce first (e.g., can it go after a guarantor or share pledgor before enforcing a mortgage)? Will the choice or order of enforcement affect the lender's rights to enforce additional | The lender is generally entitled to choose which security to enforce first. If enforcement of a security does not cover claims of a lender, it can take advantage of other securities until its claims are covered in full. |

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| security later on? | |
| **G Bankruptcy / Insolvency** | |
| What risks does the lender or security recipient face if, at the time of the grant of security, the borrower or security-giver is insolvent/subject to insolvency proceedings or becomes insolvent/subject to insolvency proceedings after the security is taken? | The Bankruptcy Law provides that a company which is subject to rehabilitation or bankruptcy proceedings may not undertake any activities except for those in the ordinary course of business (i.e. making payments for facilities, salary payments). This said, it is still possible to grant security, but only if and when this is agreed with the insolvency administrator. It is unlikely, however, that the insolvency administrator would agree to grant any security.<br><br>If such security is granted, the major risk is that the validity period of such security would be subject to hardening periods under the Bankruptcy Law (as ultimately the purpose of insolvency proceedings is to sell the bankrupt's property and distribute proceeds fairly among creditors).<br><br>If the borrower or security-giver becomes insolvent/subject to insolvency proceedings after security is taken, the relevant security instrument may be set aside as a preference or non-market transaction. See discussion of hardening periods below.<br><br>The Bankruptcy Law does not apply to the bankruptcy of state enterprises, public institutions, pension funds, banks or insurance (or reinsurance) companies. Also, the Bankruptcy Law does not apply to the project finance and securitization transactions (as defined in the Kazakhstan Law on Project Finance and Securitization No. 126-III dated 20 February 2006) or to transactions executed in the trade system of the Kazakhstan Stock Exchange by way of open auction. |
| Is it possible to verify whether at the time of the grant of security the borrower or security-giver is insolvent/subject to insolvency proceedings? | The lender can verify this using the database of insolvent companies/companies in the process of insolvency proceedings run by the territorial departments of the Kazakhstan Ministry of Finance on their websites. However, such information may be out-of-date and/or incomplete. |
| What is the impact of insolvency or an insolvency proceeding on the foreclosure process? | Upon declaration of bankruptcy (or rehabilitation), foreclosure proceedings are automatically suspended by operation of law. |
| What is the process? | Bankruptcy proceedings are conducted by a bankruptcy manager (appointed by the Committee for Insolvent Debtors Affairs) and supervised by court. They may be initiated by creditors, authorized state executive authorities, or the debtor itself. |
| Is an insolvency proceeding about liquidation or re-organization? | Bankruptcy is either completed through (i) recognition of bankruptcy, sale of property and liquidation, or (ii) rehabilitation of the debtor's solvency. The law also envisages the possibility of initiating 'fast rehabilitation' (i.e., a 'pre-pack' procedure where the debtor's financial recovery is highly likely, and steps taken towards rehabilitation have been agreed between the debtor and its creditors before the application is submitted to the court). |
| How, if at all, can liens or security (and/or earlier foreclosures) be voided or extinguished during insolvency proceedings (e.g., as creditor preferences or as suspect transactions)? | Prior to including a claim on the list of creditors' claims, the administrator will review the claim. If there is a legal basis to challenge the claim, the administrator will be expected to do so. The Bankruptcy Law provides for a scrutinized test of validity in addition to the general grounds for invalidation of a transaction under the Kazakhstan Civil Code.<br><br>The administrator will check: (i) the form of the transaction (e.g. transactions need to be performed in writing and notarized); (ii) the |

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| | content of the transaction (e.g. presence of the major terms and conditions applicable to transactions of such type); and (iii) the parties to the transaction (e.g. for the possibility that a party to the transaction was not authorized, or did not have capacity under the law to execute such transaction).<br><br>The test of validity specifies several additional instances in which a transaction may be considered to be invalid, namely: (i) when the price and/or other terms of the transaction are substantially worse than those of similar transactions and the transaction will lead or has led to a financial loss; (ii) the transaction is outside the debtor's ordinary course of business, as imposed by law or by the debtor's constitutive documents, or the transaction was not properly authorized by the debtor (e.g. the transaction required approval of a management body of the debtor and such approval was not timely received); (iii) the property was transferred free of charge (including for temporary use), or at a price significantly below market value and to the detriment of the creditors; (iv) the transaction was made within the last six months and preferentially benefits a certain creditor (or group of creditors); or (v) the transaction constituted a gift from the debtor outside the debtor's ordinary course of business. |
| Who controls real-property-generated cash-flow during an insolvency proceeding? | The assembly of creditors and the bankruptcy manager. |
| Are there statutes or regulations governing the conduct of receivers, security trustees or other security agents while in possession of real property? | There are no specific references. |
| Is mortgage enforcement for the lender better (e.g., faster, better advertised, better process, less chance of delays) in insolvency or in 'normal' foreclosure? | Solvent foreclosure is administered and controlled by the lender or its representative. By contrast, in insolvency proceedings the mortgaged property is sold by the insolvency manager, who determines the sale method, starting price, etc. Crucially, the sale proceeds in insolvency are first used to settle the claims of senior creditors. In a solvent foreclosure, the proceeds are fully used to satisfy the lender's claims.<br><br>Mortgage enforcement is also usually less time-consuming for the lender through solvent foreclosure. |
| **H Enforceability Opinions** | |
| Are enforceability opinions available and customary from counsel and relied upon by international lenders? | Yes. |
| Who normally gives the opinion? | External counsel. |
| **II MORTGAGE LOAN TERMS** | |
| **A Prepayment Issues** | |
| Can the rate of prepayment be controlled through contractual restrictions in loan documents? | Yes. However, Kazakhstan banks follow certain regulatory restrictions related to interest rate and acceleration of outstanding debt repayment. |
| **B Cash Management** | |
| How can the lender assure itself that | It is generally possible to establish control over cash-flows in respective |

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| the cash-flow from a given property is duly applied (i.e., lock box)? | agreements between the lender, the owner of cash-flows and the bank, although cash-flow instruments in general and lock box tools in particular are relatively undeveloped. |
| Can a local borrower open accounts in foreign banks and subject those accounts to corresponding foreign security? | Yes, although Kazakhstan legal entities must notify the NBK when opening foreign bank accounts and report operations made through such accounts. |
| **C Are Restrictions on Additional Indebtedness Enforceable?** | |
| Are there any limitations on the enforcement of restrictions in loan documents against the borrower's incurring additional indebtedness? | Kazakhstan law does not expressly prohibit the parties to a loan from restricting the borrower's ability to incur additional indebtedness. Court practice related to this issue, however, is relatively undeveloped.<br>Certain limitations with respect to credit exposure exist with respect to borrowers who are natural persons with low income. |
| **D Insurance** | |
| Can lenders obtain a lien on insurance proceeds or otherwise obtain the benefit of casualty, liability and/or other insurance maintained by the security-giver with respect to the property? Is there a difference between being listed as a payee under, and/or taking security over, the policy? | Lenders can obtain a lien on insurance proceeds under appropriate documentation.<br>There may be different legal consequences depending on how the respective security holder is listed, but this should be discussed on a case-by-case basis. |
| Is political risk insurance available? | Although uncommon in Kazakhstan, political risk insurance is generally available subject to insurance companies' respective terms, conditions and limitations. |
| Is insurance coverage available for natural disasters? | Yes. |
| Is business interruption insurance available? | Yes. |
| Do lenders have the ability to evaluate the insurer and its claims record? | Yes. |
| **E Casualty/Condemnation** | |
| Does applicable law mandate the application of insurance proceeds or condemnation awards in any particular manner? | No. |
| **F Late Charges/Default Interest** | |
| Does applicable law permit the imposition of default interest or late charges? | Yes, though Kazakhstan banks are subject to certain regulatory limitations applicable to interest generally and default interest in particular. |
| Can 'interest on interest' be charged? | The law does not explicitly prohibit 'interest on interest.' However, Kazakhstan courts may decrease any penalty/fine/default interest if it is too large relative to the actual damages of a creditor. In such case, courts take into account (i) the extent to which obligor has actually performed its obligations, and (ii) the interests of both the creditor and |

