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The International Comparative Legal Guide to:

Lending & Secured Finance 2015

3rd Edition

A practical cross-border insight into lending and secured finance

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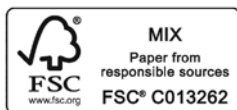
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Uzbekistan

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Uzbekistan?

The attraction of foreign loans for the purpose of their refinancing has become a trend for commercial banks in Uzbekistan. The role of commercial banks as the only available sources of financing is being diminished in the market by the active participation of other credit institutions, such as lease companies.

After successful implementation of the first project finance in Uzbekistan, the Uzbek market was placed on the global map for project financing, and it is expected that Uzbekistan will have a number of large project financings coming in the future. Overall, the market has shifted from a one lender-one borrower structure and we are seeing more projects beginning with multiple lenders.

1.2 What are some significant lending transactions that have taken place in Uzbekistan in recent years?

The largest foreign investments and loans attracted to Uzbekistan have been directed toward fuel-energy sector and transport and communication sector. The most representative of them is the Surgil Project, an integrated gas-to-petrochemicals project, which is one of the largest multi-sourced financings ever raised globally. For this project, senior lenders have extended around USD 2.5 billion. Another recent lending project involved the granting of a loan by the Asian Development Bank in the amount of USD 500 million for the construction of individual houses in rural areas. We would also mention a loan by the China Development Bank in the amount of USD 100 million to Uzbektelecom, the state-owned telecoms company, for acquiring telecoms equipment.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Under Uzbek law, a company, being a member of one corporate group, can guarantee borrowings of another member(s) of the group. The issue of provision of financial assistance to a related party, particularly by a daughter company to its parent company, is not relevant under Uzbek law.

It should be noted that certain corporate approvals may be required for the provision of corporate guarantees.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

The absence of benefit (consideration) for provision of guarantee may be an issue in bankruptcy proceedings, where the court administrator may challenge such guarantee as causing damage to the creditors of the company.

Moreover, Uzbek law sets a general requirement that, in case insolvency of a company is caused by a member of that company or its owner, who has a right to give mandatory instructions to the company, such member shall bear subsidiary liability for the debts of the company, where the assets of the company are insufficient to satisfy the claims of the company's creditors. Insolvency of the company shall be considered caused by the actions of the member of the company only in situations when this member used his right to give mandatory instructions to the company to take certain actions, knowing that such actions will cause the insolvency of the company.

2.3 Is lack of corporate power an issue?

Legal entities acquire legal capacity from the date of their registration and in accordance with the purposes of their activities set in their constitutive documents. Hence, a company may enter into any lawful transaction, as long as it is not prohibited by its charter. For a company to be able to enter into certain transactions, such as transactions with related parties or 'large transactions' (transactions the total value of which exceed 25% of the company's assets for private companies and 15% for public), the company shall be required to receive approval of its relevant governing bodies. Failure to obtain such approvals may lead to the transactions being challenged under the questions as being concluded *ultra vires*.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Uzbek law does not impose approvals other than those mentioned in question 2.3. However, if the guarantee is given in favour of a foreign entity/person and implies the transfer of hard currency abroad, the guarantor shall comply with the foreign exchange regulations of Uzbekistan. Please see question 2.6 below.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Uzbek law does not impose any requirements pertaining to net worth, solvency or limitations in the amount of the guarantee for the guarantee to be valid. Such matters are considered by the company internally. Please note, however, that these factors can be determinative when the guarantees are challenged by the court administrator, as discussed in question 2.2.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Foreign currency operations are strictly regulated in Uzbekistan. Though legally it is not required, in practice for the guarantor to transfer hard currency abroad under the guarantee, the servicing bank of the guarantor shall be informed on the existence of the guarantee. It is preferred for the guarantee to include the servicing bank as a party to make the enforcement process less complicated.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

In accordance with Uzbek law, the performance of obligations may be secured by penalty, pledge of movable and immovable assets, participation interests (shares) and proprietary rights, retention of the obligor's property, surety, guarantee, advance or any other way established by legislation or contract.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Uzbek law permits the conclusion of a mixed contract, in which there are elements of different contracts. Hence, it is possible to provide in one general agreement a pledge of different types of assets. However, it should be noted that in relation to a pledge agreement of certain types of assets and proprietary rights, Uzbek law provides certain requirements, such as form of the contract and its perfection, e.g. state registration or notary certification. For example, an agreement on a pledge of vehicles shall be executed on registered high-security forms and be subject to notary certification. Mortgage agreements, in addition to notary certification, are subject to state registration.

