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The International Comparative Legal Guide to:

Lending & Secured Finance 2019

7th Edition

A practical cross-border insight into lending and secured finance

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Editorial Chapters:

1 **Loan Syndications and Trading: An Overview of the Syndicated Loan Market** – Bridget Marsh & Tess Virmani, Loan Syndications and Trading Association 1

2 **Loan Market Association – An Overview** – Nigel Houghton & Hannah Vanstone, Loan Market Association 6

3 **Asia Pacific Loan Market Association – An Overview** – Andrew Ferguson, Asia Pacific Loan Market Association (APLMA) 12

General Chapters:

4 **An Introduction to Legal Risk and Structuring Cross-Border Lending Transactions** – Thomas Mellor & Marcus Marsh, Morgan, Lewis & Bockius LLP 15

5 **Global Trends in the Leveraged Loan Market in 2018** – Joshua W. Thompson & Korey Fevzi, Shearman & Sterling LLP 20

6 **Developments in Delayed Draw Term Loans** – Meyer C. Dworkin & Samantha Hait, Davis Polk & Wardwell LLP 26

7 **Commercial Lending in a Changing Regulatory Environment, 2019 and Beyond** – Bill Satchell & Elizabeth Leckie, Allen & Overy LLP 30

8 **Acquisition Financing in the United States: Will the Boom Continue?** – Geoffrey R. Peck & Mark S. Wojciechowski, Morrison & Foerster LLP 34

9 **A Comparative Overview of Transatlantic Intercreditor Agreements** – Lauren Hanrahan & Suhrud Mehta, Milbank LLP 39

10 **A Comparison of Key Provisions in U.S. and European Leveraged Loan Agreements** – Sarah M. Ward & Mark L. Darley, Skadden, Arps, Slate, Meagher & Flom LLP 46

11 **The Global Subscription Credit Facility and Fund Finance Markets – Key Trends and Forecasts** – Michael C. Mascia & Wesley A. Misson, Cadwalader, Wickersham & Taft LLP 59

12 **Recent Developments in U.S. Term Loan B** – Denise Ryan & Kyle Lakin, Freshfields Bruckhaus Deringer LLP 63

13 **The Continued Growth of European Covenant Lite** – James Chesterman & Jane Summers, Latham & Watkins LLP 70

14 **Cross-Border Loans – What You Need to Know** – Judah Frogel & Jonathan Homer, Allen & Overy LLP 73

15 **Debt Retirement in Leveraged Financings** – Scott B. Selinger & Ryan T. Rafferty, Debevoise & Plimpton LLP 82

16 **Analysis and Update on the Continuing Evolution of Terms in Private Credit Transactions** – Sandra Lee Montgomery & Michelle Lee Iodice, Proskauer Rose LLP 88

17 **Secondments as a Periscope into the Client and How to Leverage the Secondment Experience** – Alanna Chang, HSBC 95

18 **Trade Finance on the Blockchain: 2019 Update** – Josias Dewey, Holland & Knight 98

19 **The Global Private Credit Market: 2019 Update** – Jeff Norton & Ben J. Leese, Dechert LLP 104

20 **Investment Grade Acquisition Financing Commitments** – Julian S.H. Chung & Stewart A. Kagan, Fried, Frank, Harris, Shriver & Jacobson LLP 109

21 **Acquisition Financing in Latin America: Navigating Diverse Legal Complexities in the Region** – Sabrena Silver & Anna Andreeva, White & Case LLP 114

22 **Developments in Midstream Oil and Gas Finance in the United States** – Elena Maria Millerman & John Donaleski, White & Case LLP 121

23 **Margin Loans: The Complexities of Pre-IPO Acquired Shares** – Craig Unterberg & LeAnn Chen, Haynes and Boone, LLP 127

24 **Credit Agreement Provisions and Conflicts Between US Sanctions and Blocking Statutes** – Roshelle A. Nagar & Ted Posner, Weil, Gotshal & Manges LLP 132

25 **SOFR So Good? The Transition Away from LIBOR Begins in the United States** – Kalyan (“Kal”) Das & Y. Daphne Coelho-Adam, Seward & Kissel LLP 137

Continued Overleaf →

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General Chapters:

26	**Developments in the Syndicated Term Loan Market: Will Historical Distinctions from the High-Yield Bond Market Be Restored?** – Joseph F. Giannini & Adrienne Sebring, Norton Rose Fulbright US LLP	141
27	**Green Finance** – Alex Harrison & Andrew Carey, Hogan Lovells International LLP	144
28	**U.S. Tax Reform and Effects on Cross-Border Financing** – Patrick M. Cox, Baker & McKenzie LLP	149

Country Question and Answer Chapters:

