

# Loans & Secured Financing

*Contributing editor*  
**George E Zobitz**



**2017**

GETTING THE  
DEAL THROUGH 

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*Contributing editor*

**George E Zobitz**

**Cravath, Swaine & Moore LLP**

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# Uzbekistan

Nail Hassanov and Maxim Dogonkin

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## Loans and secured financings

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

The popularity of bank loans compared with debt securities lies in the underdevelopment of the Uzbek securities market. There are statutory limitations for companies to issue debt securities (eg, private limited liability companies are not allowed to issue them at all); their circulation is heavily regulated by the Centre for Control and Development of the Securities Market; while the instrument is generally viewed by the companies as unprofitable and somewhat unexplored in practice. One of the few issuers of debt securities within the market are commercial banks that use them for inter-bank lending or for attracting funds from state-owned investors.

It is likely that the liberalisation of legislation governing debt securities would significantly contribute to their popularity, since bank loans provided by local banks have their own shortcomings which, inter alia, include: lengthy procedures for loan approval; bank unwillingness to extend loans without a security covering about 125 per cent of the borrowed amount; and multiplicity of covenants requested from the borrower.

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

Bank loans vary in form, but are generally term or revolving-loan facilities secured by a borrower's property or a guaranty of third parties. Owing to the widespread problem of currency conversion in Uzbekistan, banks are reluctant to provide loans in foreign currency.

The majority of Uzbek banks provide funds for the following purposes: investment in equipment; working capital financing; wage payment; and participation in investment projects such as construction and production-facility creation. Loans for investment in fixed assets or for participation in investment projects are usually long term; up to 10 years, whereas replenishment loans are not, as a rule, extended for more than one year.

Another popular type of facility is a letter of credit, which is widely used during import and export operations. It should be noted that opening a letter of credit also requires the provision of a security. Swingline facilities and competitive bid revolving credit facilities are rare.

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

Traditional banks are the major players in bank loan financing, with financial lease companies also playing an active role; however, their share in the market is relatively small. Usually, bilateral loans are provided, while syndicated loans are mainly extended when large state-initiated investment projects are being implemented.

Owing to the strict financial regulatory regime, traditional banks continue to dominate the debt securities financings market. Although Uzbek law provides for the possibility to create investment funds, their operation is overregulated with investors being unwilling to operate through this structure.

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

Since traditional banks are the main providers of bank loan facilities in Uzbekistan, terms of extension do not vary much. Note also that state-owned banks generally have more funds than private banks because of their continuous state support, so are more generous and flexible in providing funds.

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

Using loans as bridges is almost inapplicable in Uzbekistan, since debt security financing remains uncommon.

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

It should be noted that loan facilities with multiple investors lack regulatory guidance. The main legislative act that regulates loan facilities with multiple banks is the one that relates to syndicated loans for financing large investment projects over 25 per cent of the amount of the banks' regulatory capital. In this type of financing, a leading bank is assigned by the participating banks and is responsible for administering the loan facility and monitoring the project in the name of the other participating banks. A bank is considered to be a leading bank when it maintains the primary depository bank account of the debtor and initiates the syndicated loan.

With respect to other multi-investor loans, one of the investors is appointed as a leading bank. Uzbek law does not impose any particular requirements as to rights, obligations and functions of the leading bank and common rules governing agency agreements apply.

The leading bank, being an agent of the investors, acts as an intermediary and a representative of investors and is mostly unable to perform any legally significant actions in its own name, for example, to dispose any entrusted property. Responsibilities of the agent are not fiduciary in nature, but consist of due performance of its functions under the contract. The agent is remunerated with agent fees set in the relevant agreement concluded between the investors and is to be reimbursed against all losses incurred in the course of performing its functions.

Note that the concept of trust is alien to Uzbek law.

