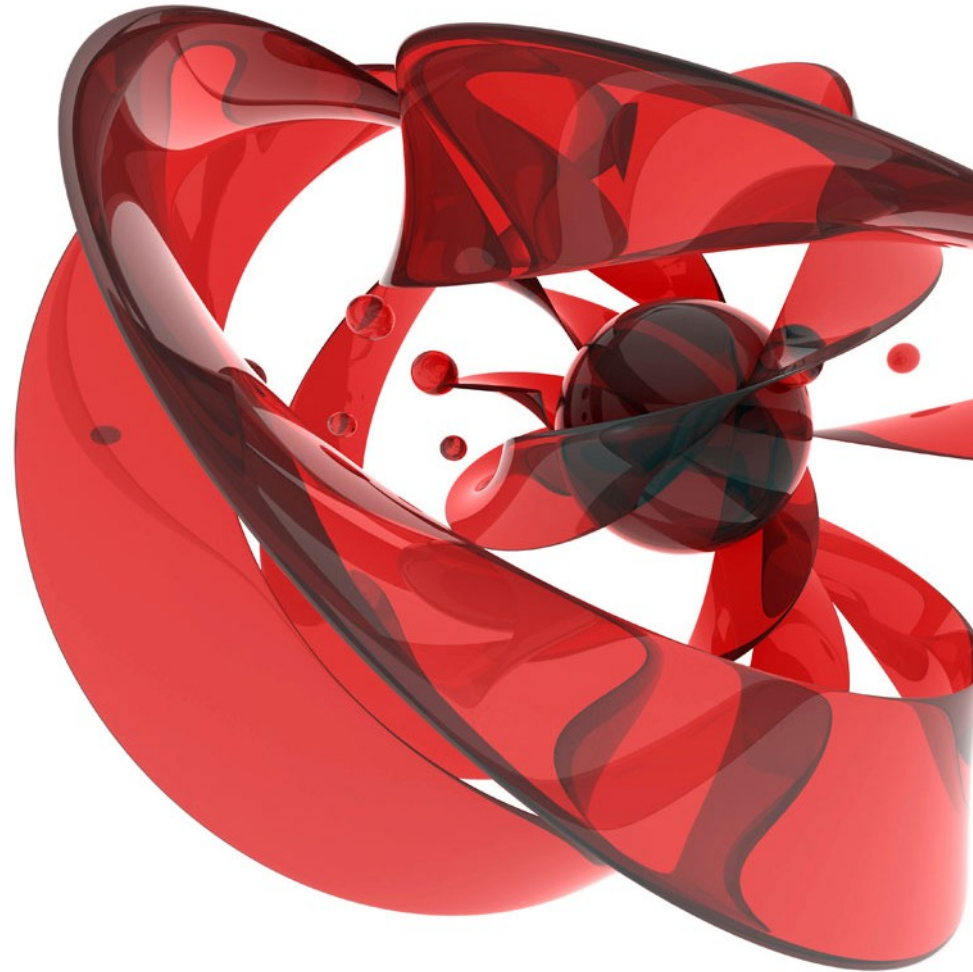


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JUDr. Petra Myšáková, LL.M.

Loan Financing



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Loans

- Section 497 of the Commercial Code:
 - “By a loan agreement the creditor undertakes to provide the debtor, at his request, funds up to a certain amount and the debtor undertakes to repay the provided funds and pay interest“
- plus further 10 sections
- so why the loan agreement sometimes has over 100 pages?

Loan types I.

- bilateral x syndicated
 - number of creditors
- term x revolving
 - according to whether funds repaid may be drawn again
- single-currency x multi-currency
 - currency-conversion mechanisms
- secured x unsecured

Loan types II.

Term

- must be drawn within a certain time from entering into the agreement
- may be repaid in instalments or in one repayment at the end of the term
- amounts repaid may not be redrawn
- mid- and long-term needs (acquisitions, etc.)

Revolving

- may be drawn at any time during the term of the agreement
- amounts repaid may be redrawn
- variable needs (operational financing)

Loan types III. – by purpose

- operation
- acquisition
- project
- real estate

- *asset finance*
- *islamic finance*
- *swingline*
- *evergreen*

Syndicated loans – how and why

- multiple creditors lend to a debtor – under same conditions
- large amounts
- diversification of risk
- possibility to transfer share in loan
- less paperwork for the debtor
- rights and duties of creditors separate, but they provide funds proportionately
- complex provisions on mechanisms of the creditors syndicate

Parties

creditors' side

- arrangers
- facility agent
- security agent

debtors' side

- debtors
 - guarantors
 - security providers
- (collectively the obligors)

Course of transaction

- offer of financing – *term sheet*
- negotiation of loan agreement
- negotiation of further documents – security
- signing
- fulfilment of conditions precedent
 - legal opinion
- drawing
- [subsequent syndication]

Structure of agreement – elements required by law

- undertaking of creditor to provide funds
- undertaking of debtor to repay the funds and pay interest

Structure of agreement - reality

- undertaking of creditors to provide funds
- drawing
- repayment and early repayment
- interest
- margin protection
- representations and warranties
- covenants
- events of default
- mechanics

Why all this?

