HERBERT SMITH FREEHILLS

GUIDE TO LENDING AND TAKING SECURITY IN ASIA PACIFIC

LEGAL GUIDE
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CONTENTS

INTRODUCTION

This is the third edition of the Herbert Smith Freehills "Guide to Lending and Taking Security in Asia Pacific". Readers of our first and second editions and our other Asia guides will know that the Guide is intended to provide business people and lawyers with concise information on the legislative and regulatory issues of lending and taking security across the key jurisdictions in Asia.

The Guide owes much to the co-operation of the leading law firms who have contributed chapters on their respective jurisdictions. We would like to express our gratitude to them for their input.

The latest edition also includes new questions in relation to whether trusts are recognised in each of the respective jurisdictions, how trusts are used in the context of taking security over securities held in a clearing system and the impact of the insolvency of an intermediary (or its equivalent as defined in each of the respective jurisdictions) on the claims of the secured lender in relation to securities held in a clearing system. We hope that these issues will be of interest. Each chapter has also been reviewed and updated to address legislative and procedural developments.

Please note that the information contained in this Guide is not legal advice, and while the content of it is current to 1 March 2014, laws are of course subject to change. We therefore recommend that you obtain formal legal advice before relying on the information contained in this Guide.

Herbert Smith Freehills also publishes several other well-regarded legal guides, including the "Asia Pacific Guide to Dispute Resolution", "Asia Pacific Guide to Financial Services Regulation", "Asia Pacific Guide to Anti-corruption Regulation", "Asia Pacific Employment Law Guide", "Asia Pacific Competition Law Guide", and several others. Visit us at www.herbertsmithfreehills.com/insights/guides/asia-guides for a full list or contact us at asia.publications@hsf.com for further information.

We hope that this Guide will be a useful resource for understanding the fundamentals relating to lending and taking security across this dynamic and important part of the world. As always, we welcome any feedback from readers. Please contact me if you have any suggestions or comments.

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AUSTRALIA

HERBERT SMITH FREEHILLS

LENDING

1. Does a lender require a licence to lend money to a company based in Australia (the "borrower")? Are there any exemptions available?

There are two licences that may be relevant to a lender to an Australian borrower, but these would not usually be required by a non-bank lender if the lender's activities in, or connected with, Australia are confined to lending and the lender is acting for its own account. These licences are:

- an authorisation under the Banking Act 1959 (Cth) (the "**Banking Act**"), which is required in order to carry on any "banking business" in Australia. However, to be carrying on "banking business" in Australia, a lender's borrowing activities as well as its lending activities would need to have a relevant Australian connection. If an entity lending in Australia or to Australian entities was also borrowing in Australia or from Australian entities, the nature of its activities would need to be examined more closely to determine whether it was carrying on "banking business" so as to require an authorisation. Depending on the nature of its activities, even if an exemption applies, it may still be necessary for a lender to register under the Financial Sector (Collection of Data) Act 2001 (Cth) (the "**FSCODA**") (referred to below); and
- an Australian financial services licence under the Corporations Act 2001 (Cth) (the "**Corporations Act**") ("**AFSL**"), which is required in order to carry on a "financial services business" in Australia. A "financial services business" is defined in a broad and complex manner, and is subject to a range of specific exemptions and exclusions. A lender providing a standard loan as principal would usually be covered by an exemption. However, the entry into of related foreign exchange contracts and derivative transactions may require a licence.

Lenders which are, or are related to, banks (and certain other classes of financial institutions) must also be aware of certain restrictions under the Banking Act which will restrict their activities in Australia. Unless the Australian Prudential Regulation Authority ("**APRA**") has granted a lender consent to do so, the lender cannot use certain restricted terms in Australia, including 'bank', 'banker' and 'banking'. Further, the Banking Act also prohibits the establishment and maintenance of representative offices in Australia unless APRA has given consent for that office. For completeness, a lender will need to be registered as a foreign company in Australia, or incorporate a local Australian entity, if it carries on business in Australia.

Lenders may also subscribe to the Code of Banking Practice (2013 edition) of the Australian Bankers Association and the ePayments Code of Conduct, both of which are voluntary. Additional regulations apply in respect of consumer credit activities (including under the National Consumer Credit Protection Act 2009 (Cth) and the National Credit Code established under that Act) and dealings with personal information (including under the Privacy Act 1988 (Cth)), which are beyond the scope of this Guide.