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

The leading bank, or several banks, making large contributions in syndicate bank loan facilities negotiate the key terms of the transaction; collect, check and keep all related documents; monitor repayments and risk associated with the lending. In some cases, the leading bank receives and channels repayment proceeds. The fee of the arranger may vary depending on its actual functions and the role in setting up the transaction. It is usually set in the agreement between the investors.

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

In most cases of cross-border financing, the parties choose English law as the governing law of the bank loan documentation; sometimes, however,

a foreign investor will prefer to use their own nation's law, for example, Russian or Chinese law.

The security documents that provide for enforcement of relevant collateral in Uzbekistan are governed by Uzbek law. This is done for convenience of enforcement of the security in Uzbekistan.

### Regulation

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

The Uzbek banking system lacks some transparency which makes estimating the impact of the requirements difficult. However, although the Basel III standards have not been introduced yet and are going to be phased in between 2015 and 2019, current liquidity requirements are high enough and collateral is demanded in almost all cases.

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

Public companies are obliged to disclose their financial statements every quarter (on their websites, the Uzbek stock exchange website and the regulator), containing general information about their debts. Specific information about a particular bank loan must only be published if its amount exceeds 15 per cent of the company's net assets or 50 per cent of the public company's charter capital, whichever is less. The disclosure may also be necessary if the lending transaction has any specific features, for example, the loan is taken from an affiliated bank or where the cost of provided collateral exceeds the 15 per cent threshold.

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

There are no specific regulatory requirements for the use of bank loan proceeds and control over them. Applicable anti-money laundering and anti-terrorism regulations require banks to conduct overall monitoring over their clients' operations and inform the Central Bank of Uzbekistan and designated departments of the Public Prosecutor's Office about suspicious transactions. In exceptional cases, the banks may suspend their client's operations. Bank employees may also be held administratively or criminally liable if notification procedures are not properly complied with.

The investor may not be held liable for the debtor's use of the proceeds contrary to the regulations, unless it is proven that such use was done with the consent of the investor. There is a risk, however, that the loan proceeds used for criminal purposes by the debtor can be forfeited and retained by the state.

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

There are no limitations for lending to companies operating in particular jurisdictions. Nevertheless, local investors are obliged to exercise stricter control over companies operating in offshore jurisdictions and jurisdictions that do not ensure proper control over terrorism financing. Special reports on the operations of such companies are to be submitted to tax and law-enforcement authorities.

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

Uzbek law does not set any limitations of this kind. Banks and other investors are free to provide credit at their sole discretion. The only requirement here is to increase the amount of reserves that are made on the extension.

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

Generally, banks are free to set their interest rates independently. In some cases, for example, provision of mortgage or education loans to an individual, a fixed interest rate is set by the Central Bank.

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

No formal limitations are set. Government policy favours foreign currency fund inflow to the country, especially if the repayment is agreed to be made in the national currency, the Uzbek som.

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

The key regulatory requirements and their impact are provided above.

### Security interests and guarantees

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

There is no common practice in this regard. Collateral or guarantee support may be provided by parent, holding or affiliated companies. Uzbek law does not set limits on providing collateral by entities connected with the borrower.

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

Security typically covers obligations, which directly relate to the loan facility. Additional coverage appears only when the most sophisticated structures are used or when a foreign investor is involved. In such cases, hedging or other ancillary obligations may also be included.

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

Many types of assets are pledged, including:

- moveable property (mainly equipment);
- immovable property;
- shares;
- goods in circulation; and
- property rights.

Although, a practice has emerged to pledge intellectual property right and bank accounts, it is not well established and more detailed regulation is required.

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

A security interest is usually attached through conclusion of pledge or charge agreements (under which no transfer of title is intended). In certain cases, a security interest may also be attached by law (eg, the sale of goods in instalments). Notary certification or state registration may be required for some types of security agreements (eg, related to immovable property and automobiles) to enter into legal force.