- the bank does not lend money that lies in its cellar
- it will borrow on the market from other banks and lend to its debtor
- profit = interest-rate margin
- the bank wants to protect its profit

Drawing

- purpose
- conditions precedent
- drawing process

Repayment and early repayment

- repayment
- obligatory early repayment
 - illegality
 - change of control
 - disposal of assets
- voluntary early repayment
- costs of interruption

Interest and interest periods

- fixed x floating
 - PRIBOR, LIBOR, EURIBOR
 - published or determined by reference banks
- interest periods
 - debtor's choice
- margin
 - bank's profit

Margin protection

- obligatory costs
- market disruption
 - if it is problematic to determine the interest rate or the banks cannot obtain funds on the market at the interest rate
- supplementing of withholding tax
- increased costs
- other

Representations and warranties

- status
- validity, approvals, conformity with liabilities
- no event of default
- financial statements
- disputes
- specific representations
- repetition

Covenants

- observing of financial indicators
- information duties (reporting, notices of default)
- general
 - *negative pledge*
 - financial indebtedness
 - asset disposals
 - change in business
 - specific covenants

Events of default

- non-payment
- breach of covenants or untrue representation
- cross default
- bankruptcy
- invalidity of security or of other documents
- material adverse change

- consequence – loan called

Mechanics

- appointment of agent
 - represents creditors
 - administrative role
- appointment of security agent
 - holds security for all creditors
- proportional sharing
- creditor democracy
- fees
- transfers and changes to parties
- governing law and jurisdiction

Security

- security interest / security assignment / security bills of exchange
- surety

Security agent

- establishing security in favour of all creditors is impractical if there are many of them
- creditors wish to freely transfer shares – ideally the security should be in favour of one creditor
- in common-law jurisdictions the security agent holds security for creditors in trust
- parallel debt (loan agreement under English law)
- joint and several creditorship of security agent

Czech law I.

- security usually condition precedent of drawing
- Section 155 of the Civil Code:
 - Subsection 3: By a security interest there may be secured also a future claim or a conditional claim
 - Subsection 4: By a security interest there may be, up to an agreed amount, secured also claims of a certain kind which will arise to the pledgee against the pledgor at a certain time
- pledgor is often different from obligor
- what about additional increase in credit line?

Czech law II.

- financial assistance
- Sections 161e and 161f of the Commercial Code
 - “when the company acquires its own shares, it may not provide any advances and may not provide any loans or credits for the acquisition of its shares, and it may not secure any loans or credits provided for the acquisition of its shares or other obligations related to the acquisition of its shares“
 - will be applied by analogy to securing of obligations related to the acquisition of the shares in the controlling company
- loans are often for several purposes – how to differentiate between them?

Czech law III.

- transactions with related parties – s.r.o. / a.s.
- Section 196a(1 and 2)
 - transactions with personally interconnected parties only with consent of general meeting and at arm's length

Czech law IV.

- Section 196a(3 and 4)
 - “when the company or a person controlled by it acquires assets from the founder, shareholder or person acting with him in concert or from another person stipulated in Subsection 1 or from a person controlled by it or from a person with which it forms a group, for consideration of at least one-tenth of the subscribed registered capital at the acquisition date, or when it transfers to them assets of such value for consideration, the value of such assets shall be determined based on the opinion of a court-appointed expert“
 - provisions of Subsections 1 to 3 relate also to assumption of surety

Czech law V.

- determinateness of legal acts
 - in the event of a market disruption the interest rate shall be determined according to “the creditor’s costs of financing“
 - 29 Odo 1000/2004

Czech law VI.

- transfers between creditors
 - there is no assignment of contract under Czech law
 - assignment of claims and assumption of debt
 - creditors wish to transfer without consent of debtor
 - prior consent?

Czech law VII.

- overindebtedness
 - sum of liabilities exceeds value of assets
 - for this purpose, is surety a liability?
 - overindebtedness is a criminal act
- invalidity of legal acts in insolvency proceedings
 - without adequate consideration
 - giving preferential treatment
 - wilfully curtailing creditors' rights

Questions?

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