Whether or not it requires a licence, a lender may need to register under the FSCODA. This legislation is primarily concerned with collecting information about the Australian financial sector and requires a corporation to register and provide periodic reports if, among other things, 50% or more of its assets in Australia consist of debts owed to the corporation as a result of transactions entered into in the course of providing finance. A debt owed by an Australian borrower is likely to be regarded as situated in Australia.

2. What are the consequences of making a loan to a borrower in Australia without a licence?

A company that carries on a banking business or financial services business in Australia without the necessary authorisation or AFSL or which fails to register when required under the FSCODA, is guilty of an offence punishable by fines or imprisonment or both. Such persons may also be subject to civil penalties, civil remedies (such as injunctions and compensation orders), and administrative sanctions (such as banning orders).

In addition to the above penalties, the Corporations Act grants rights of rescission (subject to various limitations and exceptions) to persons who contract with persons carrying on a financial services business without a licence and without being covered by an exemption which, when exercised, would result in the relevant contract no longer being binding upon the non-defaulting party. There are corresponding limits on enforcing a contract which may be rescinded.

As noted above, consumer credit activities (and consequences of breach of licensing requirements) are beyond the scope of this Guide.

3. Will a borrower based in Australia have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Yes, unless an exemption is available.

Interest withholding tax ("**IWT**") is generally payable where an Australian resident or an Australian branch of a non-resident makes a payment of interest (or an amount in the nature of interest) to a non-resident or to an offshore branch of a resident, unless an exemption is available. The general rate of IWT is 10% although the rate of IWT may be reduced under an applicable international tax agreement or treaty.

While the legal obligation to pay IWT rests with the lender, the borrower is obliged to withhold the amount of IWT from its interest payment to the lender and to remit that amount to the Australian Taxation Office. The lender can be pursued by the tax authorities if the borrower fails to withhold. As most Australian debt facilities include a gross-up requirement to ensure the lender receives the same amount as it would have received but for the withholding, the borrower in effect bears the burden of the IWT.

There are two main exemptions from IWT that may be available:

- under some of Australia's double tax treaties, payments to certain eligible financial institutions (including export credit agencies) are exempted from IWT. That exemption is currently included in Australia's double tax treaties with the United Kingdom, the United States of America, New Zealand, Japan, France, Finland, Norway and South Africa.
- under section 128F of the Income Tax Assessment Act 1936 (Cth), payments of interest on debentures and certain other debt interests (including certain syndicated loans and certain types of shares exhibiting debt-like characteristics) may be exempted from IWT if the issue of the debenture or debt interest satisfies the "public offer test". There are a number of ways in which the issue of a debenture or debt interest can satisfy the public offer test, including by being offered for issue to at least ten eligible institutional investors or lenders, who must be unrelated. In addition, a syndicated loan must satisfy a number of other conditions, including that at least A$100m (or its equivalent in another currency) is available for drawing at the time of the first drawdown.

Certain sovereign lenders may also benefit from an exemption from IWT.

4. Is there any limit to the level of interest that can be charged on loans made in Australia?

No. However:

- an "unfair loan" is voidable in the winding up of an Australian company. A loan will be "unfair" if, among other things, interest on the loan is "extortionate" at the time the loan was made or has since become extortionate, having regard to the risk of the loan and other relevant matters;
- some legislations that apply in transactions to which natural persons are parties allow the terms of an "unjust" or "unfair" agreement to be reviewed by the courts: in this context, what is "unfair" or "unjust" is not defined;
- if the terms of the loan are in a standard form contract and the loan is made to an individual wholly or predominantly for personal, domestic or household use or consumption, the unfair terms provisions of the Australian Securities and Investments Commission Act 2001 (Cth) ("**ASIC Act**") will apply to the terms of such loan. The effect of this is that a term of the loan will be unfair if it causes a significant imbalance in the parties' rights and obligations arising under the loan, the term is not necessary to protect the legitimate interests of the loan provider and it would cause detriment to the recipient of the loan. However, the unfair terms provisions do not apply to a term which "sets the upfront price payable under the contract" and according to the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010 (Cth) (which amended the relevant sections of the ASIC Act), in the case of a credit contract, this will include both the principal repayable and the interest payable under the contract. Therefore, provided the interest rate (and if the rate is variable, the manner in which the rate can be varied) is clearly disclosed at the time that the contract is entered into, the level of the rate should not be capable of being challenged on the basis that it is "unfair"; and
- very high interest rates may support arguments based on unconscionability and similar common law and equitable doctrines. A finding that the relevant lender had acted unconscionably in connection with the loan, or that undue influence had been exerted upon the borrower, could have a wide range of consequences, including the setting aside of all or part of the transaction and any security given in connection with the relevant loan.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. It is possible to subordinate debt in Australia, such that one lender ("**junior lender**") may agree that a second lender ("**senior lender**") be preferred over the junior lender for repayment of a debt, provided that the subordination does not disadvantage any other creditor of the debtor that is not a party to the subordination arrangements. There are two principal methods used to document such an arrangement, which will usually be documented in a tripartite agreement between the senior lender, the junior lender and the debtor:

- contingent debt method: whereby the junior lender's right to have its debt repaid is contingent upon the senior lender's debt having first been repaid (to a specified extent); or
- turnover agreement/subordination trust method(s): whereby the junior lender agrees to pay the senior lender and/or to hold on trust for the senior lender, any amounts paid by the debtor to the junior lender, until the senior lender has been repaid (to a specified extent). Senior lenders generally prefer for the junior lenders to agree to hold such amounts on trust for the senior lender (rather than to merely pay the senior lender) to protect these funds against the insolvency of the junior lender.

The second method may give rise to a security interest over the junior lender's claim in favour of the senior lender for the purpose of the Personal Property Securities Act (the "**PPSA**") and require registration on the Personal Property Securities Register (the "**PPSR**").

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Australia or a guarantee from an entity incorporated in Australia?

Generally, no. Foreign investment regulations under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (the "**FATA**") can technically apply to require approval for a person to take a security over shares, assets or an interest in land, but an exemption is generally available for persons whose ordinary business includes the lending of money if the interest is held solely by way of security

for the purposes of a money-lending agreement (the "**Money-Lending Exemption**").

However, in respect of any "direct investment" in Australia by a "foreign government investor", under the Australian Government's "Foreign Investment Policy" (the "**Policy**") approval of the Foreign Investment Review Board ("**FIRB**") is required. Approval may be required under the Policy (although not legally binding) notwithstanding that no approval is required under the FATA because the Money-Lending Exemption applies. Relevantly:

- an entity will be a "foreign government investor" if a foreign government, its agencies or related entities have an interest of 15% or more in that entity (or multiple foreign governments, their agencies or related entities have an aggregate interest of 40% or more) or foreign governments, their agencies or related entities, and any associates otherwise control that entity. This will apply to a number of banks including those which have been nationalised or received bailouts during or after the global financial crisis;
- any investment of an interest of 10% or more is considered to be a direct investment, in addition to other investments which are deemed to be direct investments; and
- the size of the investment is immaterial.

Previously, any enforcement of a security interest over an Australian business' assets or shares by a foreign government investor was taken to be a direct investment and required approval under the Policy. As it could be impractical to obtain approval at the time enforcement of security was being contemplated (and also imprudent in case approval is refused), it was common for lenders affected by the Policy to seek approval prior to the loan being made and securities being granted.

Following recent changes to the Policy:

- in the case of a lender which is a foreign government investor which is regulated by APRA as an authorised deposit taking institution, it is not required to give notice or seek approval under the Policy to take security over an asset as part of a lending agreement or to enforce that security and sell that asset. However, if the security is enforced and the lender gains control of the asset and retains it for more than 12 months, then approval is required under the Policy; and
- in the case of other lenders which are foreign government investors, the Policy provides that it will be a direct investment if the lender retains an interest of 10% or more following the enforcement of a security interest, in which case approval would be required.

Whilst on their face these changes provide some relief for the foreign government related lenders which have opened branches or otherwise operate in Australia, at the time of writing it is yet to be seen whether the limits as to time and percentage of holdings by the lender following enforcement will provide sufficient comfort to the relevant foreign lenders or whether they will still seek upfront approval to mitigate any risk of being prevented from enforcing the security in the manner they may wish, given that the circumstances surrounding an enforcement (including what equity share the lender may ultimately hold following an enforcement, which may include a debt-for-equity swap) is relatively uncertain at the time of providing funding.