It should be separately noted that, under Uzbek law, pledge agreements shall include a description of the pledged property and an assessment; hence, a general description of the object of the pledge, such as "all property and proprietary rights of the pledgor" is not permitted.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Collateral can be provided by the pledge of movable and immovable property. Under Uzbek law, land is owned by the state and may not be pledged. However, Uzbek legislation permits the pledging of rights over land, unless such pledge is expressly prohibited by a contract or law. As stated in question 3.2, a pledge agreement for certain types of assets, such as immovable property, vehicles etc.,

shall be subject to certain requirements; failure to comply with such will invalidate the pledge agreement.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Receivables can be provided as a security by way of pledge of rights under contracts. It should be noted that only property rights can be pledged. Inalienable rights, such as claims to compensate for damages caused to health and life, alimonies claims etc., cannot be pledged.

Pledge over receivables is done by means of the conclusion of a pledge agreement in a simple written form, unless the main contract, obligations of which are secured, is not subject to notary certification itself. Under Uzbek law it is not required to notify the debtors of the pledgor of the pledge of claim rights.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

There are two possible ways for taking security over money deposited in bank accounts. The simplest way is to separate the money under question from the remaining monetary funds of the pledgor. This can be done by placing the money in a separate block account, which shall not be operated by the pledgor without the consent of the pledgee.

The other option is to take security of the rights over present and future funds in the bank accounts of the pledgor. This way the pledgor will be able to manage its bank account and dispose freely with the money in these accounts until there is a default. It should be noted that rights to control and manage bank accounts and to determine priority of making payments as such may not be pledged.

In either of these options it is recommended to introduce the servicing bank of the pledgor as a party to the pledge agreement to facilitate the enforcement process, when applicable.

3.6 Can collateral security be taken over shares in companies incorporated in Uzbekistan? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Uzbek law provides for two types of shares. One is shares in public companies; and this share is considered securities. Shares are also issued in uncertificated form. The other is shares in other forms of commercial entities, such as limited liability companies and these are referred to as 'participating interest'.

Both shares and participating interests can be pledged. To pledge shares the parties shall enter into a written contract, which is subject to registration with a registrar (depository) within two business days after the conclusion of the pledge agreement. Uzbek law does not impose any registration requirements for pledge of participating interest. These pledge agreements can be made in simple written form unless the main contract, the performance of obligation of which is secured, was not notary certified itself. In this case, the pledge agreement shall be notary certified as well.

Theoretically, pledges over shares and participating interests can be granted to a pledgee which is a foreign entity, under a New York or English law-governed document. It should be noted, however, that under Uzbek law, regardless of the choice of parties as to the governing law, mandatory provisions of Uzbek law governing such relations shall apply. Hence, to facilitate enforceability of the security, in practice such pledge agreements are governed by Uzbek law.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over inventory can be taken by way of pledge of goods in circulation; unlike in other types of pledge agreement, contract of pledge of goods in circulation does not require indication of the price of the pledge goods. However, the pledge contract shall define the amount, below which the value of the goods in circulation cannot fall. Decrease of the value of the pledged goods in circulation is permitted in proportion to the performed part of the secured obligation, unless otherwise provided in the contract.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Under Uzbek law, the rights of the mortgagee over a secured obligation and the mortgage agreement may be certified by a mortgage bond, which is a security paper. Uzbek law provides for cases when a mortgage bond cannot be issued. One such case is when the object of mortgage is an entire enterprise or there are lease rights over it. Issuance and the subsequent deals with the mortgage bond or rights over it are subject to state registration.