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| | the obligor. |
| **G Alterations** | |
| Are restrictions on the borrower's ability to alter mortgaged property enforceable? | Generally, yes. |
| **H Defaults** | |
| Does the law provide any statutory mandatory notice or cure rights? | Generally, no. However, in most cases the parties will include contractually agreed notice and cure provisions in their agreements. Furthermore, Kazakhstan banks observe different rules in practice for notifying a borrower of an event of default, a 40-day grace period to cure such default, etc. |
| Are there any other restrictions on the ability of a lender to call a default? | Save as discussed above in relation to Kazakhstan banks, no. |
| Are there issues regarding the enforceability of transfer restrictions, both of asset and ownership interests? | It is generally possible to establish transfer restrictions based on the principle of 'freedom of contract.' However, subject to certain exceptions, Kazakhstan civil law does not enforce transfer restrictions regarding rights that are generally transferable by operation of law. |
| Are transfer taxes payable upon foreclosure, the sale of the property or upon the sale of the loan? | Yes. In case of foreclosure, there could be VAT (depending on the type of property), an auction fee, and corporate income tax.<br>With respect to sale of property, VAT (depending on the type of property) and capital gains tax would apply.<br>For sale of loan, corporate income tax could be applied. |
| **I Title Insurance** | |
| Is title insurance available? If available, is it commonly used? | In practice title insurance is not yet well developed or readily available on the market. |
| Is lender's coverage available? If available, is it commonly used? | Yes. It may be used upon request of an insurer client. |
| **J Environmental** | |
| Do lenders commonly conduct environmental due diligence? | No. |
| Are there lender liability issues to be considered? | Nothing specific at this time. However, if a lender acquires ownership or other (e.g., lease) rights to contaminated land, it could be declared liable for clean-up measures. |
| **K Leasing Issues** | |
| Are there laws or regulations governing lease terms and rental rates? (Note, this question applies solely to tenant leases of premises in commercial development, and not land leases.) | Kazakhstan law contains general rules governing tenant leases (form and term of contract, parties' liability, termination events, etc.). However, particular terms and rates are mostly unregulated and subject to contract. |
| Are tenant estoppels (e.g., certificates signed by tenants confirming certain | Tenant estoppels (as well as the very concept of estoppel) are unknown to Kazakhstan law. Even if such certificate is obtained, it will not give |

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| acts) available and what is their legal relevance and are they enforceable? | complete comfort to the purchaser as the existence of such certificate will not legally prevent the tenant from raising a claim that is inconsistent with the statements contained in the estoppel. |
| Is a lock-box arrangement available? | Lock-box arrangements are undeveloped in Kazakhstan although they can be created by contract. |
| Are there laws governing the transfer and/or the application of security deposits? | No, such terms are subject to contract. |
| Are subordination, non-disturbance and attornment agreements (SNDAs) generally available? | SNDA arrangements are generally not prohibited by law. However, enforcement of such arrangements has not been adequately tested. As regards the attornment component of the SNDA agreement, a change in ownership of real property does not normally affect the lease agreement. As a result, the new owner can require the tenant to continue to perform its obligations vis-a-vis the new owner. |
| Can the lender affect changes in property management? | Yes, subject to contract. |
| Are leases terminated or terminable when the mortgage is enforced? Does the answer change if the lease predates the mortgage? | A change in ownership of real property (as in the case of a foreclosure of the lender on a mortgage in an event of default) does not normally affect a tenant's continued rights to possession under a lease, though this can be otherwise agreed. This rule also applies to a scenario where the lease predates the mortgage. |
| **L Servicing** | |
| Does the applicable legal system permit the effective splitting of the servicing of a loan from the ownership of the loan? | Kazakhstan law does not prohibit the loan owner from transferring its payment collection and other processing functions to the loan servicer. Such transfer, however, would not be a common practice for locally originated loans. |
| **III OWNERSHIP OF REAL PROPERTY** | |
| **A Types of Real Property Interests** | |
| Free Ownership. | Ownership interests in real estate are registered in the Unified State Register of Rights to Immovable Property and Transactions thereof.<br>State registration is the only proof of existence of a registered property right, and is confirmed by a stamp of the registration body on the relevant agreement. Lack of such stamp would mean that registration has not been performed and title has not arisen. |
| Leasehold Ownership. | Rights under a lease for one year or more are subject to mandatory state registration.<br>The Lessee has a preferential right to conclude a lease agreement for a new term, unless otherwise provided by the agreement or applicable law<br>Gratuitous temporary land use rights may be granted for up to 5 years unless otherwise specified by law.<br>Chargeable temporary land use rights may be provided for a short term (under 5 years) and a long term (from 5 to 49 years). |
| **B Foreign Ownership** | |
| Can foreign investors own property | Kazakhstan law generally permits foreign legal entities (including legal |

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| outright and/or through subsidiaries? | entities with foreign participation) to purchase both residential and non-residential buildings, apartments and certain interests in land (designated for industrial and residential purposes).<br><br>We also note that legal entities registered in Kazakhstan as a subsidiary of a foreign company are viewed as Kazakhstan entities. Accordingly, Kazakhstan subsidiaries of foreign companies may possess property in Kazakhstan under their own names. |
| What local restrictions apply to foreign ownership (direct or indirect)? | Land plots granted (or to be granted) for construction of industrial and non-industrial property, including housing, buildings/ structures, facilities and their compounds, as well as land plots intended for servicing buildings/ structures or facilities in accordance with their designation, may be in private ownership of foreign legal entities, except for land plots for commercial agricultural production and forestry.<br><br>Foreign entities may hold agricultural land plots or interests over rights to such plots only on the basis of lease.<br><br>Certain types of land may not be transferred under Kazakhstan law to private ownership, including *inter alia*: land used for national defence and security purposes; public areas (urban or rural settlements); main railways and public roads; specially-protected natural territories. |
| **C Title Due Diligence** | |
| What special factors might arise in title due diligence? | If title to assets was obtained before or during the first few years following the collapse of the Soviet Union (including *inter alia* thorough privatization) then there may be numerous specific factors that arise during due diligence of such title. In such cases, it is not always possible to assess with certainty whether the title was obtained in a due and proper manner.<br><br>In addition to the above, other special due diligence factors may be in place depending on the composition and complexity of the target assets. |
| Does title registration constitute reliable evidence of ownership? Can a registration be unwound? | State registration is the main evidence of registered property rights and encumbrances. Registration is confirmed by a stamp of the registration body on the relevant agreement.<br><br>Ownership title and other rights or encumbrances with respect to real estate are recorded in the Legal Cadastre.<br><br>The Legal Cadastre is presumed to be accurate. However, that even registered rights may be challenged in legal proceedings.<br><br>Under Kazakhstan law, the statute of limitation is three (3) years from 'the moment when a person has discovered or should have discovered a violation of his/her right.' |
| **D Other Issues; Restitution** | |
| Does the local law allow for restitution and on what grounds? | Kazakhstan does not have any laws or court practice providing for restitution of property to former owner (i.e., pre-communist) of property in Kazakhstan. The law provides for restitution generally only for invalid transactions, and these are subject to a relatively short statute of limitations. |
| **IV TAXES** | |
| Describe all national and local transactional and income taxes imposed on a transfer of real property. | Rules related to profit tax and VAT are complex and their application and interpretation depend on a given transaction and the parties involved. As such, below is a very general overview. |

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| Who typically pays (i.e., buyer, seller, negotiated?)? | There are no special transactional taxes on transfer of real property in Kazakhstan. However, transfer of ownership to real property triggers state registration of the ownership right to a new owner. Such registration is subject to a state fee normally be paid by the purchaser, the size of which depends on (i) the type of real property being transferred, and (ii) the current size of the monthly calculation index ('**MCI**'), which changes on an annual basis. In 2016 this state fee should generally not exceed US$ 147.<br><br>If the parties involve a Kazakhstan public notary to notarize a sale and purchase agreement (not mandatory), the public notary collects in addition to its own fee a state fee for notarization of that agreement, paid by the seller, the purchaser or both. The size of the state duty for notarization also depends on the type of real property being transferred and the current size of the MCI. In 2016 this state duty should generally not exceed US$ 58.<br><br>Proceeds from the sale of real property by a Kazakhstan legal entity or a foreign legal entity with a permanent establishment ('**PE**') in Kazakhstan are subject to a 20% corporate income tax ('**profit tax**'). While there is no special capital gains tax in Kazakhstan, in addition to profit tax, a foreign legal entity generating income from Kazakhstan sources through a PE must pay a 15% tax on its net income. This rate of tax on net income might be reduced under any relevant double taxation treaty.<br><br>A foreign legal entity with no PE in Kazakhstan or generating its income without involvement of its PE in Kazakhstan must pay withholding tax on capital gains from the sale of property located in Kazakhstan and subject to registration with Kazakhstan authorities at 15% without any deductions. However, residents of jurisdictions with preferential taxation, the list of which is determined by the Kazakhstan Government, are subject to a 20% tax on any type of revenue derived from a Kazakhstan source.<br><br>Sale of real property by a legal entity registered as a VAT taxpayer is subject to 12% VAT on the sales price (excluding land plots and residential property (except for residential property used for hotel services), which are VAT exempt). VAT on the sale of real property is charged by the seller to the purchaser on top of the sale price. The purchaser can generally fully recover (credit) this VAT (i.e., input VAT) if the real property is used for a VATable activity. By law, the credit can be obtained through an offset against VAT on the purchaser's own sales (i.e., output VAT), or a refund if there is no sufficient output VAT for the offset. |
| Describe all national and local taxes imposed on the financing of real property. Who typically pays? | Equity financing (contributions to charter capital) are ordinarily tax-free for both the contributor (shareholder/participant) and the recipient party (the company). Debt financing is ordinarily tax-free on the principal of the loan and subject to a 15% withholding tax on the interest derived from the lending. Where the lender is a foreign resident, the rate of this withholding tax may be reduced based on an applicable double tax treaty. For Kazakhstan, borrower interest is generally deductible within certain limits. These limits must be carefully checked in each transaction.<br><br>12% VAT may apply to debt financing depending on certain factors that must be analysed in each case separately.<br><br>Note that any secured debt financing of real property will trigger state registration of the mortgage. As described above, such registration and notarization are subject to state fees the sizes of which are now generally nominal. |