29	**Angola**	Bravo da Costa, Saraiva – Sociedade de Advogados / PLMJ: Bruno Xavier de Pina & Joana Marques dos Reis	159
30	**Argentina**	Marval, O'Farrell & Mairal: Juan M. Diehl Moreno & Diego A. Chighizola	165
31	**Australia**	King & Wood Mallesons: Yuen-Yee Cho & Elizabeth Hundt Russell	174
32	**Austria**	Fellner Wratzfeld & Partners: Markus Fellner & Florian Kranebitter	183
33	**Belgium**	Astrea: Dieter Veestraeten	193
34	**Bermuda**	Wakefield Quin Limited: Erik L Gotfredsen & Jemima Fearnside	199
35	**Bolivia**	Criales & Urcullo: Andrea Mariah Urcullo Pereira & Daniel Mariaca Alvarez	207
36	**Botswana**	Kelobang Godisang Attorneys: Wandipa T. Kelobang & Laone Queen Moreki	214
37	**Brazil**	Pinheiro Neto Advogados: Ricardo Simões Russo & Leonardo Baptista Rodrigues Cruz	221
38	**British Virgin Islands**	Maples Group: Michael Gagie & Matthew Gilbert	230
39	**Canada**	McMillan LLP: Jeff Rogers & Don Waters	237
40	**Cayman Islands**	Maples Group: Tina Meigh	247
41	**Chile**	Carey: Diego Peralta	255
42	**China**	King & Wood Mallesons: Stanley Zhou & Jack Wang	262
43	**Colombia**	Lloreda Camacho & Co.: Santiago Gutiérrez & Juan Sebastián Peredo	269
44	**Costa Rica**	Cordero & Cordero Abogados: Hernán Cordero Maduro & Ricardo Cordero B.	276
45	**Croatia**	Macesic & Partners LLC: Ivana Manovelo	284
46	**Cyprus**	E & G Economides LLC: Marinella Kilikitas & George Economides	292
47	**Denmark**	Nielsen Nørager Law Firm LLP: Thomas Melchior Fischer & Peter Lyck	300
48	**England**	Allen & Overy LLP: David Campbell & Oleg Khomenko	307
49	**Finland**	White & Case LLP: Tanja Törnkvist & Krista Rekola	316
50	**France**	Orrick Herrington & Sutcliffe LLP: Emmanuel Ringeval & Cristina Radu	324
51	**Germany**	SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH: Dr. Dietrich F. R. Stiller & Dr. Andreas Herr	335
52	**Greece**	Sardelas Liarikos Petsa Law Firm: Panagiotis (Notis) Sardelas & Konstantina (Nantia) Kalogiannidi	344
53	**Hong Kong**	King & Wood Mallesons: Richard Mazzochi & Khin Voong	352
54	**Indonesia**	Walalangi & Partners (in association with Nishimura & Asahi): Luky I. Walalangi & Siti Kemala Nuraida	360
55	**Ireland**	Dillon Eustace: Conor Keaveny & Richard Lacken	366
56	**Israel**	E. Schaffer & Co.: Ehud (Udi) Schaffer & Shiri Ish Shalom	375
57	**Italy**	Allen & Overy Studio Legale Associato: Stefano Sennhauser & Alessandra Pirozzolo	381
58	**Ivory Coast**	IKT Law Firm: Annick Imboua-Niava & Osther Tella	390
59	**Japan**	Anderson Mori & Tomotsune: Taro Awataguchi & Yuki Kohmaru	396
60	**Jersey**	Carey Olsen Jersey LLP: Robin Smith & Laura McConnell	404
61	**Luxembourg**	Loyens & Loeff Luxembourg S.à r.l.: Antoine Fortier-Grethen	414
62	**Mexico**	Gonzalez Calvillo, S.C.: José Ignacio Rivero Andere & Jacinto Avalos Capin	422
63	**Mozambique**	TTA – Sociedade de Advogados / PLMJ: Gonçalo dos Reis Martins & Nuno Morgado Pereira	430

Continued Overleaf

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Country Question and Answer Chapters:

64	**Netherlands**	Ploum: Tom Ensink & Alette Brehm	437
65	**Portugal**	PLMJ Advogados: Gonçalo dos Reis Martins	445
66	**Romania**	Trofin & Asociații: Valentin Trofin & Mihaela Atanasiu	452
67	**Russia**	Morgan, Lewis & Bockius LLP: Grigory Marinichev & Alexey Chertov	462
68	**Serbia**	JPM Janković Popović Mitić: Nenad Popović & Nikola Poznanović	470
69	**Singapore**	Drew & Napier LLC: Pauline Chong & Renu Menon	477
70	**Slovakia**	Škubla & Partneri s. r. o.: Marián Šulík & Zuzana Moravčíková Kolenová	487
71	**Slovenia**	Jadek & Pensa: Andraž Jadek & Žiga Urankar	494
72	**South Africa**	Allen & Overy LLP: Lionel Shawe & Lisa Botha	504
73	**Spain**	Cuatrecasas: Manuel Follía & Iñigo Várez	514
74	**Sweden**	White & Case LLP: Carl Hugo Parment & Tobias Johansson	525
75	**Switzerland**	Pestalozzi Attorneys at Law Ltd: Oliver Widmer & Urs Klöti	532
76	**Taiwan**	Lee and Li, Attorneys-at-Law: Hsin-Lan Hsu & Odin Hsu	541
77	**UAE**	Morgan, Lewis & Bockius LLP: Victoria Mesquita Wlazlo & Amanjit K. Fagura	549
78	**USA**	Morgan, Lewis & Bockius LLP: Thomas Mellor & Rick Eisenbiegler	564
79	**Venezuela**	Rodner, Martínez & Asociados: Jaime Martínez Estévez	576

EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Lending & Secured Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of lending and secured finance.