Mortgage bonds can be pledged under the pledge agreement by way of transferring the mortgage bond to another person (pledgee of the mortgage bond) in order to secure obligations of the initial mortgage bond holder under a loan agreement or another obligation arising between this person and the pledger of the mortgage bond or any lawful owner of the mortgage bond.

Uzbek law does not provide for granting a security interest over pledge rights under agreements on the pledging of movable property.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

In Uzbekistan the state fees for notary certification of security deals are set by the Cabinet of Ministers of Uzbekistan.

The public notary levies the state fees for notarisation of security deals. The amount of the state fee depends on the security agreement. For example, the state fee for notary certification of the mortgage agreement will be calculated based on the total value of the object of mortgage. The average fee for such types of transactions is 0.1% of the value of the object of mortgage. The state fee for notary certification of pledge agreements of foreign and local light vehicles younger than a year old is five minimum monthly salaries for each horse-power except for pledge agreements with licensed credit organisations. It should be noted that, under Uzbek law, pledge agreements with vehicles are subject to a stamp duty of 10% of the minimal monthly salary set in the Republic of Uzbekistan.

The state cadastre does not levy fees for registration of mortgage agreements. As for the fees of the registrar of pledges over shares, the amount of the fee is set in a contract concluded between the registrar and the applicant.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Depending on the complexity of the security transaction, the review by the public notary and notary certification of the agreement may be lengthy. One should take into consideration the time required for preparation of the documents requested by the public notary, particularly if one of the parties to the contract is a foreign entity.

Generally, registration of the security transaction with the relevant state authorities, however, is done within one business day.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

The general rule is that the owner of the property is free to create encumbrance over its property, for example, by entering into a security agreement without the consent of any other party.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Security of the borrowings under a revolving credit facility follows the general procedure. In practice, commercial banks view the entire amount made available to the borrower as the debt of the borrower and, hence, request security over this entire amount.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

If the pledge agreement does not require notary certification, then this pledge agreement can be executed by a simple signing of the document by the relevant authorised representatives of the parties. In cases when the pledge agreement require notary certification, then the signing of the pledge agreement shall be done in front of the public notary. The public notary may request documents confirming the authority of the signatories.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

There are no special prohibitions or restrictions in granting such security. The company shall, however, receive corporate approvals from its governing bodies when the security is either a related-party transaction or a 'large transaction'. Please see question 2.3.

5 Syndicated Lending/Agency/Trustee/Transfers

- 5.1 Will Uzbekistan recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?**

Uzbek law does not recognise the role of a security trustee or agent in enforcing the security and applying the proceeds from such enforcement to the claims of all the lenders. Under Uzbek law, the holder of security can only be the creditor, i.e. a party to whom the debt is owed by the debtor.

- 5.2 If an agent or trustee is not recognised in Uzbekistan, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

Generally, loan documents are drafted in a conventional manner implying one lender-one borrower relations. However, the need to achieve the mentioned effect exists in project financing. In recent project financing, parallel debt and joint and several creditor structures are being used or are being considered to be used in Uzbekistan. Either of these structures attempt to allow the security agent/trustee to enforce claims on behalf of all the lenders without each individual lender enforcing its security separately. Since these structures are novel to the Uzbek legal environment and neither is free from legal concerns, it is difficult to assess how these will be enforced in practice in the future, and how the Uzbek courts view these structures in case there are disputes over enforcement of security.

- 5.3 Assume a loan is made to a company organised under the laws of Uzbekistan and guaranteed by a guarantor organised under the laws of Uzbekistan. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?**

Assuming that both the loan agreement and the guarantee are governed by Uzbek law and assuming that both Lender A and Lender B are foreign entities, transfer of the loan agreement shall be made by way of the conclusion of an addendum to the loan agreement, introducing a new Lender B. Such loan agreement shall then be submitted for notification purposes to the borrower's bank for subsequent registration with the Central Bank of Uzbekistan.