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| What proven methods exist to avoid or defer transfer taxes resulting from the sale or transfer of real property? | The above discussed taxes may be reduced or avoided by exploiting exemptions provided for by Kazakhstan law. In practice, the following are normally used:<br>• Exemptions existing under the Kazakhstan Tax Code. For example, capital gains from sale of shares in a company are not subject to profit tax if shares are listed and sold through the Kazakhstan Stock Exchange ('**KASE**') or a foreign stock exchange. Therefore, one may structure a transaction through sale of shares in a company owning the real property after its listing on KASE. In addition, capital gains of individuals from the sale of shares or participatory interest is also exempt from profit tax, if the following conditions are simultaneously satisfied: (i) on the date of sale of shares or participatory interests the taxpayer has been their owner for more than 3 years, (ii) the legal entity, shares or participatory interests being sold is not a subsoil user in Kazakhstan, and (iii) more than 50% of the value of the legal entity, shares or participatory interests being sold accounts for the property of a person(s) which is not a subsoil user(s).<br>• Sale of property at cost (i.e. without deriving a capital gain) will not lead to income subject to taxation in Kazakhstan.<br>• Deploying reduced rates available under double taxation treaties ratified by Kazakhstan.<br>Depending on the particularities of a given transaction, one may use other methods to shelter transfer taxes. |
| **V DE-LEVERAGING** | |
| Must the seller or the purchaser notify the debtor of the sale of the receivables in order for the sale to be effective against the debtor and/or creditors of the seller? | Either the seller or the purchaser must notify the debtor as to the sale of the receivables. The absence of such notice may not necessarily result in invalidation of the sale of receivables, but the purchaser shall accept all risks arising thereby. |
| More generally, what formalities are required for perfecting (i.e., making enforceable against other creditors of the seller) the sale of a mortgage loan? | In general, the seller and purchaser must execute a respective mortgage loan sale and purchase agreement and notify the debtor of such fact. |
| Must the seller or the purchaser obtain the debtor's consent to the sale of the receivables in order for the sale to be effective against the debtor? | In general and unless otherwise stipulated by an agreement, neither the seller nor the purchaser is required to obtain the debtor's consent to the sale of the receivables. |
| Are there any governmental regulatory consents or filings required in relation to such sales (e.g., exchange control rules and/or banking monopoly)? | There are no regulatory consents specifically related to the sale of receivables. However, and if applicable, the seller and the purchaser must follow general currency control rules and/or prudent norms for second-tier banks. |

# Azerbaijan

| I LENDING | |
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| **A Legal Ability to Originate Loans** | |
| What licenses will a foreign lender need to lead or grant one-off or occasional loans secured by real estate? What if the lender starts to make loans more frequently? | The Azerbaijani Law on Banks (2004) and the Law on Non-Banking Credit Organizations (2009) generally regulate professional lending activity in Azerbaijan. Under Article 32 of the Law on Banks (2004) and Article 10 of the Law on Non-Banking Credit Organizations (2009), ordinarily a relevant license from the Central Bank of Azerbaijan ('**CBA**') is required to make a loan. Whether collateral (such as real estate) is given to a lender is immaterial. However, under current interpretation and practice, a foreign lender does *not* need a license to make one-off or occasional loans into Azerbaijan. Though the rule is untested, if a lender were to start making loans more frequently, a license may be necessary (particularly if the lender were owned or controlled by Azerbaijani shareholders).<br><br>For the sake of completeness, we note that the licensing authority of the CBA is likely to be transferred to the Financial Markets Supervision Chamber, which was established very recently. |
| Do exchange control (or similar) issues arise? Do commissions and fees have to be paid in local currency? | Transactions between purely domestic entities must be carried out in the Azerbaijani national currency (the *Manat* or '**AZN**'). Cross-border transactions (including the granting of loans by a foreign lender, as well as the payment of commissions and fees to it) can be carried out with payment in foreign currency. |
| **B Loan Documentation** | |
| Does local law provide for a standard form of loan document, or is one used in practice (e.g., LMA)? | No. However, the law requires certain elements to be included in loan documentation. LMA documentation is not yet widely used. |
| What types of security may be obtained? Are there standard types of security taken in practice? | Ordinarily, lenders will prefer to take:<br><br>- a mortgage over the property being financed,<br><br>- a pledge over any movable property,<br><br>- a pledge of rights (receivables) and,<br><br>- where possible, a pledge of shares in the borrower and/or its holding company.<br><br>Security is usually structured on a case-by-case basis. No standard form documents exist – lenders ordinarily develop their own forms with outside counsel. |
| Can the laws of another jurisdiction or country govern the loan and/or security documents? Is this common? | The choice of foreign law by the parties is acceptable and common, provided the transaction is cross-border and there is some connection with such foreign law. If neither the parties nor the property has any connection at all with the selected foreign law, the choice of law clause could be voided by the local courts with respect to the issue of the required form of the agreement (e.g., in written form versus notarised, etc.). However, the parties may choose to use an unrelated foreign law clause with respect to the substantive obligations of the parties under the agreement. Azerbaijani civil law contains certain mandatory provisions (regardless of the governing law of the contract) which will apply to an Azerbaijani party (e.g., with respect to its legal capacity and authority to |

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| | enter into a transaction, etc.). However, security over assets in Azerbaijan (e.g., a mortgage over property in Azerbaijan) must be subject to Azerbaijani law. |
| Do special issues arise in syndication, such as limitations on the use of a security trustee and/or the need for a parallel-debt structure? Are these structures common, and do they work under local law? | Azerbaijani law does not yet specifically accommodate syndications. Accordingly, these are ordinarily structured as cross-border loans under standard syndication documentation. There is no specific limitation on the use of a security trustee, though it remains in question how the Azerbaijani legal system will recognize and support the rights of a trustee in an enforcement scenario.<br><br>A pledge or mortgage may currently be created solely in the name of the 'creditor' ('obligee'). Thus, for purely domestic-law loans with multiple lenders, a joint and several creditor structure or sub-participation structure must be used. For cross-border deals, it remains unclear to what extent a foreign-law trust instrument will be recognized in Azerbaijan in light of the limitation on the security being issued solely in favour of the 'creditor.' Theoretically, parallel debt could be used, with lending documents governed by the laws of jurisdictions recognizing the validity of abstract parallel debts (e.g., English or German law). However, it is not widely used in Azerbaijan and its enforceability remains untested in the Azerbaijani courts. |
| Are there local-law usury rules that may affect the terms of a commercial loan? | No. This is purely a contractual issue. We are not aware of any limitations on the interest rates that may be charged for a commercial loan. However, domestically-registered banks, organizations conducting banking operations, micro-credit organizations, and credit companies in Azerbaijan may be restricted in what they can charge. |
| What is the effect of a negative pledge covenant under local law and court practice, and what remedies are available if the covenant is breached? | A negative pledge covenant is treated as enforceable *inter partes*. The lender may sue for damages, for acceleration (where provided) or for restitution (where expressed under the relevant agreement as a material term). The negative pledge, however, will not invalidate the creation of *bona fide* security interests created in violation thereof (e.g., a subsequent pledge). |
| Do stamp duties or similar charges arise in respect of loan, security and/or other credit-support (e.g., guarantee) documentation? Are there customary and accepted ways for legally deferring, minimizing or eliminating them? | Fixed state and notarial duties and charges apply for the notarization of a mortgage and its registration, if the security is subject to registration with the relevant state authorities. A separate fee may be payable to banks for guarantees. The rates of state and notary duties are fixed by law and cannot be modified, though these are usually nominal. |
| Can property-specific needs be addressed by means of pledged cash reserves and escrows funded from the loan proceeds, and are these means common? | Borrowers may pledge cash reserves and use funds in escrow. Local law does not expressly address escrow mechanisms, and they remain untested in country. Although supported by freedom-of-contract principles, as a practical matter, escrow arrangements tend to be structured abroad. Where the borrower is an Azerbaijani legal entity and/or where accounts are to be opened in Azerbaijan, there may be challenges to creating such an account security. Azerbaijani law does not regulate in detail matters related to the pledge of cash reserves and escrows. From that perspective, creating a pledge over an account outside of Azerbaijan is preferable. Where an overseas account is to be opened, the local tax authorities must be notified, and an applicable account opening document must be issued. In addition, quarterly reporting will need to be carried by the Azerbaijani account holder. In the absence of further judicial or legislative clarity, the manner in which a pledge of an account / account rights / cash will be enforced will remain unpredictable. |