It is divided into three main sections:

Three editorial chapters. These are overview chapters and have been contributed by the LSTA, the LMA and the APLMA.

Twenty-five general chapters. These chapters are designed to provide readers with an overview of key issues affecting lending and secured finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in lending and secured finance laws and regulations in 51 jurisdictions.

All chapters are written by leading lending and secured finance lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Thomas Mellor of Morgan, Lewis & Bockius LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Acquisition Finance in Latin America: Navigating Diverse Legal Complexities in the Region

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Private equity and strategic investors continue to demand loans with "certain funds" or "SunGard" limited conditionality to finance their M&A activity in Latin America. Having survived many geopolitical challenges in 2018, the M&A market in Latin America should improve in 2019 from greater political stability, accompanied by other local trends that suggest increased opportunities for investors and lenders financing M&A activity in the region.

For any acquisition finance transaction in Latin America, the parties will need to consider country-specific concerns, including guaranty limitations and security steps and timing, applicable withholding tax regimes and exchange control regulations, to determine the optimal structure and lender syndicate composition for such transaction.[1]

M&A in Latin America

Latin American M&A in 2018 included 600 announced deals for a total of US$72.6 billion of value, which was a decrease in value of 25.3% in comparison to 2017 and the lowest total deal value on record since 2005.[2] In Latin America, 2018 was plagued by domestic and cross-border political and economic uncertainty, including seven presidential elections (in Brazil, Colombia, Costa Rica, El Salvador, Mexico, Paraguay and Venezuela) and two transitions to power (in Chile and Cuba), trade wars and corruption scandals, among other challenges. Despite the unstable geopolitical environment, the total number of Latin American M&A deals in 2018 was only 54 below the 2017 level (600 in 2018 as compared to 654 in 2017).[3] Also, there were bright spots as 2018 set a number of records for Latin American M&A activity. The industrials and chemicals sector set a new record, closing the year with US$23 billion worth of deals, which was nearly 2.5 times the value registered by this sector in 2017 (in part due to a single US$15.3 billion acquisition of Fibria Celulose in Brazil). The deals in 2018 also included the second-highest total deal value on record in the technology sector with US$2.4 billion (double 2017's US$1.2 billion) and record deal counts in the construction sector (with 30 transactions worth US$2.3 billion) and in the pharmaceuticals, medical and biotech sector (with 69 transactions worth US$1.8 billion).[4]

For 2019, the International Monetary Fund is forecasting that the GDP in Latin America and the Caribbean will grow by 2.2%, with country-specific variations (Argentina: a decrease of 1.6%; Brazil: an increase of 2.4%; Chile: an increase of 3.4%; Colombia: an increase of 3.6%; Mexico: an increase of 2.5%; and Peru: an increase of 4.1%).[5] The Intralinks Deal Flow Predictor report predicts that through Q1 2019, Argentina is expected to show the highest increase in M&A announcements among the largest Latin American economies, whereas levels of M&A announcements are expected to be flat to declining in Brazil, Chile, Colombia, Mexico and Peru.

Opportunities for International Lender Activity in Latin America

Despite certain warning signs of market stress, the following country-specific factors should continue to provide opportunities for international lenders in financing M&A activity in Latin America.

- In Argentina, the federal government's launch of a huge infrastructure plan through public-private partnership structures coupled with the lift of the legal and *de facto* foreign exchange restrictions applicable to cross-border financings seem poised to increase M&A in the country and the opportunities for off-shore lenders to finance that activity. However, recent devaluation of the Argentine peso and high inflation may hinder such increase.
- In Brazil, although financing for acquisitions has traditionally been provided by local banks and local debentures with much support also being provided at below market levels by the National Development Bank ("BNDES"), BNDES' recent retreat from activity may create additional opportunities for off-shore banks. In this regard, BNDES has been gradually changing its credit portfolio over the past few years from a concentrated portfolio formed by large corporations (known as "Super Nationals") to a more diverse base, including venture capital and seed funds focused on start-ups and small-sized companies. In the near future, also, BNDESPar, the equity investment vehicle of BNDES, will play an important role in M&A activity in Brazil, either by divesting major equity stakes in large corporations or by investing in such small-sized companies mentioned above.[6] Brazilian corporates with US-dollar revenues, including, in particular, exporters of commodities, are the most likely borrowers of US-dollar off-shore debt, given that currency hedging costs may be prohibitive, but market participants continue to explore structures to minimise currency risk for Brazilian borrowers without significant US-dollar revenues. Some interesting transactions took place in 2018, despite the political turbulences throughout the year. For instance, the IPOs of PagSeguro and Stone, major credit card processors in Brazil, were very well received by the market.[7] With the new Federal government having taken office on January 1, 2019, market players expect increased activity in terms of project finance for infrastructure, privatisation and equity deals in general.
- In Chile, on the heels of the election of centre-right President Sebastián Piñera in December 2017 there were mixed results for M&A activity in 2018, which closed 2018 with 56 transactions (a decline from 57 transactions in 2017) with a value of US$12.4 billion (half of the US$24.6 billion recorded in 2017).[8] In 2018, there were several landmark transactions, such as Scotiabank (Bank of Nova Scotia in Chile) acquiring the BBVA operations and Chinesse Tianqui entering into