However, Uzbek law does not expressly require receipt of the consent of the guarantor for such transfer; there is a provision in Uzbek law that states that the guarantee may be terminated if the secured obligation is changed without the consent of the guarantor in such a way that it leads to unfavourable consequences for the guarantor. To avoid the risk of a potential dispute as to whether a change of lenders is also a change of the secured obligation which is unfavourable to the guarantor, in practice the lenders request the borrower to obtain the consent of the guarantor and amend the guarantee to indicate Lender B as the lender secured by the guarantee. Such amendment of the guarantee shall also be presented to the servicing bank of the guarantor for notification purposes.

The need for possible corporate approvals of all the parties involved shall also be taken into consideration.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

- 6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

Under Uzbek law, interest payable on loans are subject to withholding tax, except for interests paid by local banks and leasing companies to foreign financial institutions. As for the proceeds of a claim under a guarantee or the proceeds of enforcing security, these are treated the same way as payments received for the underlining obligations, e.g. the principal amount is not taxable, but the interest is subject to withholding tax at a rate of 10%.

- 6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

As mentioned in question 6.1, interest paid by local banks and leasing companies to foreign financial institutions are exempt from withholding tax. Other than that, there are no other incentives and/or preferences applicable to foreign lenders.

There are no taxes applicable to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration.

- 6.3 Will any income of a foreign lender become taxable in Uzbekistan solely because of a loan to or guarantee and/or grant of security from a company in Uzbekistan?**

Under Uzbek law, interest payable on loans, profit received from guarantee or enforcement of security is subject to withholding tax, except for interests paid by local banks and leasing companies to foreign financial institutions.

- 6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?**

Please see question 3.9.

- 6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.**

There are no such legally adverse consequences. The borrower shall, however, consider foreign currency conversion for the purposes of re-payment, if it does not have its own stable hard currency proceeds.

7 Judicial Enforcement

7.1 Will the courts in Uzbekistan recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Uzbekistan enforce a contract that has a foreign governing law?

Uzbek courts will recognise and enforce parties' choice of a foreign law as the governing law, provided one of the parties is a foreign entity or individual, or there is a so-called 'foreign element' in their relations.

7.2 Will the courts in Uzbekistan recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Since Uzbekistan and the USA and/or the UK have not signed any international bilateral/multilateral agreements on the recognition of judgments of the state courts of these states, judgments of such courts will not be recognised and enforced in Uzbekistan.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Uzbekistan, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Uzbekistan against the assets of the company?

If both parties to a loan agreement are legal entities, such disputes shall be adjudicated by an economic court of Uzbekistan. The term for filing a lawsuit and obtaining a judgment depends on the complexity of the case. Cases in the first instances are adjudicated within a period of one to three months. Cases in the second and third instances are reviewed within one month from submitting an appeal application.

Enforcement of judgments depends mostly on the creditworthiness of the debtor and the presence of liquid assets. Thus, in practice, enforcement can take from one month up to several years.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

There are, indeed. Uzbek law provides for enforcement of security through either court proceedings or out-of-court proceedings. The out-of-court proceedings shall either be stipulated in the security agreement or in a separate notary certified agreement concluded between the pledgor and the pledgee upon occurrence of the default triggering enforcement of security. Out-of-court proceedings are not permitted in situations when: (i) conclusion of the pledge agreement required the consent of a third party; (ii) the object of security has certain historical, art and other cultural value to society; and/or (iii) the pledgor is absent and it is not possible to identify its location. It should be noted that, due to the absence of an extended regulatory environment for the out-of-court proceedings as well as a relatively easy way to challenge an agreement on out-of-court proceedings, in practice the majority of security enforcement is conducted through courts.

Under Uzbek law, enforcement of security shall be conducted only through public auction (sale). Direct possession of the object of security by the pledgee is not permitted. It should be noted that the debtor may apply to the court for deferral of sale of the security for a term of up to one year. Moreover, the court has a right to refuse enforcement of security in case the debtor's default is extremely negligible and the amount of the pledgee's claim as a result of such breach is evidently disproportionate to the value of the object of security.

It should be separately noted that the starting price of the security to be sold at public auction is set by the court if the enforcement is not through court and by the agreement of the pledgee, and the enforcement was not conducted through out-of-court proceedings.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Uzbekistan or (b) foreclosure on collateral security?