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| Is it common to structure property financings using offshore holding companies, and if so what forms of foreign-law security are commonly encountered? What benefits do such security structures provide? | Such structuring is still relatively uncommon in Azerbaijan. Except for the security documents related to real estate and other registrable properties, other security related arrangements can be regulated by foreign law, and this may help in cases where the local law does not provide sufficient comfort. |
| Is arbitration available? | Azerbaijan is a member of the 1958 New York Convention, and foreign arbitral awards are generally enforceable in Azerbaijan, subject to prevailing court practice.<br><br>Issues which are within the exclusive jurisdiction of the courts of Azerbaijan may not be subject to arbitration. Such issues include, *inter alia*, disputes regarding immovable property located on the territory of Azerbaijan.<br><br>Asymmetrical arbitration clauses (i.e., clauses where one party retains the right to choose either arbitration or litigation) are sometimes seen in Azerbaijan cross-border financings. Given the recent Russian *Sony Ericsson* case and Azerbaijan's common legal heritage with Russia, the legal community is watching Azerbaijan's courts' reactions and qualifying legal opinions. So far, Azerbaijan has no reported court precedents in which such clauses have been invalidated or undermined based solely on their asymmetry. However, parties are well-advised to use a symmetrical arbitration clause. |
| **C Limitations on Borrowing** | |
| What corporate approval requirements ordinarily arise for a company to borrow and/or provide security? | Depending on the organizational form of the legal entity (e.g., LLC, JSC, etc.) the approval of the general director or board of directors is ordinarily required. Under Article 99 of the Civil Code, any agreement for an amount over 25% of the value of the net assets of an *open* JSC is deemed to be a 'contract of special significance.' The general meeting must adopt and publicly announce a corresponding resolution''. Under Article 25.1.9 of the Law On Banks, the supervisory board of a bank must approve any transaction exceeding 50% of the bank's charter capital and consent to the conclusion of any other transaction if specifically required in the charter. If a related-party transaction (see below), special requirements will also apply. A borrower's or security provider's charter may also contain further approval requirements. Absent the requisite approvals, the transaction may be unwound as invalid. Additionally, it may become impossible to register such transaction with the relevant state authorities. |
| Are there financial limits relevant to a company (e.g., as to the amount it can borrow and/or as to the security for its borrowings or the borrowings of other companies)? | Generally, no financial limits apply to borrowers other than banks. There is a provision related to local limited liability companies, which requires that their charter capital be sufficient to satisfy the claims of their creditors. However, in practice this provision is rarely complied with and does not appear to allow for invalidation of a transaction concluded in violation thereof. Insolvency considerations (under Article 103.5 of the Civil Code) should also be checked.<br><br>Under the Azerbaijani equivalent of thin capitalization rules, the actual amount of interest paid in respect of loans from abroad, as well as those granted by a related party, may be deducted from income up to an average rate of interest not exceeding 125% in respect of credits issued at the interbank credit auction, for the time period to which this interest relates, in the same currency and for similar periods. In the event that there is no auction held, the interbank credit rate published by the CBA must be used as a reference. |

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| Are there legal restrictions on 'financial assistance' or 'upstream guarantees' that must be considered? | No formal restrictions as such exist in Azerbaijan.<br><br>However, the granting of any form of credit support for another party's obligations (whether a suretyship, guarantee, pledge or other security) risks challenge within the 90-day hardening period if the security giver enters insolvency proceedings. (There is also a separate one-year related-party transaction rule, which would apply, *inter alia*, to a person who owns or otherwise controls at least 25% of the shares of the debtor.) This is due to the lack of a carve-out in the Bankruptcy and Insolvency Law for such transactions. |
| Are there lawful and reliable means of overcoming any limitations (e.g., whitewash)? | Given the absence of statutory carve-out in the Bankruptcy and Insolvency Law there are no reliable means of whitewashing against this risk. |
| Can a company or individual give security for the obligations of a third party? Are there any limitations here? | Subject to applicable insolvency rules, yes, security may be given for third-party obligations. No special statutory restrictions apply other than limitations on certain types of corporate transactions (see above) and related transactions (see below). For individuals, certain limitations may also apply (e.g., under marital, guardianship and/or consumer protection laws). In respect of legal entities and entrepreneurs (subject to the Bankruptcy and Insolvency Law), there is a risk that the security may be found invalid in insolvency proceedings of the security giver within the 90-day (or one-year as the case may be) hardening period (see discussion above). |
| Can a company give security for financing being provided to a shareholder, a director or a related party? Must any special approval requirements be met? | Yes, subject to procuring the requisite corporate approvals and, in relation to a bank, complying with the relevant prudential norms. Following recent legal reforms, the definition of a related party has been significantly expanded. Additionally, where the value of a related party transaction is equal to or exceeds 5 percent of the relevant company's total assets, such transaction shall be entered into based on the opinion of an independent auditor and a resolution of the general meeting of its disinterested shareholders, adopted by simple majority. If the value of the related party transaction is less than 5 percent of the company's total assets, it must be approved by the general meeting of shareholders, the supervisory board or the management board of the company, in accordance with the company's charter. A transaction entered into in violation of these rules may be challenged by the company and/or its shareholders in court. There is also a risk of any security being deemed a suspect transaction, subject to the Bankruptcy and Insolvency Law (see above). Furthermore, related-party security will invariably involve a higher degree of risk. |
| What investigations should be made about the security-giver (whether an individual or a company)? | Appropriate legal due diligence should be made on capacity (due existence, authority, and absence of insolvency), including various of the above matters, as well as title and encumbrances over any collateral. Where the security is critical to the credit risk analysis, a formal legal opinion from local counsel on these matters should be sought. |
| **D Validity of Security** | |
| Are there any general prohibitions or limitations on taking security? | Generally, no. However, Azerbaijani law prohibits land ownership by foreigners (though the prohibition does not extend to Azerbaijani entities owned by foreigners). Where land passes to a foreign individual or legal entity as a result of a mortgage foreclosure, the foreigner must sell such land within one year. Otherwise local authorities will exercise eminent domain rights. Foreign lenders must consider this when assessing credit risks involving land collateral and address it appropriately. |

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| Is there ever a risk of claw-back and/or fraudulent transaction in the taking of security? | Yes. See, e.g., 'Bankruptcy / Insolvency,' below. Security may also be clawed back if taken fraudulently or otherwise in violation of law (see, e.g., 'Limitations on Borrowing,' above). |
| Does local law distinguish as between the 'creation' and the 'perfection' of security? | No. A security interest over immovable and movable property subject to registration becomes valid only after completion of the relevant registration. |
| Can security be taken over 'future' property (e.g., property not yet owned by the security-giver and/or not yet even in existence), and/or future earnings from existing or future property? | No, other than pledges of receivables and inventory. |
| Can security be given by individuals, and are there special limitations/requirements for such security (e.g., consumer-protection rules)? Do any special issues arise here? | Security may be given by individuals subject to capacity, consumer-protection and matrimonial rules. Note that under the Law on Mortgages of 2005 property in common ownership of individuals or several residents living (i.e., registered) in this property can be mortgaged only the notarized consent of all such owners and/or residents. However, the Azerbaijani Constitutional Court has recently ruled that the absence of consent of the underage family members of the security-provider and other people residing with him/her may not be the basis for the invalidation of a mortgage agreement. A different position was taken by the Court in relation to obtaining the consent of the spouse of a security-provider in relation to mortgaging marital immovable property – in that case the Court effectively instructed the lower court to invalidate the mortgage agreement in part related to the property jointly owned by the spouse of the security-provider, because her specific consent had not been obtained. |
| Are loans generally structured (or may they be structured) as 'recourse' loans whereby the security-giver always remains personally liable, or as 'non-recourse' whereby after default the lender may seize the collateral but its recovery is limited to the collateral? | Loans may be structured as full recourse, limited recourse or non-recourse. |
| What claims or other liens can prime an earlier security interest? | The courts, the Ministry of Taxes and the Chief State Road Police Department of the Republic of Azerbaijan (but in the latter case, only with respect to motor transport) may seize a debtor's property, which will prevent foreclosure of security thereover. A bankruptcy administrator may also by application to the court have security invalidated under fraudulent transfer rules. |
| What benefits does an earlier security interest enjoy over second-ranking security? | Claims under earlier-ranking security are satisfied from proceeds of sale of the collateral in priority over second-ranked security. |
| Are there any relevant time periods (e.g., as to the length of validity of security or as to the time in which the lending must take place)? | No. |
| What would a typical time period be for entering into and perfecting a straightforward secured transaction? | It is always difficult to accurately predict the timing of any given transaction, but the more information that is available upfront, the more accurate any prediction will be. A straightforward secured transaction may take several weeks; a more complex one a month or more. |