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the non-metallic producer SQM. Copper prices and public policies ensure that there will be an additional increase in mining, infrastructure and energy transactions.

- In Colombia, given the huge wave of road concessions together with a high sponsor concentration, it is expected that international investors will continue purchasing stakes in these projects, which may require acquisition financing, depending on the stage of development of the relevant project. Additionally, multi-latinas will continue to expand from and into Colombia and into the countries of the Pacific Alliance (Chile, Peru and Mexico), which acquisitions typically rely on financings from both the international and the local banking markets.
- In Mexico, although the uncertainties created by the possibility of Mexico not reaching a trade agreement with the U.S. and Canada have ended with the signing of the new United States-Mexico-Canada Agreement (USMCA), the arrival of a new administration to the federal government with control of both chambers of congress may generate uncertainties but also opportunities for M&A activity. It is expected that during the first months of the new administration investors will take an opportunistic stand and consider in their investment decisions the policies and direction that the new administration adopts in different sectors that have driven M&A activity in Mexico in recent years (i.e. financial, infrastructure, power, oil & gas and real estate development).
- In Peru, financing for acquisitions by foreign investors has traditionally been provided by off-shore lenders or affiliated companies. Local investors traditionally have preferred loans from local banks, including bridge loan to bond take-out structures. Recently, local investors with Peruvian bank relationships with access to medium- and long-term acquisition finance structures through local banks and local investment funds, including mezzanine funds, are providing some acquisition financing to local investors. There have been discussions in political circles recently about eliminating the 18% VAT applicable to interest payments to foreign lenders that are not financial institutions, which would facilitate loans by such off-shore lenders to Peruvian investors, but the legislative change has not yet passed.

Latin American Acquisition Finance Transactions

Pure leveraged, limited-recourse acquisition loan finance transactions occur in Latin America less frequently than in the US or Europe. This is partly because the volumes of M&A activity in the region (US$72.6 billion in 2018) are still a fraction of US M&A activity (US$1.5 trillion in 2018) and European M&A activity (US$989.2 billion in 2018).[9] Country and currency risks specific to the region also add to lenders' perceived risks of such limited-recourse loans. In addition, non-financial institution lenders, which are traditionally the lenders interested in providing term loan Bs, a preferred source of debt financing by private equity funds, have been relatively inactive in the region due to unfavourable local withholding taxes, which are often applicable in the region to off-shore lenders that are not financial institutions or are organised in countries designated as tax havens. And local banks have often been able to provide competitive pricing in this environment.

In our experience, international lenders have been more active in providing acquisition finance bridge loans in Latin America, which often take the form of bridge-bond take-out structures, and are frequently tied to M&A advisory mandates or other larger client relationships. Also, we have seen that Asian and European banks that are active in the medium- and long-term project finance markets have been active in leveraged acquisition financing – with project finance-style debt-sizing parameters – of single-asset or portfolio power or infrastructure deals supported by US-dollar linked, long-term commercial contracts. At the same time, we have often observed, in line with the business drivers of the international banks, acquisition finance in the region being backed in whole or in part by corporate balance sheets, with customised, non-all-assets collateral packages when leverage exceeds 3.5 to 4.5 times EBITDA.

As private equity funds and strategic buyers seek loan financing for their targets in Latin America, cross-border acquisition loans will remain an important, if not critical, part of the capital toolbox. A buyer will generally require certainty of loan funds before committing to a purchase agreement, whether the acquisition loan financing takes the form of a bridge loan or longer-term financing, whether the target is a corporate or project, and whether the buyer is a strategic corporate or a private equity fund. The volumes of M&A activity in the region, including in the real estate, energy, natural resources and infrastructure sectors in particular, would appear to be a promising source of highly bankable senior acquisition loans, with or without capital market take-outs.

Loans vs. Bonds

Loans tend to take centre stage in acquisition finance transactions because a loan commitment provides the needed certainty that debt funds will be available at closing. Typically, a purchase agreement for an acquisition will not include a "financing-out", i.e., a right to terminate the purchase agreement if the buyer cannot finance the transaction, and before signing the purchase agreement the buyer will need certainty that the required debt will be available at closing. Although an acquisition finance transaction may take the form of loans or bonds, it can be a challenge for a buyer to rely on a planned bond issuance to close an acquisition, given the notorious volatility of the capital markets. Buyers tend to rely on loan commitments from banks and other lenders to finance acquisitions, either in the form of term loans or bridge loans, which may be refinanced post-closing with a capital markets bond issuance.