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

Under Uzbek law, perfection of a security interest is not separated from its creation. Once the security interest is duly created, the investor perfects its rights over the collateral and, hence, receives a priority right to foreclose on pledged or charged assets. To mitigate the risk of having a dispute on priority rights over the collateral, a ban on subsequent pledge or charges is often incorporated into the security agreement. To further mitigate this risk, information on the encumbrance may also be recorded in the pledge register maintained by the special department of the Central Bank of Uzbekistan. Note that recording of security rights in the pledge register is not mandatory and does not affect the priority rights of the secured investor. However, it may be used as an argument in a dispute of such nature.

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

Yes, security interests can both extend to future-acquired assets and secure future-incurred obligations. It should only be noted that the security agreement shall specify the nature, the amount and the term of performance of the future-incurred obligation. If this cannot be defined at the time of creating the security, then such security cannot be established.

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

Under Uzbek law, a security interest is terminated automatically on termination of an underlying obligation. There are no particular maintenance requirements.

However, if the security is provided by a third party and the security agreement does not provide for the term of the security interest then, as a rule of law, the security interest is terminated if the secured investor does not bring a claim against the third-party pledger within one year from the obligation's maturity.

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

Unless otherwise provided in the security agreement, or the nature of the security interest suggests otherwise, the pledger is not entitled to dispose of the collateral without the consent of the pledgee.

In the case of pledge of goods in circulation (floating charge), the sale is permitted up until crystallisation.

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

Generally, the guarantor may rely on defences available to the party whose obligations are guaranteed. Further, the guarantor may refuse to perform its obligations if secured obligations have substantially changed and responsibilities of the guarantor have changed accordingly without their consent.

It is unlikely that guarantors may waive their rights to these defences.

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

Since the concept of trust is not recognised by Uzbek law, the parallel debt structure is sometimes utilised within inter-jurisdictional financial transactions. A joint and several creditors' structure may also be applied as an alternative to the parallel debt structure.

Despite both structures being used in cross-border lending, how they are enforced in Uzbek courts remains unclear because the legalisation governing securities remains in its infancy.

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

As soon as parties cannot agree on foreclosure, court proceedings are usually initiated and pledged property is sold at public auction. If the property is not sold, owing to the lack of demand, the creditor may accept the property in satisfaction of their claims.

Out-of-court enforcement is possible, if this is provided for in the security agreement, or if the pledgee and the pledger enter into a notary certified agreement on out-of-court enforcement after a default. Out-of-court enforcement may not be used when: (i) consent of a third party or a body was required for the creation of security; (ii) an object of security is a property having historical, art or other cultural value for the society; or (iii) the pledger is absent or its location cannot be identified.

Note that an Uzbek court may refuse to enforce a pledge if the non-performance is 'extremely insignificant' and the pledgee's claim is 'manifestly disproportionate' to the value of the pledged property.

Uzbek laws do not permit direct purchase of secured objects in the course of foreclosure. Sale of pledged property, except for pledged rights, which are transferred to the pledgee in the case of enforcement, shall be done through public sales. No direct sale is permitted under Uzbek laws. Uzbek courts are entitled, at the request of the pledger, to defer public sale of the pledged property up to one year. During this period, the borrower

shall not be relieved of his or her obligation to repay the debt or any penalties therewith.

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

These doctrines are unknown to Uzbek law. However, there is a general concept of premeditated bankruptcy. If the bankruptcy of the company was artificially caused by its management or the shareholders, then they may be held liable under administrative or criminal laws. Moreover, a corporate veil may be lifted and the parent company that managed the withdrawal of assets may be called upon to account to creditors.

**Intercreditor matters**

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

Contractual subordination arrangements are uncommon in Uzbek legal practice because their validity remains questionable. There remains some risk that even concluded agreements will not be enforceable during bankruptcy proceedings, and the limitation of some creditors' rights will not be recognised.