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| What obligations may be secured (e.g., specific debts, all present and future debts, guarantee obligations, interest, fees and expenses)? | Under the Civil Code of 1999 and the Law on Mortgages, any future or current obligations may be secured. |
| What fees (excluding legal fees) and taxes are payable (e.g., for searches, notaries and registration, as well as enforcement)? | A mortgage agreement must always be notarized. Furthermore, if a lender wants to enforce without applying to a court (by a notarial writ (extrajudicial enforcement)), the relevant pledge agreement must be notarized. Notary fees range from AZN 30 to AZN 135 (from ca. EUR 18 to EUR 78), depending on the physical location, type and value of the secured property. The fees for the registration of the property may vary depending upon the type of the property. For example, the fee for the registration of a mortgage over immovable property is AZN 60-80 (from ca. EUR 35 to EUR 46). The fee for the enforcement of the security upon default of the debtor depends upon the method of foreclosure (judicial, extra-judicial or via open market sale). In an extra-judicial proceeding the court bailiff will charge for its services depending upon the type and location of the security (usually in the amount of up to 7 percent of the value of the property). In a judicial proceeding the fee for the application to the court of first instance is from AZN 20 to AZN 30 (from ca. EUR 12 to EUR 18), depending on the amount of the claim.<br><br>No taxes arise for the notarization, registration or enforcement of security. |
| How do lenders perfect a security interest in cash reserves? | A pledge of cash is perfected by entering into a written pledge of cash, to which the account bank may also be a party. |
| Are there any limitations on a lender's ability to charge interest on portions of the loan advanced into escrow with the lender? | Azerbaijani law does not contain any provisions on escrow mechanisms, and they therefore remain largely untested. As a practical matter, escrow arrangements tend to be structured abroad. In our view, the charging of interest would not be prohibited. |
| Is a lender required to pay interest on reserves in escrow with that lender? Are taxes levied on the interest paid on such reserves, and if so who pay those taxes? | See above re escrows generally. In our view, no requirement exists to pay interest on reserves held in escrow. If any tax is payable, and the counterparty is an Azerbaijani resident, such tax should be paid by that person.<br><br>In case of a pledge of cash reserves, any interest that has accrued on such reserves belongs to the security-provider, unless otherwise agreed by the parties. |
| Address encumbrance of shares, movable property / fixtures, etc. Are there filing or registration requirements? | A pledge of non-registrable movable property is perfected by entering into a written security agreement signed by both parties.<br><br>A pledge of rights is perfected by entering into a pledge agreement and notifying the obligor under the pledged rights, if such obligor is a person other than the pledgor. In the event that the pledged rights are evidenced by a security, such security must, unless otherwise agreed, be delivered to the pledgee's possession or deposited with a bank or a notary public.<br><br>No notarization of the pledge of non-registrable assets is legally required. However, if the pledgee wishes to have an option of enforcing the pledge by a notarial writ instead of a court decision, the relevant pledge agreement must contain an extrajudicial enforcement clause and be notarized.<br><br>A pledge over shares (participatory interests) in the charter capital of Azerbaijani legal entities must be registered. Depending on whether or not a pledge agreement contained an extrajudicial enforcement clause and was notarized, the agreement on the pledge of shares can be enforced by a court decision or by a notarial writ. In both cases, the pledged shares |

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| | must be sold through a public auction.<br><br>The pledge of shares is subject to registration with the State Securities Committee. |
| **E Creation of Mortgage** | |
| How is a mortgage of real estate established? | A mortgage is created by entering into a notarized and publicly registered agreement or by issuing a mortgage certificate. A mortgage agreement over immovable property must be notarized with a public notary located in the same locale as the collateral. The notarized mortgage agreement must then be registered with the relevant office of the State Registry Service of Immovable Property under the State Committee on Property Issues (the '**Register**').<br><br>Some of the services provided by the Register are also performed by the State Agency for Public Service and Social Innovations under the President of the Republic of Azerbaijan ('ASAN'), which was established by Decree of the President of the Republic of Azerbaijan, No. 685, dated 13 July 2012. According to this decree the ASAN service centres established in Baku and in other cities will perform, *inter alia*, the following services:<br><br>Primary and re-stated registration of ownership of apartments and the issuance of statements and technical certificates;<br><br>State registration of the ownership of individual houses and the issuance of statements and technical certificates;<br><br>Reference notes on state registration in connection with restrictions (encumbrances) of rights over real estate. |
| Does the mortgage have to be in any special form?<br><br>What are rules on priority? | There is no specific form for a mortgage other than that it be in writing. However, the law requires that certain information be included into the mortgage agreement. At the time of enforcement priority is given to the lender who registered its mortgage first (Azerbaijan is a race-notice jurisdiction). |
| Are construction mortgages achievable over buildings and other structures to be built in the future on a land plot? Are there special statutory provisions on these and/or are special provisions required in the mortgage agreement? | It is possible to mortgage unfinished construction provided that the owner of the construction registers its rights thereto. This rule is not applicable to construction which has not been started. |
| Can mortgages be granted to more than one named lender? | Yes. |
| **F Foreclosure & Enforcement** | |
| Who may act in enforcement? (Are there restrictions on the type of parties that may exercise remedies?) | Subject to the provisions of the law and of the provisions on default, any creditor whose rights are breached may act in enforcement. There is no specific limitation on the use of a security trustee, though how the Azerbaijani legal system will recognize and support the rights of a trustee in an enforcement scenario remains to be seen. |
| Can the lender buy the mortgaged property or otherwise become its owner? | In general, yes. The mortgaged property can be sold in an open market sale. However, the mortgagee is allowed to participate in the sale and acquire the collateral if the initial sale is unsuccessful during the sale on the open market based on the initial sale price of the property announced for the sale. Such sale shall be conducted in compliance with the agreement between mortgagee and mortgagor which must be notarized |

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| | and registered with the Register (Article 45.2 of the Law on Mortgage). The mortgagee and the mortgagor also have the right to participate in the public auction sale of the mortgaged property on the same basis as any other party. If the mortgagee wins the auction the mortgagee is free from payment of the amount equal to the claim (the amount of the loan) (Articles 42.3 and 42.4 of the Law on Mortgages). The pledged security may be sold only via public auction, where the pledgee has the right to participate (Article 297 of the Civil Code). |
| What are the steps involved in judicial foreclosure? | Judicial foreclosure entails the following stages: (i) notice of default; (ii) registration of the notice of default; (iii) court judgment; (iv) appeal (if any); (v) execution of the court judgment; (vi) a public auction sale; (vii) eviction; (viii) distribution of proceeds; and (ix) release of a mortgage. Each of these stages has its own content, filing, and timing requirements.<br><br>*Notice of Default*: The mortgagee must serve a notice of default on the mortgagor, all known junior mortgagees and co-mortgagees by registered mail. The notice must be dated and signed by the mortgagee and must contain details on (i) the mortgaged property; (ii) the secured obligation; and (iii) the manner of enforcement. The mortgagor, a mortgagee other than the foreclosing mortgagee, and any other interested party may appeal the notice of default in the court within twenty-one (21) days from the date of service.<br><br>*Registration of the Notice of Default*: The mortgagee must register the notice of default with the State Register Service of Immovable Property within seven (7) days from its service upon the mortgagor.<br><br>*Court Judgment*: Once the notice of default is registered, the mortgagee may apply to a court for a judgment to foreclose upon the mortgaged property. The court is required to rule within a one-month period. If the mortgaged property is the only residence of the mortgagor, the court may also stay the execution of its judgment for up to a year.<br><br>*Appeal*: The mortgagor may appeal against the judgment of the court within a month. The appellate court is required to rule on the appeal within a month, and such ruling becomes effective immediately.<br><br>*Execution of the Court Judgment*: Within three (3) days of receipt of the effective court judgment, the court bailiff must send an order on foreclosure to a specialised auctioneer.<br><br>*Public Auction Sale*: A specialized auctioneer must publish two announcements – 30 days and 15 days before the proposed public auction sale. The first auction requires that the property be sold for at least 70% of the starting price. The second auction allows the sale of the foreclosed property at a price which covers the auction expenses and the secured obligations to the mortgagee and any senior mortgagee(s). The mortgagee may participate in a public auction sale from the first round, in which case no deposit is required.<br><br>*Eviction*: The residents of the foreclosed property are required to vacate the premises within a month after its sale through a public auction. If they refuse to vacate the premises an additional court order may be required. However, the law does not recognize foreclosure as a valid basis for eviction, unless all residents have agreed in a notarized document to vacate the premises in the event of foreclosure.<br><br>*Distribution of Profits*: The sales proceeds must be allocated within seven (7) days in the following order or priority: (i) any amounts due to the mortgagee, including any interest, default interest and penalties, any loss incurred as a result of the mortgagor's default; (ii) the cost of enforcement, including public auction fees and legal costs; and (iii) the cost of the maintenance of the mortgaged property. |