Loan Commitment Documentation in the UK, Europe and the US

Conditionality

Because a purchase agreement for an acquisition will rarely contain a "financing-out", a buyer will want to ensure that its lenders have provided a loan commitment with limited conditionality before signing the acquisition agreement. In recent years, the conditionality of lenders' loan commitments in the acquisition finance context generally follows the "certain funds" standard in the UK and the European markets and the "SunGard" standard in the US. Under "certain funds" conditionality, the lenders' commitment to fund on the closing debt are subject only to: (i) the making of certain key representations; (ii) the absence of major events of default (including insolvency proceedings or payment defaults of the acquisition vehicle); (iii) the absence of illegality; (iv) the absence of a change of control; and (v) security being granted over certain assets of the acquisition vehicle, including the shares of the target being acquired. In contrast, the "SunGard" standard of conditionality limits the conditions such that: (a) the only representations that must be must be true and correct as a condition to funding are the specified loan agreement representations (limited largely to representations relating to corporate existence, power and authority, margin regulations, solvency and anti-terrorism and corruption laws) and the specified

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acquisition agreement representations (limited to representations and warranties in the purchase agreement relating to the target that, if untrue, would be material to the lenders and with respect to which the buyer can terminate its obligation to the close the acquisition); (b) the collateral in which a security interest must be granted and perfected at closing includes only collateral that may be perfected by the filing of a UCC-1 financing statement or the delivery of possessory collateral such as share certificates; and (c) the only material adverse change or material adverse event ("MAC") that is a condition to funding is the MAC[10] that applies in the purchase agreement – to eliminate any potential daylight between the loan commitment and the purchase obligation.[11]

Security Principles

Lenders in the UK, the European markets and the US markets also include in the commitment documentation an agreed description of the guaranty and security principles that will apply to complete the credit support package after closing. In the UK and the European markets, the guaranty and collateral package will vary considerably depending on the applicable jurisdictions involved, given wide variance in applicable guaranty limitations and security interest legal regimes in the region. In the US, the parties often agree to limit the collateral and guaranty package, such that no security interest is required to be provided in real property valued below a certain threshold, leased real property, motor vehicles, margin stock, interests in joint ventures (and possibly non-wholly owned subsidiaries) and other immaterial assets.

Commitment Documents in Latin America

The Latin American loan market generally follows the US loan market approach to loan documentation, rather than the UK or European approach, including with respect to commitment documentation.

Closing Date Collateral and Security Principles

Similarly, commitment documents with respect to acquisition finance transactions involving Latin American targets tend to follow the US "SunGard" standard of conditionality and US guaranty and security principles framework in the acquisition context. There are, however, challenges in using the "SunGard" standard of conditionality in Latin America relating to the formulation of the closing date collateral in the conditions to closing and the security principles.

In general, most Latin American jurisdictions do not have a construct to permit all asset security under a single document or to permit perfection of a security interest by a single filing in a central filing system of varied security interests. Ordinarily, each category of collateral will require a separate security document and separate perfection steps. Notarisation and registration requirements (which require a registry to register collateral a number of days or weeks after filing, in particular for real estate) and fees may further complicate the process and make the taking of security more expensive and protracted, or outright prohibitive from a commercial standpoint.

If the acquisition target is located in Latin America, it will be important to understand, in each relevant jurisdiction (including each specific country and, sometimes, each applicable state within such country), what the target's valuable assets are given the nature of its business, the steps and timing (and related fees required) to create and perfect a security interest in each applicable category of such assets, and whether there are financial assistance (restrictions on the ability of a company to provide a guaranty in support of, or collateral to secure, indebtedness incurred to finance the purchase of that company) or other limitations on the ability of companies organised in that country to provide guaranties or credit support in the acquisition finance context. Care must be taken to formulate a closing date collateral package that will both ensure that the lenders have a security interest in the important assets of the target and ensure that perfection can be achieved on the closing date without execution risk and to frame the security principles and ongoing collateral package to protect the lenders' interest while managing transaction timing and expense. In contrast to the US market, there is no "standard" guaranty and collateral package for acquisition loans in Latin America. Such packages tend to vary from country to country and from industry to industry within each country depending on the requirements to create and perfect security interest in the assets key for that industry.

We have endeavoured here to provide an overview of considerations in several of the jurisdictions in which M&A activity and acquisition finance transactions have been active.

In Argentina, so long as a guaranty provides arm's-length benefit to the Argentine guarantor and the required corporate formalities are complied with, the guaranty will be enforceable, subject to potential avoidance, depending on the circumstances, if the guarantor enters into insolvency proceedings within two years of the guarantee being granted in the case of new debt. Also, the Argentine courts have held that some transactions in which a company has provided financial assistance to, or a guarantee for, the acquisition of its shares have violated the Argentine Commercial Companies Law ("ACC"), by violating the administrator's duties of loyalty and care and the restriction on companies giving financial assistance or providing guarantee in connection with the acquisition of their own shares. It is not possible under Argentine law for a company to grant a blanket security interest in all of its personal property assets and security will need to be provided under separate documentation for each category of collateral. Also, it is a challenge to obtain a perfected security interest in a bank account, which may require the construction of a trust and additional time and expense. Notary fees, stamp taxes and registration fees can be material in connection with secured transactions and will vary depending on the type of assets pledged and the location of the pledgor and its assets. Registration of some security interests may take between one and several months. A recent law recognises the concept of collateral agency, so lenders do not need to be a party to the local security documents and intercreditor arrangements affecting local collateral.