Applications made under the Policy (but not required under the FATA) are not subject to time limits, although the Policy states that the aim is to consider these proposals within 30 days. Strictly speaking, FIRB will provide a notification of no objection rather than approval.

In a case where the security which benefits an affected lender is granted in favour of a security trustee, FIRB will look past the identity of a security trustee to determine the identity of the beneficiaries of the security trust. Accordingly, it is common for secured beneficiaries who are related entities of a foreign government for the purposes of the Policy to apply for FIRB consent notwithstanding the fact that an Australian security trustee holds the security interest.

There is no explanation in the Policy of the consequences of failing to seek FIRB approval for applications required to be made under the Policy but not required under the FATA. In a strict legal sense, a breach of the Policy does not amount to a breach of the FATA; however, FIRB is very concerned to ensure that its Policy is complied with and therefore it is important to a foreign government investor's ongoing relationship with the Australian Government to comply with the Policy.

Governmental approvals are also required in order to take security over certain types of assets subject to specific regulation, such as mining and resource interests.

7. Does the taking of security in Australia result in a lender being liable to tax in Australia?

The mere taking of security or a guarantee in Australia does not generally result in a lender being liable to income tax in Australia (if that lender would not otherwise be liable to tax).

However, for a lender that is tax resident in a jurisdiction with which Australia does not have a comprehensive double tax treaty, security over assets in Australia would be one element to consider in determining whether interest on the loan had an Australian source and was therefore liable to Australian income tax. This is generally not relevant for lenders that are tax resident in a jurisdiction with which Australia has a comprehensive double tax treaty or where the borrower is Australian.

8. Can a security interest be taken in Australia over the following assets?

The grant, validity and priority of security over most classes of property, other than land, are subject to the PPSA and its related legislation. The PPSA came into effect in early 2012 and represents a complex and far-reaching law reform. It contains many significant areas of complexity and uncertainty which are not touched on in this commentary, which is intended as a general discussion only. Commercial parties should therefore seek specific legal advice on the application of the PPSA for their transactions.

Refer to our answers in question 15 for the applicable registration regime for each of the asset types referred to below.

8.1 Land

Yes. Security over land is typically taken by way of a registered mortgage over the specific piece of land. Land may generally also be charged under a general charge (for example over all lands, or all property, which the grantor owns or may own in the future) but the lack of a statutory registration regime to protect the priority of

such general charges in relation to land means that they are not generally relied on where there is specific land to which high security value is being attributed.

8.2 Shares in an Australian company

Yes. Security is usually taken by way of a specific security agreement in the form of an equitable mortgage or fixed charge. Taking a legal mortgage is not common in Australia due to consequences of registering the shares in the name of the mortgagee (for example, potential tax consequences). Prior to the PPSA, it was typical to take security over specific shares by way of an equitable mortgage, but under the PPSA, there is little difference between these two forms of security.

Under a specific security agreement in relation to shares, the grantor typically remains entitled to dividends and voting rights until the secured party assumes control following default. The security agreement is generally drafted so that the security also attaches to rights issues, bonus shares and other rights attaching to the secured shares. It is common practice for the secured party to require an undated share transfer form executed by the grantor in blank and share certificates, if the shares are certificated. This is to enable the secured party to transfer and otherwise deal with the secured shares in the event of a default and may allow the secured party to perfect its security interest by control for the purposes of the PPSA.

Shares listed on the Australian Securities Exchange ("**ASX**") are generally uncertificated and registered in the ASX's clearing house electronic sub-register system ("**CHESS**") through a sponsoring broker or non-broker participant ("**Intermediary**") in CHESS with which the shareholder enters into a sponsorship agreement, although the shareholder remains the legal owner of the shares. Where an entity taking security over shares registered in CHESS is a participant in CHESS, it may become the Intermediary in respect of the shareholding thereby giving it practical control over the transfer of shares (although this may not of itself amount to 'control' for PPSA purposes). Alternatively, the secured party may enter into a tripartite sponsorship agreement with the security provider and its Intermediary for the purpose of obtaining such control.

Security interests in shares are generally subject to the PPSA and must be perfected under the PPSA in order to protect their priority and validity as against third parties and their validity in an insolvency of the grantor. Perfection can be by registration, or by satisfying certain prescribed tests of possession or control. Such security interests are usually perfected by registration even if also perfected by possession or control.