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| | *Release of a Mortgage*: The mortgagee must release the mortgage within five (5) days from the date on which the property was publicly sold. |
| Is non-judicial foreclosure (i.e., self-help) available? Are there special rules for ensuring that this right exists and on how it may be exercised? | Non-judicial foreclosure proceedings are possible only by way of a notarial writ, executed by the mortgagee and the mortgagor. In Azerbaijan, extrajudicial enforcement requires a sale by public auction and the statutory distribution of the proceeds, which entails the payment of expenses associated with the public auction, repayment of the loan and return of the remaining amount to the mortgagor. |
| Address the pros and cons of judicial vs. non-judicial foreclosure and self-help remedies. What are the types and main features? | Non-judicial foreclosure is usually preferred because it is shorter in time and is less expensive. The judicial procedure involves the use of the local court system, wherein the decisions are sporadic and cannot be predicted in advance. |
| What would a typical time period be to enforce a mortgage? | The time period may be from 2 weeks to several months. |
| What are the typical timeframes involved in foreclosure? | The time period may be from 2 weeks to several months. |
| What are the typical costs involved in foreclosure? | The costs of foreclosure will depend upon the length of the proceedings, the value of the claim and the subject matter of foreclosure. Given the general lack of bona fide commercial property bankruptcies in Azerbaijan there is little guidance to draw upon. If foreclosure is done via an extra-judicial proceeding the court bailiff will charge a fee depending upon the type and location of the security. In judicial proceedings the fee for the application to the court of first instance is from AZN 20 to AZN 30 from ca. EUR 12 to EUR 18) depending on the amount of claim plus expenses (for legal services and further bailiff services). |
| What are the requirements for exercising remedies? | A default by the debtor to repay the bank loan amount or interest on time, a substantial change in the financial situation of the debtor or at any time by giving at least one month notice (depending on the amount of the loan) to the debtor (Article 742.2 of the Civil Code). Please note that reasonable notice for other loans is 3 months and 1 month notice is provided for loans in the amount of up to AZN 110 (ca. EUR 65). Criminal liability also may apply to the head of an entity for deliberately avoiding repayment of creditors' debts or payment for securities (Article 196 of the Criminal Code). This liability may be imposed only by the relevant court decision and only if the damage caused is significant (i.e., more than from 1,000 to 7,000 AZN (from ca. EUR 575 to EUR 4,025)) or major (i.e., more than 7,000 AZN (ca. EUR 4,025)). |
| Is the right to exercise remedies restricted to monetary defaults only, or may a lender also call a default and foreclose for violations of covenants? | The lender has the right to exercise remedies with respect to monetary defaults. In addition, the lender may declare a default for the material breach of the contract. The Civil Code provides that the following cases cannot be considered as a basis for the termination of the contract: (i) if the violation of the obligation is minor; (ii) if the creditor is fully or primarily responsible for the violation of the obligation; or (iii) if the debtor has already brought a counterclaim or will bring a counterclaim immediately after refusal from the contract. The answer to this question also depends on the terms of the relevant financing documentation as well as the choice of applicable law. |
| Are there *de minimis* defences against foreclosure, and if so may these be | Any defences which could be raised by the owner of the security shall be resolved in the local courts, where the security holder may raise |

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| contractually overridden? | objections and counter-defences. The law provides that foreclosure is possible if the debtor has failed to pay interest timely twice in a row. If the security holder attempts to foreclose on security after the first failure of the debtor to pay interest on time, the security provider may use this fact as a *de minimis* defence. |
| Are any remedies exclusive of any other remedies? | No. |
| Do any governmental regulatory consents arise in the sale or other transfer of collateral on foreclosure (e.g., in certain jurisdictions there may be restrictions on foreign ownership of real property and/or strategically important assets; competition law restrictions; etc.)? | The sale or other transfer of collateral upon a foreclosure related to the sale of the shares of a bank, insurance company or mass media entities might entail the consent of the relevant regulatory state authorities. The consent of the State Antimonopoly Service under the Ministry of the Economy and Industry is triggered in the context of an acquisition if, inter alia:<br>• more than 20% of the voting shares in a company are purchased by another market subject, or<br>• there is an acquisition of fixed assets or intangible assets of one entity by another entity (its group), provided that the balance sheet value of the relevant assets exceeds 10% of the total value of all fixed assets and intangible assets of the disposing entity;<br>where:<br>• the aggregate balance sheet value of assets of the acquirer (its group) and the target exceeds 75,000 multiples of the monthly minimum wage in Azerbaijan (currently AZN 7,875,000 or approximately EUR 4,527,165);<br>• the share of the acquirer (its group) OR the target in any particular market in Azerbaijan exceeds 35%; or<br>• the acquirer (its group) controls the seller economic entity.<br>However, due to the prohibition against land ownership by foreigners, a mortgage agreement with a foreign individual or a foreign legal entity acting as a mortgagee of a land plot should include an undertaking on the obligatory sale of the land within one year of execution thereon as a result of a failure to fulfil an obligation secured by the mortgage. (see section D above). |
| Are judgments rendered in civil matters recoverable against an entity's real estate interests? Are judgments junior or senior to previously recorded claims? | Yes, judgments rendered in civil matters may be recoverable against an entity's real estate interests. Generally, foreclosure proceedings may only be carried out on the basis of a court ruling; however, under the extra-judicial procedure a writ which is duly certified by a notary, executed by the mortgagee and the mortgagor, may be used in substitution for a court ruling to commence foreclosure. Where there are several mortgages over the same property, the first mortgage duly registered and recorded in the Register will be senior to any subsequent mortgages and claims of unsecured creditors. |
| Can a lender choose which security to enforce first (e.g., can it go after a guarantor or share pledgor before enforcing a mortgage)? Will the choice or order of enforcement affect the lender's rights to enforce additional security later on? | Yes, the lender may choose the security for enforcement, and it does not affect its right to further enforcement of any additional security. |
| **G. Bankruptcy / Insolvency** | |

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| What risks does the lender or security recipient face if, at the time of the grant of security, the borrower or security-giver is insolvent/subject to insolvency proceedings or becomes insolvent/subject to insolvency proceedings after the security is taken? | The claims of secured creditors must be satisfied whether or not the insolvency proceedings have been instituted. However, the administrator who is appointed at the time of the insolvency proceeding of a company has the right to apply to a court and request a restriction over the transfer or encumbrance of the rights of the debtor over its property if such transfer or encumbrance had occurred (i) when the debtor was insolvent, (ii) ninety (90) days before the bankruptcy was initiated; or (iii) during the year proceeding the filing of the bankruptcy, if the creditor or a guarantor is a related party of the debtor. |
| Is it possible to verify whether at the time of the grant of security the borrower or security-giver is insolvent/subject to insolvency proceedings? | The information about an insolvency proceeding of any company is published in several newspapers in Azerbaijan. The practice is in compliance with the law. Usually such announcements are published in the newspaper 'Azerbaijan.' |
| What is the impact of insolvency or an insolvency proceeding on the foreclosure process? | Upon the declaration of bankruptcy, foreclosure proceedings are automatically suspended by operation of law. We note that the debtor cannot dispose of any part of its property for the purpose of carrying out economic activity or satisfying its obligations, or for any other purposes from the institution of insolvency proceedings. Such decisions may be made by the debtor only with the permission of the court, the administrator of the property or the temporary administrator of the property. The administrator who is appointed at the time of the insolvency proceeding of the company has the right to apply to a court and request a restriction over the transfer or encumbrance of the rights of the debtor over its property if such transfer or encumbrance had occurred (i) when the debtor was insolvent; (ii) ninety (90) days before the bankruptcy was initiated; or (iii) during the year proceeding the filing of the bankruptcy, if the creditor or a guarantor is a related party of the debtor. |
| What is the process? | Bankruptcy proceedings are judicial proceedings conducted by the court and supervised by the bankruptcy administrator (who is appointed by the court). They may be initiated by creditors or authorized state executive authorities, as well as by the debtor himself. The process of involuntary bankruptcy includes the following steps: 1) submission of a claim to the court; 2) publication of notification to the creditors; 3) appointment of the administrator of the property 4) meeting of the creditors; 5) registration of claims and the evaluation of the remaining assets of the company; 6) sale of assets via an open auction; 7) distribution of assets in accordance with the order of priority; 8) reporting to the court and creditors; and 9) final decision of the court on completion of bankruptcy proceeding. |
| Is an insolvency proceeding about liquidation or re-organization? | If the appointed administrator believes that the company could be saved, it goes through the process of sanation (which may include re-organization). If the process of sanation does not change the situation, the company must be liquidated. |
| How, if at all, can liens or security (and/or earlier foreclosures) be voided or extinguished during insolvency proceedings (e.g., as creditor preferences or as suspect transactions)? | The claims of secured creditors must be satisfied whether or not insolvency proceedings have been instituted. However, the administrator who is appointed at the time of the insolvency proceeding of the company has the right to apply to a court and request a restriction over the transfer or encumbrance of the rights of the debtor over its property if such transfer or encumbrance had occurred (i) when the debtor was insolvent; (ii) ninety (90) days before the bankruptcy was initiated; or (iii) during the year proceeding the filing of the bankruptcy, if the creditor or a guarantor is a related party of the debtor. |
| Who controls real-property-generated cash-flow during an insolvency | The assembly of creditors and the bankruptcy administrator. |