In practice, creditors prohibit borrowers from taking loans from other creditors without their consent. If the consent is obtained and the borrower takes out a loan from another bank, this subsequent bank structures the deal and security arrangements in such a manner so that no conflict exists between the creditors. Such an arrangement will financially affect the debtor because it requires them to find additional security to be offered to each subsequent creditor.

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

As stated above, intercreditor arrangements are uncommon in finance deals governed by Uzbek law. In rare instances where an intercreditor agreement is in place, all creditors fall under the same group and are treated equally.

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

Under Uzbek governed financings and intercreditor agreements' law, the division of creditors into senior and junior parties is not practised.

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

It is unlikely that junior creditors' rights may be seriously limited. They have a right to independently vote at the meeting of creditors, demanding acceleration of payments, restructuring of the debt and so forth. With that, the priority of repayment may be limited by the agreement if respected by the parties or enforced by the court.

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

The concept of creating pari passu security interest is not defined in Uzbek law, so intercreditor agreements with the reference to it are rare in practice. If concluded, the agreements usually provide that creditors are equal in their rights to the security and take coordinated actions on the foreclosure, whereas the amount each creditor may claim is limited to a certain percentage pro rata the secured sums.

**Loan document terms**

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

LMA forms with English law as the governing law are mainly used when foreign investors are involved. As for the local funding, no standardised terms have been elaborated, although all local banks typically use more or less similar forms.

### Update and trends

Two recent developments have been noted. First, local companies are keen to use free funds, enabling them to invest via alternative (non-banking) financial institutions. This has prompted new legislation to allow such funding, with the Law on Mutual Funds coming into force next year.

Second, new security measures are expected to be introduced, including the pledge of bank accounts as noted above.

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

International loan facilities are mainly based on LIBOR. Interest rates within local structures are usually fixed, but may significantly vary depending on particular circumstances. Usually, loans extended locally and in the local currency have higher interest rates owing to increasing inflation. Floating rates, if applied, are also more common for local currency loans. Sometimes the loan is denominated in a foreign currency (eg, US dollars) for calculation purposes, even though actual funding is made in the local currency.

#### 36 What other bank loan yield determinants are commonly used?

Pricing floor and similar arrangements are sometimes included within the loan agreements.

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

Protection clauses are sometimes incorporated into agreements and primarily include increased cost and tax gross-up provisions (linked as a rule with changes in legislation).

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

It is generally uncommon for banks to allow such debts. If an additional amount is sought from the same creditor, a supplementary or new agreement is usually negotiated. Taking loans from other investors without renegotiating with the primary creditor is usually prohibited by the primary loan agreement.

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

Different types of covenants may be used, including those providing for leverage and cash-flow or interest coverage tests. Such indicators

as EBTIDA, cash-flow rates and capital expenditure levels are usually in focus.

If there is a breach of covenants, negotiations usually take place where possible solutions are considered for example, investors may grant their permission for having net cash on hand for calculating a leverage test, or contributions from the debtor's shareholders may be accepted.

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

A variety of restrictions exist that may be included in a loan agreement with a particular bank, including restrictions on:

- disposals;
- mergers and acquisitions;
- change of business;
- major loans and incurrence of other indebtedness;
- creation of security over one or several types of asset;
- provision of loans; and
- establishment of branches or subsidiaries.

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

Numerous events can trigger prepayment, including:

- breach of the above covenants;
- change of control with regard to the borrower;
- disposal of assets; and
- major litigations or investigations.

Receipt of any proceeds, excessive cash flow or other forms of getting income from outside the facility do not usually trigger the prepayment.

Generally, ways to cure the situation are subject to negotiations with the investor or bank and may include the reinvestment in assets, although this is typically not permitted. Provision of additional security, however, may be accepted.

Exceptions to prepayment are usually limited, but may, for example, include events of force majeure.

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

Debtor's indemnification and expense reimbursement obligations usually include all major costs for extending the loan primarily associated with document preparation, legal, registration and notarisation fees. However, these amounts should be insignificant because they are partially included within the investor's commission fees.

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