The appropriate form of security and steps to be taken to perfect security over shares can be affected by a number of highly technical (and often counter-intuitive) distinctions under the PPSA between "investment instruments" and "intermediated securities".

8.3 Bank accounts

Yes. Traditionally, this has been subject to there being no prohibition on assignment or security under the terms of the account; however under the PPSA, such restrictions will not necessarily render a purported security ineffective.

Security over bank accounts is usually taken by way of a charge, although bank accounts could also be the subject of a mortgage. Prior to the commencement of the PPSA, there was some legal uncertainty about whether it was possible for a lender to take a mortgage or charge over an account held with it, but the PPSA has removed this uncertainty. A contractual right of set-off or flawed deposit provision may also be used where the relevant bank account is kept with the lender; such arrangements can also be treated as security interests for the PPSA and so require perfection.

Security interests in bank accounts are generally subject to the PPSA and must be perfected under the PPSA in order to protect their priority and validity as against third parties and their validity in an insolvency of the grantor. Perfection may be by registration; where the bank account is an account with an Australian bank and the bank itself is the secured party, the security interest will generally be perfected by control but would usually also be perfected by a registration claiming such control in order to protect the security against certain classes of preferred creditors (principally employee claims) in an insolvency.

8.4 Receivables (rights under contracts)

Yes. Traditionally this has been subject to there being no prohibition on assignment or security under the terms of the receivable; however, under the PPSA, such restrictions will not necessarily render a purported security ineffective.

Traditionally, security over receivables was usually taken by way of a charge, although receivables could also be the subject of a mortgage or transfer by way of security. Prior to the commencement of the PPSA, there was some legal uncertainty about whether it was possible for a lender to take a mortgage or charge over with a debt owed by it, but the PPSA has removed this uncertainty. Under the PPSA, there are potentially advantages in taking a transfer rather than charge over receivables and it is becoming common for security agreements to express security over receivables in this way.

Security interests in receivables are generally subject to the PPSA and must be perfected under the PPSA in order to protect their priority and validity as against third parties and their validity in an insolvency of the grantor. Perfection can generally only be by registration; to obtain priority over certain preferred creditors in an insolvency of the grantor, it may also be necessary for the secured party to satisfy certain additional tests, including that the registration of the security interest indicates that the secured party has control of the receivables.

For most purposes of the PPSA, absolute assignments of receivables are treated as grants of security interests and also need to satisfy these requirements.

8.5 Insurance

Yes (unless prohibited by its terms).

Security over rights under an insurance contract is usually by way of fixed charge, with the secured party being specified in the policy as loss payee and its interest noted on the policy.

Security interests in insurance contracts are generally subject to the PPSA and must be perfected under PPSA in order to protect

their priority and validity as against third parties and their validity in an insolvency of the grantor. Perfection can generally only be by registration.

8.6 Floating charge over all assets

Yes, although the effectiveness of a floating charge in relation to any particular asset will be subject to the rules relating to the grant of effective security over that asset.

A floating charge will usually affect personal property and therefore need to be perfected under the PPSA in order to protect its priority and validity against third parties and their validity in an insolvency of the grantor. Perfection is effected by registration, but the validity of such perfection must be assessed in relation to each asset that is or becomes subject to the security. Difficulties can therefore arise in relation to assets that are required to be registered by serial number as the relevant serial number may be unknown at the time of the grant of the security interest (see section 15 below).

A floating charge is treated as a circulating security interest for the purposes of the Corporations Act, resulting in it being subject to certain preferred claims (principally employee claims) in an insolvency. For this reason, it is rare for a floating charge to be granted over all assets – it is more usual for a general security agreement to be granted which is expressed to operate as a fixed charge or transfer in relation to most assets, and a floating charge only in relation to certain limited classes of assets which the grantor needs to deal with in the ordinary course of its business.

9. Are trusts recognised in Australia? How is a trust used in the context of taking security?

9.1 Are trusts recognised in Australia?

Yes, trusts are recognised in Australia.

In financing arrangements, it is common for a security trustee to hold security on trust for other finance parties. The relationship between the parties would typically be governed by a security trust deed, setting out the security trustee's powers and obligations, and consent requirements where the security trustee is taking certain actions on behalf of the beneficiaries. The security trust deed would usually also allow for the beneficiaries to change from time to time, so that the security would not need to be transferred or amended in such instances.