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| proceeding? | |
| Are there statutes or regulations governing the conduct of receivers, security trustees or other security agents while in possession of real property? | The Civil Code of 1999 and the Law on Bankruptcy and Insolvency of 1997. |
| Is mortgage enforcement for the lender better (e.g., faster, better advertised, better process, less chance of delays) in insolvency or in 'normal' foreclosure? | Although secured creditors are excluded from the general list of claims which to be satisfied in the relevant order of priority and their foreclosure is directed to the specifically secured property, there is a risk that the administrator of the insolvent entity may claim certain defences described above. Therefore, it is safer and faster to enforce a mortgage in non-insolvency foreclosure by sale via the open market or a public auction, without the involvement of the court or possible interference of the administrator. |
| **H Enforceability Opinions** | |
| Are enforceability opinions available and customary from counsel and relied upon by international lenders? | Yes. |
| Who normally gives the opinion? | Theoretically-speaking, such opinion may be issued by any person, since the law does not regulate this issue. However usually it is provided by the lawyer or law firm representing the international lender. |
| **II MORTGAGE LOAN TERMS** | |
| **A Prepayment Issues** | |
| Can the rate of prepayment be controlled through contractual restrictions in loan documents? | Yes, such restrictions may be imposed on the borrower in the loan documents. |
| **B Cash Management** | |
| How can the lender assure itself that the cash-flow from a given property is duly applied (i.e., lock box)? | A lock box account clause may be used in loan documents. Lock box clauses in Azerbaijani law governed agreements (or in relation to Azerbaijani bank accounts) may, however, be subject to enforceability problems.<br><br>Where the borrower is an Azerbaijani legal entity and/or accounts are to be opened in Azerbaijan, there will be challenges creating such account security. Azerbaijani law does not regulate matters related to escrows. Thus, if a truly pledged account is to be created, it will need to be created over a foreign account. Where an overseas account is to be opened, local tax authorities will have to be notified and issue an applicable account opening document. Thereafter, quarterly reporting will need to be done by the Azerbaijani account holder.<br><br>It is difficult to say at this stage how a pledge of account / account rights / cash will be enforced if a security is with a local bank.<br><br>However, under Article 17.14 of the Law on Notaries (1999) notaries have a right to keep the subject of an obligation, money, securities and wills as a deposit. |
| Can a local borrower open accounts in foreign banks and subject those accounts to corresponding foreign | Yes, both are possible. |

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| security? | |
| **C Are Restrictions on Additional Indebtedness Enforceable?** | |
| Are there any limitations on the enforcement of restrictions in loan documents against the borrower's incurring additional indebtedness? | These clauses can generally be included in loan documents, and damages may accrue for breach of contract. |
| **D Insurance** | |
| Can lenders obtain a lien on insurance proceeds or otherwise obtain the benefit of casualty, liability and/or other insurance maintained by the security-giver with respect to the property? Is there a difference between being listed as a payee under, and/or taking security over, the policy? | Generally yes. The difference between being the payee or the security holder is that the payee obtains proceeds of the policy from the insurance company, but in relation to an insurance contract for the mortgaged (pledged) property, the mortgagee may be recognized as a beneficiary having the right to receive compensation only for the amount equal to the debt of the borrower (mortgagor) at the time of the payment of the insurance compensation. |
| Is political risk insurance available? | No. |
| Is insurance coverage available for natural disasters? | Yes. |
| Is business interruption insurance available? | Yes. |
| Do lenders have the ability to evaluate the insurer and its claims record? | Yes. |
| **E Casualty/Condemnation** | |
| Does applicable law mandate the application of insurance proceeds or condemnation awards in any particular manner? | The Law on Mortgages does not oblige the parties to insure mortgaged property unless it is clearly provided under the mortgage agreement. If mortgaged real property is insured, the insurer may pay compensation for the restoration of destroyed property and related damages without the mortgagee's consent. There are no provisions providing for how condemnation awards are used. |
| **F Late Charges/Default Interest** | |
| Does applicable law permit the imposition of default interest or late charges? | Penalty interest may be charged in the case of a default in the repayment of a loan or any portion thereof and, in the case of any other default pertaining to the non-fulfilment of a non-monetary obligation, a contractual penalty may be imposed. Azerbaijani law provides that a court may decrease the default and/or penalty interest if the latter is disproportionate to the consequences of default. |
| Can 'interest on interest' be charged? | Under the Civil Code (Art. 445.7), the charging of 'interest on interest' is technically prohibited in Azerbaijan, though this practice is widespread under international loan agreements governed by a foreign law. |
| **G Alterations** | |
| Are restrictions on the borrower's ability to alter mortgaged property enforceable? | Such restrictions are enforceable if the alterations raise the risk of destruction or damage to the mortgaged property. |

| H Defaults | |
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| Does the law provide any statutory mandatory notice or cure rights? | A notice on enforcement of the mortgage must be sent to the debtor and mortgagor in the following cases: 1) if the main obligation or part thereof has not been fulfilled on time; or 2) if the interest on the main obligation has not been paid on time twice in succession; or 3) in case of the non-fulfilment of an obligation provided under the mortgage agreement which triggers the right of the mortgagee to enforce the security. The mortgagor has a right to appeal to the court within 21 days after receipt of the notice. Under Azerbaijani law a borrower or a third-party mortgagor (pledgor) may stop the foreclosure of the collateral at any time if it performs the obligation that is secured by such collateral, or the delayed part thereof, subject to compensating the mortgagee for the costs it has incurred in initiating the foreclosure. Any agreement limiting this right is null and void. |
| Are there any other restrictions on the ability of a lender to call a default? | With respect to leasing, under the Civil Code the lessor has a right to declare a default if the lessee fails to make lease payments twice in succession and breaches the payment terms specified under the leasing agreement.<br><br>With respect to secured bonds, the lender may send a written notice of default to the administrator of the security. If the administrator of security confirms the fact of default based on the written notice, the lender will be allowed to enforce the security (Article 1076-3.7 of the Civil Code). |
| Are there issues regarding the enforceability of transfer restrictions, both of asset and ownership interests? | Under the Law on Mortgages, unless it is otherwise provided under the mortgage agreement, any sale, encumbrance, use or lease of mortgaged property is possible only with the consent of the mortgagee. |
| Are transfer taxes payable upon foreclosure, the sale of the property or upon the sale of the loan? | There are no specific transfer taxes. However, any income earned from the sale of property will be subject to income/profits tax in accordance with general procedures. |
| **I Title Insurance** | |
| Is title insurance available? If available, is it commonly used? | In practice, title insurance is not yet well developed or readily available on the market in Azerbaijan. |
| Is lender's coverage available? If available, is it commonly used? | Only in case of the death of a physical person borrower from a bank. |
| **J Environmental** | |
| Do lenders commonly conduct environmental due diligence? | No. |
| Are there lender liability issues to be considered? | No. However, where a lender becomes the owner of the mortgaged real property as a result of foreclosure, the lender will become liable for the proper environmental condition of the property. |
| **K. Leasing Issues** | |
| Are there laws or regulations governing lease terms and rental rates? (Note, this question applies solely to tenant leases of premises in commercial development, and not land leases.) | Tenant leases, including terms and rates, are subject to contract and must be in compliance with the Civil Code, the Law on Leasing of 1992 and the Resolution of the Cabinet of Ministers On the minimum amount of rent for the lease of state property (except for forest resources) No. 191, of 29 November 2007. |