In Brazil, there is no requirement that a Brazilian guarantor receive corporate benefit provided that the required corporate formalities are complied with and, provided further, that a guarantee without sufficient corporate benefit may be avoided in an insolvency proceeding of the guarantor within two years of the guarantee being granted. It is not possible for a company to grant a blanket security interest in all of its personal property assets and security will need to be provided under separate documentation for each category of collateral. Fiduciary liens are the preferable security type for foreign creditors given the protection they bring in insolvency scenarios; although there has been a debate over the legality of fiduciary liens to the benefit of foreign creditors, in particular in connection with fiduciary liens on real estate due to certain restrictions on the ownership of real estate by foreign entities or individuals. Notary fees and registration fees can be material for the taking of security over real property and personal property pledges and will vary by the region where the applicable registry is located. Registration of security can take up to one month, depending on the type of security interest being registered and the location of the registry. If the borrower has outstanding indebtedness with BNDES (subject to

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certain exceptions), the borrower will need a waiver from BNDES for additional indebtedness, which may take some time. Notably, recent changes to Brazilian law have enhanced the attractiveness of the Brazilian legal regime to international lenders. First, foreclosing on liens over shares of publicly traded companies and other financial assets (*e.g.*, time deposits) has become quicker. Also, Brazil has recently adopted the so-called "Apostille Convention", which should facilitate and expedite the recognition in Brazil of documents executed abroad, avoiding the need for the expensive and time-consuming "consularisation" procedure.

In Chile, so long as the guaranty provides some benefit to the Chilean guarantor and the required corporate formalities are complied with, the guaranty will be enforceable, subject to potential avoidance, depending on the circumstances, if the guarantor enters into insolvency proceedings within two years of the guarantee being granted in the case of new debt. Security should be created under separate documentation for different types of assets (under different categories of pledge depending on who will have possession of the pledged asset and the type of asset). Notary fees and registration fees may apply for the taking of security over real property and personal property pledges, and registration fees will depend on the applicable registry. There are also significant limitations on the effectiveness of security interests over bank accounts, which, in practice, render such security unavailable, and Chilean law does not provide for the existence of collateral trusts.

In Colombia, per a doctrine of the Superintendence of Corporations, a parent company may guarantee the obligations of its subsidiaries, even if the corporate purpose of the guarantor does not include such power. This doctrine should be applicable even when the target is the guaranteed company, provided that the entirety of the financing is destined to pay its purchase price. In all other cases (i.e. when a subsidiary is guaranteeing the obligations of its parent company or a sister company) so long as the Colombian guarantor's corporate purpose provides such company the power to guaranty the applicable obligations, the guaranty will be enforceable as a general principle (subject to certain exceptions including, for example, if the guarantor is a simplified stock corporation (*sociedad por acciones simplificada*), or if there is a declared entrepreneurial group between the guarantor and the guaranteed entity). There is generally no prohibition on a Colombian company providing financial assistance to support the acquisition of all of its own shares, except in the case of certain specially regulated companies such as banks, insurance companies and other finance companies. However, if the target is to guarantee a partial acquisition of its own shares, minority shareholder protection rules could apply and grant minority shareholders the right to challenge the guarantee provided by the target. Security should be granted under separate documentation for different types of assets. Alternatively, a *prenda sobre establecimiento de comercio* is available in some cases to cover groups of assets, as are security trust structures. There will be notarial fees and public registry costs depending on the type of security at issue.

In Mexico, so long as the required corporate formalities are complied with, a guaranty will be enforceable, regardless of the value provided to the guarantor, subject in any insolvency to potential clawback within 270 days of the filing for the insolvency proceedings. In Mexico, a non-possessory pledge on assets and rights may generally cover all assets, except real estate, which may need a separate document and filing. As an alternative, a Mexican collateral trust structure could be used to create a security trust structure covering a substantial number of assets, but the trustee costs are significant and administration of the collateral in the trust could become onerous for the borrower. Notary fees and registration fees may apply for the taking of security over real property and personal property pledges, and registration fees will depend on the applicable registry.