9.2 How is a trust used in the context of taking security over securities held in a clearing system?

In Australia, it is not usually the case that an Intermediary would hold securities for which it is the sponsoring participant in CHESS on trust for the security holder. The security holder generally remains the legal owner of the securities.

9.3 Taking security over trust assets

A trustee may grant security over trust assets only where authorised to do so by the terms of its trust. If a trustee grants security without such authority, the beneficiaries of the trust will generally be entitled to assert their beneficial interest in the trust assets in priority to the improperly granted security.

Land titles registers in Australia generally do not record the existence of a trust over land. Accordingly, land that is trust property will generally be registered in the name of the trustee without reference to the trust; similarly, any registered mortgage would be registered against the name of the trustee as registered proprietor of the land without reference to the trust. Registration of security interests in other assets granted by a trustee may need to be registered under the PPSA against the trustee as grantor, or against the trust as grantor, depending on whether certain prescribed identifying details are available in respect of the trust.

Subject to the above comments, the grant of security over assets subject to a trust is treated in a similar manner to the grant of security over the same assets when not subject to a trust.

10. Can a company incorporated in Australia (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Yes, unless there is a particular restriction in the constitution of the guarantor, the guarantor can give a guarantee for the debt of a borrower whether the borrower is incorporated in Australia or in a different country. There are, however, certain laws in Australia that may affect the enforceability of the guarantee (such as laws relating to creditors' rights that require approval from shareholders or that require the guarantee to benefit the guarantor).

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

This will depend to an extent on the type of proceedings followed. This may be a liquidation or an administration followed by either a winding up or a deed of company arrangement (the "**DOCA**").

Generally, the secured assets do not form part of the pool of assets available to satisfy the claims of the general creditors of the borrower in a winding up of the borrower. However, this depends on any PPSA security (which will include most security) having been perfected (most securities over assets, other than land, will be void as against a liquidator or administrator unless perfected under the PPSA) and is subject to certain claims that enjoy a statutory priority over some types of security.

Administration is a debtor's moratorium regime. Securities cannot be enforced during an administration except in limited circumstances (of which the most common is where the company has granted security over the whole or substantially the whole of its property to another entity, and that entity enforces its security in relation to all property within a short decision period after the appointment of the administrator). Administration is a short-term, transitional arrangement under which the creditors will make a decision to either place the company into a winding up or enter into a DOCA. A DOCA is an alternative to liquidation and usually involves the compromise of the rights of certain (usually unsecured) creditors against the debtor. A DOCA will not bind a secured creditor unless the secured creditor consents to its terms by voting in favour of it.

Under the PPSA, a perfected security interest in a circulating asset will, on insolvency, rank behind preferential statutory creditors such as employee entitlements and costs of an administrator which are incurred before the secured party enforces its security interest. Circulating assets are those the subject of a security interest where the secured party has given express or implied authority for transfer of the assets in the ordinary course of the grantor's business, and are typically those types of assets that

would usually have been subject to a 'floating charge' prior to the introduction of the PPSA. Circulating assets always include certain specified assets (as discussed in question 15 below) unless:

- the secured party takes 'control' of the circulating asset (this is a separate notion to 'perfection by control'); and
- the secured party registers its security interest in the circulating asset and designates in that registration that it has 'control' of that circulating asset.

11. (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured party in relation to securities held in a clearing system?

If an Intermediary becomes insolvent, then it is a non-compliant participant and under the ASX Settlement Operating Rules, the ASX has the power to impose restrictions on, suspend or terminate the participation of that Intermediary in CHESS.

Upon an Intermediary's participation being suspended, the ASX may, either at the request of the shareholder or in its own discretion:

- convert the shareholding controlled by the Intermediary to an "Issuer Sponsored Holding" (where the shares are registered on the sub-register maintained by the issuer of the shares which operates outside the CHESS clearing system); or
- change the sponsoring participant for the shares controlled by the Intermediary.

If the Intermediary's participation is terminated, the ASX may make such arrangements with the Intermediary or its liquidator, receiver, administrator or trustee (as applicable) as may be necessary or desirable to convert or transfer the relevant shareholding to an Issuer Sponsored Holding or to remove it from the control of the Intermediary. In doing so, ASX and the Intermediary must, so far as possible, take into account the wishes of the shareholder.