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| Are tenant estoppels (e.g., certificates signed by tenants confirming certain acts) available and what is their legal relevance and are they enforceable? | Azerbaijani law does not have the concept of estoppel. Therefore, possible enforceability of such estoppel provisions is untested in Azerbaijan. |
| Is a lock-box arrangement available? | A lock box account clause may be used in loan documents, subject to reaching agreement with the relevant account bank. Lock box clauses in Azerbaijani law governed agreements (or in relation to Azerbaijani bank accounts) may, however, be subject to enforceability problems.<br><br>Azerbaijani law does not regulate matters related to escrows. Where an overseas account is to be opened, local tax authorities will have to be notified and issue an applicable account opening document. Thereafter, quarterly reporting will need to be carried out by the Azerbaijani account holder.<br><br>It is difficult to say at this stage how a pledge of account / account rights / cash will be enforced if the security is with the local bank. |
| Are there laws governing the transfer and/or the application of security deposits? | Articles 491 and 492 of the Civil Code provide the general rules applicable to a security deposit agreement, but there are no special rules on a security deposit applicable to lease relations. |
| Are subordination, non-disturbance and attornment agreements (SNDAs) generally available? | Azerbaijani law does not specify these concepts. The freedom of contract principle is broadly respected as a civil law concept in Azerbaijani law, though the enforceability of contractual subordination, non-disturbance and attornment agreements (SNDAs) in Azerbaijan is untested.<br><br>Under Azerbaijani law, a change in the ownership of real property (as in the case of a foreclosure of the lender on a mortgage in an event of default) does not normally affect the tenant's continued rights to possession under the lease, though this can be agreed otherwise in a tenant lease. |
| Can the lender affect changes in property management? | Yes, subject to contract, but the enforceability of such provision remains untested. |
| Are leases terminated or terminable when the mortgage is enforced? Does the answer change if the lease predates the mortgage? | Under Article 13 of the Law on Leasing, a lease agreement cannot be terminated due to a change of ownership over leased property. Where leased property is subject to nationalization or privatization, the lease should terminate with compensation of expenses and damages to the lessee. |
| **L Servicing** | |
| Does the applicable legal system permit the effective splitting of the servicing of a loan from the ownership of the loan? | The law does not specifically regulate this issue. There may be certain issues associated with bank secrecy and confidentiality requirements, because under the Law on Banks a bank must secure confidentiality of bank accounts, operations and balances, as well as client information, addresses and management. A bank must maintain the confidentiality of information on the existence of client property in the bank's depositories, information on owners of such property and the type and value of such property. Such confidential information may be disclosed only to clients or their representatives, as well as to inspectors of the CBA, external auditors, certain state authorities or the court. |
| **III OWNERSHIP OF REAL PROPERTY** | |
| **A Types of Real Property Interests** | |

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| Free Ownership.<br><br>Leasehold Ownership. | Ownership interests in real estate are registered in the Register.<br><br>Depending on the term, a lease can be long-term (more than 11 months) or short-term. Long-term lease agreements are subject to mandatory state registration with the Register. The members of the family of the lessee and persons living with the lessee have a preferential right to conclude a lease agreement for a new term if the lessee terminates the lease agreement (Article 13.6 of the Law on Leasing). |
| **B Foreign Ownership** | |
| Can foreign investors own property outright and/or through subsidiaries? | Foreign entities may freely acquire title to real property (e.g., buildings, premises and structures firmly connected to land) on the same basis as Azerbaijani entities, though foreign entities and individuals may not own land plots. Azerbaijani subsidiaries of foreign entities may generally acquire either real property or land without limitation. |
| What local restrictions apply to foreign ownership (direct or indirect)? | See above. |
| **C Title Due Diligence** | |
| What special factors might arise in title due diligence? | Special factors may arise in title due diligence, such as: (i) the registration of ownership rights may be improperly done or completely absent; (ii) the privatization of the property might not be in compliance with the law of Azerbaijan; and (iii) the lease rights of lessees may not be properly registered with the Register and thus may be unknown to third parties. Ownership title and other rights or encumbrances with respect to real estate must be recorded in the Register. The title can be verified by requesting an extract from the Register. Such extract could be obtained by the owner or user of the property or its legal representative or by any state authority or court. There is a legal presumption of accuracy in the ownership title records in the Register, though this does not guarantee title. For example, there are numerous bases in civil law for invalidating purchases and sales. Moreover, under Article 4 of the Law on the Protection of Historic and Cultural Monuments of 1998 the state has a preferential right of purchase in the event of the sale of registered monuments. |
| Does title registration constitute reliable evidence of ownership? Can a registration be unwound? | Yes, it is reliable evidence because there is a legal presumption of accuracy in the ownership title records in the Register, though this does not guarantee title. The registration can be unwound through a court procedure. |
| **D Other Issues; Restitution** | |
| Does the local law allow for restitution and on what grounds? | Article 49.3 of the Land Code of the Azerbaijan Republic (1999) provides that restitution is not allowed for former owners of land plots (or their successors). Under Article 178.6 of the Civil Code, if for thirty (30) years a person has exercised without any interruption and objection ownership over any immovable property not registered in the state registry of immovable property, such person shall be entitled to claim registration as its owner. Therefore, Azerbaijani legislation, as a rule, does not allow restitution of property. |
| **IV TAXES** | |
| Describe all national and local transactional and income taxes imposed on a transfer of real property. | There is a newly introduced simplified tax on persons involved in construction activity in the amount of AZN 45 (ca. EUR 26) per square meter of the property, multiplied, depending on the location of the building, |

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| Who typically pays (i.e., buyer, seller, negotiated?)? | by a coefficient from 0.5 to 4.0 for residential areas and coefficient of 1.5 for non-residential areas.<br><br>The transfer of ownership to real property triggers a requirement for the state registration of the ownership right of the new owner. Such registration is subject to a state duty which amounts to approximately AZN 60-80 (from ca. EUR 35 to EUR 46).<br><br>The sale of real property by legal entities is subject to 18% VAT on the sales price (if legal entity is subject to the payment of VAT). Foreign companies selling real property located in Azerbaijan are subject to withholding tax at 10% or, upon submission of return by the seller, a 20% profits tax on the profits (difference between sale proceeds and relevant expense). |
| Describe all national and local taxes imposed on the financing of real property. Who typically pays? | There are usually no special taxes on the equity of unsecured financing of real property. Equity financing (contributions to charter capital) are ordinarily tax-free for both the contributor (shareholder/participant) and the recipient party (the company). Debt financing is ordinarily tax-free on the principal of the loan and subject to a 10% withholding tax on interest (subject to any double tax treaties between Azerbaijan and the country where a lender is tax resident). VAT does not apply to debt financings. For an Azerbaijani borrower, interest is generally tax-deductible in an amount not exceeding 125% of the interest rate in respect of credits issued at the Interbank credit auction at the time to which this interest relates (in the same currency and for a similar term), or, where no auction is held, at the refinancing rate published by the CBA.<br><br>Note, any secured debt financing of real property will trigger filing fees for the mortgage, which are now generally nominal. |
| What proven methods exist to avoid or defer transfer taxes resulting from the sale or transfer of real property? | To avoid imposition of VAT on a sale of real property, the sale may be structured through a sale of shares in a project company owning such property (a 'real property holding company'). This arrangement also allows the avoidance of a step-up in the book value of the real property, which is the basis of a 1% annual property tax, resulting in potential savings on this tax. At the same time, this mechanism, by excluding the step-up, disallows the increase of the basis for tax-deductible depreciation expenses. These latter two issues (property tax and depreciation deduction) are not relevant for land and natural resources, which are not subject to property tax and are not depreciable. Land is subject to a land tax.<br><br>The profit tax on a sale of real estate also can be reduced by structuring the sale via the sale of shares in a real property holding company. With regard to the sale by the foreign parent company of shares in an Azerbaijani subsidiary more than 50% of the assets of which consist of real property located in Azerbaijan, Azerbaijani domestic law provides for taxation of such sales at a rate of 10%. |
| **V DE-LEVERAGING** | |
| Must the seller or the purchaser notify the debtor of the sale of the receivables in order for the sale to be effective against the debtor and/or creditors of the seller? | Under the Civil Code the debtor should be notified about the sale of receivables. |
| More generally, what formalities are required for perfecting (i.e., making enforceable against other creditors of | The agreement should be signed between the seller (i.e., lender) and the purchaser. If the receivable relates to immovable property or registrable movable property this agreement shall also be notarized. |

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| the seller) the sale of a mortgage loan? | |
| Must the seller or the purchaser obtain the debtor's consent to the sale of the receivables in order for the sale to be effective against the debtor? | No |
| Are there any governmental regulatory consents or filings required in relation to such sales (e.g., exchange control rules and/or banking monopoly)? | No. |

# Contact Details


**Timothy Stubbs**

Partner, Head of Russian Banking and Finance
T: +7 495 644 05 00
E: timothy.stubbs@dentons.com



**Andrei Strijak**

Partner, Moscow
T: +7 495 644 05 00
E: andrei.strijak@dentons.com



**Evgenia Laurson**

Partner, Moscow
T: +44 20 7320 6517
E: Evgenia.Laurson@dentons.com



**Natalia Selyakova**

Partner, Head of Ukrainian Banking and Finance
T: +380 44 494 47 74
E: natalia.selyakova@dentons.com



**Abai Shaikenov**

Partner,  Almaty
T: +7 727 258 2380
E: abai.shaikenov@dentons.com



**Kamal Mammadzada**

Partner, Baku
T: +994 12 490 7565
E: kamal.mammadzada@dentons.com



**James Hogan**

Azerbaijan Managing Partner
T: +33 1 42 68 48 65
E:  james.hogan@dentons.com