In Peru, so long as the required corporate requirements and formalities are complied with, a guaranty will be enforceable, regardless of the value provided to the guarantor, subject to potential actions against the officers and board members of the company under certain circumstances, including if the guarantees create a serious risk to the credits held by other creditors. Peru also restricts the ability of a company to provide financial assistance to a party to acquire its shares, although there may be structuring alternatives to reduce the impact of these Peruvian restrictions. Peru, in contrast to many other Latin American jurisdictions, does permit a blanket security interest under a *Hipoteca sobre Unidad de Producción*, under the applicable rules provided by Peruvian Civil Code, which covers a whole production unit including different types of assets (equipment, machinery, real estate, inventory and spare parts). As an alternative, lenders and holders of debt instruments may rely on the Peruvian guarantee trust structure (*Fideicomiso en Garantía*), governed by the banking law (*Ley del Sistema Financiero y del Sistema de Seguros y Orgánica de la Superintendencia de Banca y Seguros*) and the regulations issued by the banking regulator (*the Superintendencia de Banca, Seguros y AFP*), as well as on the securitisation trust (*Fideicomiso de Titulización*), regulated by the capital markets law (*Ley del Mercado de Valores*) and the regulations issued by the securities market regulator (*Superintendencia del Mercado de Valores*). The securitisation provides to the holders of the instruments a legal protection under which the transfer of the assets to the securitisation trust may not be subject to any annulment action since the date on which such assets were transferred to the trust. The *Fideicomiso en Garantía* could be used to create a security trust structure covering a substantial number of assets, including future cash flows, with expedited enforcement proceedings and other benefits. The *Fideicomiso de Titulización* is a trust structure that also may cover different types of assets, including the future cash flows, aimed to guarantee the offering and issuance of debt instruments in the local and/or the international markets. There have been issuances of securitisation notes (*Bonos de Titulización*) that have been structured to finance future acquisitions by local investors, who act as originators of the respective *Fideicomiso de Titulización*. The securitisation has been also used to pay the bank bridge that financed the acquisition transaction by such investors, converting the indebtedness into a long-term debt. Notarial fees will be required to formalise the security agreements as public deeds and the applicable fees will depend on the notary. There are also public registry costs.

Other Latin American Structuring Considerations

In addition to the required bespoke determination of the closing date credit support and ongoing credit support for an acquisition finance loan in the Latin American market, there are additional distinct issues in Latin American jurisdictions that may impact acquisition finance transactions and which are not typically addressed in UK, European or US commitment letters.

Withholding Tax and Other Tax Considerations

The parties will need to consider, in particular, applicable withholding tax obligations and the agreements with respect to tax gross up by the borrower. In many Latin American jurisdictions, a significant withholding tax will apply to interest payments from Latin American corporate borrowers to off-shore lenders, particularly lenders that are not regulated financial institutions or lenders organised in certain locally designated "tax haven" jurisdictions.

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For example, in Argentina, if a foreign Lender is a bank or financial institution under the supervision of the relevant central bank or equivalent authority of its jurisdiction and is located in a jurisdiction that is not considered to be "low tax" or a jurisdiction that is party to an exchange of information treaty with Argentina, there will be an effective withholding tax rate of 15.05%; otherwise, the effective withholding tax rate is 35%. Also, double taxation treaties may set forth ceilings to the applicable rates. The borrower may also need to pay VAT at the rate of 21% or 10.5% depending on whether the lender is a financial institution and other factors. And there may also be applicable stamp taxes in connection with the execution of the loan agreement, promissory notes and other loan documents depending on where the applicable agreement is signed and/or causes effects, and the applicable industry.

In Brazil, payments of interest to non-residents are generally subject to a 15% withholding tax, which may be reduced in the case of an applicable double taxation treaty in effect between Brazil and the country in which the foreign investor is located or increased to 25% in the case of an investor located in a tax haven jurisdiction, according to a list issued by the Brazilian tax authorities.

In Chile, interest payments by a Chilean borrower to an off-shore lender will be subject to a 35% withholding tax; provided that a reduced 4% withholding tax rate will apply to interest paid to foreign banks or financial institutions and also to bond holders, and there may be a reduced rate also if there is an applicable double taxation treaty. In addition, there may be a one-time applicable stamp tax proportional to the principal of the loan or bonds in connection with the execution of the loan agreement or a bond issuance.

In Colombia, interest payments to off-shore lenders are generally subject to a 15% withholding tax rate (even after the tax reform approved in 2018), subject to a number of exceptions. For example, loans provided by lenders located in jurisdictions with which Colombia has a double taxation treaty generally benefit from a lower rate ranging from 0% to 5% depending on the country. However, if a lender is located in a tax haven jurisdiction, the applicable rate is increased to 35%.

In Mexico, interest payments to off-shore lenders are generally subject to: a 4.9% withholding tax rate in the case of interest paid to certain financial institutions that are residents of a country that has entered into a tax treaty with Mexico; a 10% withholding tax rate in the case of interest paid to certain financial institutions that are not residents of a tax treaty partner of Mexico; a 15% withholding tax rate in the case of interest paid to reinsurance companies or interest derived from financial leases; a 21% withholding tax rate in the case of interest paid to sellers of machinery in connection with a sale on credit; a 35% withholding tax rate in the case of interest paid to other lenders; and a 40% withholding tax rate in the case of interest paid to a related party located in a tax haven.