Commonly, under a sponsorship agreement between an Intermediary, shareholder/grantor and secured party, the agreement and sponsorship arrangements may either terminate or be terminable by notice upon the Intermediary's insolvency, or the shareholder/grantor would have the right to transfer the shareholding to another sponsoring participant. Generally, the secured party would require the shareholder/grantor to procure that a replacement sponsorship agreement is entered into in a short period of time.

If a shareholder were to suffer loss due to the insolvency of its Intermediary, it may be able to make a claim on the National Guarantee Fund. Claims may be made in respect of the loss of property held by the Intermediary on trust or on behalf of the shareholder. If the property is money the claim will be paid as money. If the property is not money, the claim will be paid in the form of the same type of property (eg equivalent shares in the relevant issuer) unless that property is unobtainable, in which case the claim will be paid as money.

Although a secured party could not make a claim on the National Guarantee Fund, the proceeds of any such claim would ordinarily be subject to the security granted by the shareholder to the secured party.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

Yes, subject to the comments above regarding the moratorium on enforcement of security during an administration and to FIRB approval for foreign controlled entities, in general terms, a lender can enforce its security or claim under the guarantee freely after default by the borrower.

A guarantee can be freely enforced unless the guarantor is the subject of a liquidation or administration or the guarantor has been provided by a director of the borrower (or relative of a director) and the borrower is subject to an administration.

In the case of a security interest, although it depends on the nature and terms of the security, the typical terms would customarily confer such a power and (subject to contractually agreed grace periods and any statutory requirement to give notice of enforcement) such a power would generally be enforceable. Where the security is over the assets of a business, the usual mode of enforcement is by the appointment of a receiver with powers to manage and sell the business and assets.

A lender can make a demand for payment under a guarantee, subject to complying with any particular requirements in the contract of guarantee as to the form or timing of the demand. If the guarantor fails to pay, then:

- if the guarantor is an Australian company, the lender can serve a statutory demand on the guarantor giving the guarantor 21 days to pay the amount demanded. If the amount demanded is not paid or if the demand is not remedied within the 21-day period, then the lender can apply to the court to wind up the guarantor; and
- alternatively, the lender may issue court proceedings against the guarantor. The amount of time involved in pursuing such an action varies widely depending upon the circumstances.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

No, unless the security or guarantee was invalid or was voidable, or the lender's enforcement action did not conform with the terms of the security or the guarantee.

However:

- an administrator can generally prevent the enforcement of a security unless the security is over the whole or substantially the whole of the security provider's property – please refer to the commentary in question 11 regarding the administration regime;
- a creditor holding a higher ranking security can usually enforce its security in priority to any lower ranking security; and
- an otherwise valid security or guarantee granted by an Australian company may be void or voidable in certain circumstances.

The main circumstances in which an otherwise valid security or guarantee may be void or voidable are as follows:

- most securities over assets, other than land, will be void as against a liquidator or administrator unless perfected under the PPSA within the specified time frame;
- a court may, on the application of a liquidator, make orders relating to certain "voidable transactions" in the winding up of a company, including orders that the transaction is void. The following types of transactions are or may be voidable:
  - insolvent transactions, being transactions that either cause the company to become insolvent or occur when the company is insolvent, and are either an unfair preference to a creditor (ie they have the effect of placing the creditor in a better position than other creditors) or an uncommercial transaction (being one that a reasonable person would not have entered into in the circumstances);
  - unfair loans to a company, being loans where the charges or interest paid in relation to the loan were extortionate at the time the loan was made or have since become extortionate; and
  - unreasonable director-related transactions, being a payment, disposition or certain other transactions for the benefit of a director of the company or an associate of a director, where a reasonable person in the company's circumstances would not have entered into the transaction.
- a security interest over circulating assets created by a company within six months before either the commencement of the winding up of the company or the date on which the application to wind up the company was filed will be invalid against the liquidator, unless it can be shown that the company was solvent immediately after the creation of the security interest and except to the extent that the security interest secures an advance to or other liability incurred by the grantor after the date of, and in consideration for, the security interest; and
- the security provider or guarantor may be entitled to avoid the transaction where the lender knew or suspected at the time of the transaction that the directors of the security provider or guarantor were not properly performing their duty to the company in providing the security or guarantee (eg were not acting in the best interests of the security provider or guarantor).

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving a guarantee to secure the loan used by the borrower to acquire such company?