The restrictions listed in question 7.4 apply to all creditors, regardless of whether these are foreign or local lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in Uzbekistan provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Upon announcement of liquidation proceedings by the court, enforcement of security can be done only by the court administrator. It should be noted that, under Uzbek law, proceeds received from sale of security do not comprise the liquidation estate of the company and shall be transferred to the secured lender in the amount of their claim.

7.7 Will the courts in Uzbekistan recognise and enforce an arbitral award given against the company without re-examination of the merits?

When an arbitral award is given in accordance with the provisions of the New York Convention on Recognition and Enforcement of Foreign Awards, such arbitral award shall be recognised and enforced in Uzbekistan without re-examination of its merits.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Please see question 7.6.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In case when all assets of a company are secured and proceeds from the sale of these assets are equal or less than the amount of the claims of the secured lenders, the claims of the secured lenders are satisfied only after compensation of court expenses, expenses related to payment of remuneration fees of the court administrator, the current utility bills and insurance of the property of the company as well as satisfaction of claims arising after the initiation of bankruptcy proceedings and personal injury claims.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

State unitary enterprises and entities funded exclusively by the state budget funds, as well as political parties and religious organisations, are excluded from the scope of the Law of Uzbekistan “On bankruptcy”. It should also be noted that individuals cannot be declared bankrupt unless they are sole entrepreneurs.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

When a company is undergoing bankruptcy proceedings, there are no other processes available to the relevant creditors.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party’s submission to a foreign jurisdiction legally binding and enforceable under the laws of Uzbekistan?

Parties’ submission to a foreign jurisdiction is legally binding and enforceable under Uzbek law, provided one of the parties to a dispute is a foreign entity or individual, or there is a so-called ‘foreign element’ in their relations.

9.2 Is a party’s waiver of sovereign immunity legally binding and enforceable under the laws of Uzbekistan?

According to Uzbek law, the state acts in civil relations on an equal basis with other participants of such relations, i.e. it shall not use its sovereign immunity. However, the state is free to expressly waive its immunity and such waiver shall be recognised and enforced.

10 Other Matters

10.1 Are there any eligibility requirements in Uzbekistan for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Uzbekistan need to be licensed or authorised in Uzbekistan or in their jurisdiction of incorporation?

There are no eligibility requirements applicable to foreign lenders. They do not need to have any legal presence in Uzbekistan to be able to lend money to Uzbek companies.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Uzbekistan?

When considering the loan structure, lenders shall consider the strict currency control regulations applicable in Uzbekistan, including assignment of foreign proceeds, opening off-shore accounts by the borrower, etc.

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He also assists clients with various corporate law matters and provides advice on a broad range of transactions including commercial contracts, joint ventures and shareholders' agreements.

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Azizbek provides extensive legal support to clients in their real estate transactions, including: acquisitions and disposals; property development; leasing, renovation and construction; commercial, industrial and residential properties; enforcement of judicial awards and foreclosures; reorganisation transactions; real estate financing and lending secured by mortgage; and real estate litigation. He directs clients through all stages of the transaction, carefully explains the legal nuances and finds solutions to seemingly unsolvable problems.

Leges Advokat

Leges Advokat is an elite law firm in Uzbekistan, providing legal services of the highest quality with a deep and intimate knowledge of the Uzbek legislation and practice. We provide a comprehensive range of legal services to multinational corporations, international financial institutions, sovereign governments and their agencies, as well as domestic corporations and financial institutions. Our particular specialties are direct foreign investments, project financing in the energy, oil and gas sector, cross-border secured lending, leasing operations, infrastructure and construction projects.

Leges Advokat has been continuously ranked and recognised as a top Uzbek law firm. This is an extraordinary distinction and speaks to our specific focus on having the best legal team in Uzbekistan. Lawyers of Leges Advokat have the experience, technical and support resources necessary to meet the full gamut of clients' needs in the market of Uzbekistan. We are committed to providing our clients with efficient, consistent, high-quality service, combined with an innovative approach.

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