In Peru, interest paid by a local borrower or issuer to off-shore lenders or investors (including foreign companies, investment funds, trusts, financial institutions and other entities, in each case, regardless of whether they are domiciled in a tax haven), will be generally subject to a special rate of 4.99% withholding tax (*Impuesto a la Renta*), provided that certain formalities and requirements are complied with: (i) the lender or investor is not a related party of the local borrower or issuer (if the lender or investor is related to the borrower or issuer, the withholding tax rate is 30%); (ii) the proceeds of the loan or of the issuance of the debt instruments must be used in connection with the corporate or business purpose of the borrower or issuer; and (iii) the interest rate of the loan or debt instrument should not exceed the rate of LIBOR + 7.0% (or any interest paid on a loan or debt instrument in excess of LIBOR + 7.0% will be subject to a 30% withholding tax, except in the case when the borrower is a financial institution). Early prepayment premiums may also be subject to such withholding tax. The deduction by a local borrower or issuer from its annual *Impuesto a la Renta* of the interest paid to off-shore lenders or investors will be subject to a limit calculated on the relationship between the borrower's or issuer's outstanding capital consisting of indebtedness to its net worth (sub-capitalisation rules).

In Peru, in addition to withholding taxes, VAT (*Impuesto General a las Ventas*) may also apply and should be paid by the borrower. Interest on loans granted by foreign banks and other regulated financial entities will not be subject to the Peruvian 18% VAT. If the loans are provided by an off-shore entity that is not a regulated financial entity, including a corporation, the applicable interest payments will be subject to such VAT. In the case of notes and other debt instruments that constitute *valores mobiliarios*, which requires that the issuance include 10 or more instruments, issued by public or private offering by local issuers, the interest paid to foreign investors, including those domiciled in tax havens, will not be subject to VAT. In addition, VAT will not be applicable to interest payable under local instruments that constitute *títulos valores*, in those cases where the instruments have not been placed through a public offering and have been acquired through the Lima Stock Exchange.

Foreign Exchange Controls

Similarly, foreign exchange controls may require specific structuring to comply with local requirements. Foreign exchange controls are various forms of controls imposed by a government on the purchase or sale of foreign currencies by residents or on the purchase or sale of local currency by non-residents.

In Argentina, the foreign exchange controls applicable to cross-border financings have been lifted, allowing disbursements to be made and kept abroad, and conversion from Argentine pesos to US dollars to repay or prepay financings before or after collateral enforcement.

In Brazil, remittances from Brazil to off-shore lenders will need to be registered in the Brazilian Central Bank's system. Further authorisation by the Central Bank may be required for the conversion of such Brazilian currency-denominated amount into foreign currency and its remittance abroad upon the occurrence of certain macroeconomic events (i.e., disequilibrium in the balance of payments), but the Brazilian Central Bank has shown less strict foreign exchange enforcement over time, and there is no known precedent in which Central Bank authorisation has been required in the past decades. Although the repayment of a loan by a Brazilian company is not subject to the financial transactions tax, such tax may become payable on the closing of a foreign exchange transaction for the inflow of funds into Brazil on the granting of the loan, depending on the amortisation term of the principal; under current law such tax is payable at a 6% rate if the term of the loan is fewer than 180 days, and 0% if the term of the loan is equal to or greater than 180 days.

Chile has no applicable currency control issues, but there are certain reporting requirements. The exchange rate under which Chilean pesos would be converted to US dollars, or *vice versa*, may be freely agreed upon between the parties, provided that, in extreme cases, the Central Bank may intervene to regulate such conversion rates.

In Colombia, during 2018 there was a material amendment to exchange control regulations broadening, in essence, the type of approved derivative transactions that local residents are allowed to enter into, together with reducing certain formal requirements. In terms of foreign indebtedness, foreign exchange regulations still require foreign lenders to have a Central Bank code and require notifying the Central Bank of disbursements on a loan with non-Colombian lenders and of remittance of funds abroad to repay a loan

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with non-Colombian lenders. Repayment of loans to foreign lenders also must be made through specified foreign exchange intermediaries or compensation accounts, which are off-shore bank accounts that are registered with the Central Bank and subject to specified reporting obligations, and set-off by the lenders will not be permitted.

In Mexico and Peru, there are no applicable currency controls.

Conclusion

Given the tremendous opportunities for Latin American M&A activity in the coming years and the important role of loan facilities in financing acquisitions, understanding the local laws applicable to acquisition financing transactions in Latin America will continue to be critically important to market participants going forward.

Endnotes

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8. Mergermarket, *Global and Regional M&A Report 2018* (2018).
9. *Id*.
10. A MAC condition in a purchase agreement is typically much narrower than a typical MAC condition in a loan agreement and will specifically exclude any changes from market and economic conditions, for example. Agreeing to use the purchase agreement MAC limits the lenders' ability to refuse to fund their commitments under conditions where they might otherwise not be obligated to fund under a typical loan agreement outside of the acquisition context.
11. The UK and European certain funds requirement notably does not include the equivalent of the MAC condition, given that there is rarely a MAC condition to the obligation to close the purchase under a typical purchase agreement in those markets.

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