Yes. Part 2J.3 of the Corporations Act precludes a company from providing financial assistance to a person who acquires shares in the company or any of its holding companies except in limited circumstances.

Financial assistance is not defined but will include the giving of a guarantee or granting of security by a company to support debt used to acquire shares in that company or its direct or indirect holding company. A company may financially assist a person to acquire shares in the company or any direct or indirect holding company only if:

- the assistance does not materially prejudice the interests of the company, its shareholders or the company's ability to pay its creditors;
- the company obtains shareholder approval in accordance with a prescribed whitewash procedure; or
- the assistance is exempted under section 260C of the Corporations Act.

Lenders are often only prepared to rely on the whitewash procedure. The whitewash procedure includes a 14-day waiting period following lodgement of notice with the Australian Securities and Investments Commission ("**ASIC**") and a requirement that approval also be obtained from the shareholders of any Australian listed holding company or the ultimate Australian-incorporated holding company of the company giving the assistance. Assuming that shareholders' consent to a short notice period can be obtained (which is usually the case where the relevant companies are not listed), the process takes a minimum of 15 days from the date of the lodgement of the first notice with ASIC.

Contravention of the prohibition does not affect the validity of the financial assistance or any related contract or transaction and the company is not guilty of an offence. However, persons (which could include a lender) involved in a breach of the prohibition may be liable for fines of up to A$200,000 and/or (for individuals whose involvement is dishonest) imprisonment for up to five years. Civil penalties may also be imposed requiring persons involved in a breach to compensate the company concerned for any loss it suffers as a result of the breach.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Security granted over land will generally require registration on the land titles register in the state or territory in which the land is situated in order to protect its validity and priority as against third parties. However, a failure to register will not generally affect the validity of the security in an insolvency of the grantor.

Security granted over most classes of property other than land is required to be perfected under the PPSA in order to protect its validity and priority as against third parties and its validity in an insolvency of the grantor. Except for certain types of property in relation to which security may be perfected through prescribed methods of possession or control, perfection must generally be by registration on the PPSR. There is no prescribed time period for the registration, however (subject to certain exceptions):

- priority will generally be determined by reference to the order in which security interests have been perfected, so a delay in registration can adversely affect the secured party's priority; and
- if a security interest is not registered within 20 business days after the security agreement which provides for it is entered into, it will generally be void in an insolvency which occurs less than 6 months after registration.

It should be noted that registration on the PPSR provides no assurance of priority – there may be prior security interests perfected through some means other than registration (eg by possession or control or under temporary perfection rules), whilst it is possible that later security interests may also obtain priority by being perfected by control or because they benefit from special priority rules relating to particular kinds of security interest such as purchase money security interests (or "**PMSIs**").

Security granted over certain other specific classes of assets, such as minerals and resource interests, requires the consent of or registration with (or both) certain other government bodies.

Additional commentary is included below in relation to certain classes of assets:

15.1 Land

In most states and territories, most land ownership is governed by the Torrens title system, whereby the relevant land titles office maintains a register of land holdings which guarantees an indefeasible title to those recorded on the register. Some land remains under the old title system tunder which the land titles office merely operates as a register of prior dealings affecting the land; such prior dealings must be searched to establish a good chain of title.

Interests in Torrens title land may be granted by the registered proprietor of that land and registered with the appropriate government body in the relevant state or territory in a form which is a registrable instrument under the Torrens title legislation of that state of territory. The usual registrable form of security over Torrens title land is the registered mortgage, which operates when registered as a statutory charge.

Registration is not mandatory and a failure to register will not affect the validity of the security as against the grantor. However, registered interests generally have priority over both unregistered interests and subsequently registered interests, so failure to register may lead to postponement and potentially extinguishment.

15.2 Shares in an Australian company

Under the PPSA, security interests in shares in a company (classified as either "investment instruments" or "intermediated securities") can be perfected through certain prescribed methods of possession or control, but it is usually also advisable to register the security interest on the PPSR so that it is perfected in relation to the proceeds of the share (for example, distributions).

15.3 Bank Accounts

A security interest taken by an Australian bank over an account held with it is generally perfected automatically by control and enjoys super-priority over other security interests in the account. Security interests in bank accounts may also be perfected by registration on the PPSR.

Whether a security interest is perfected by control as contemplated above, or by a registration on the PPSR, it will generally be deemed to be a 'circulating security interest' and so rank after certain preferred claims (principally employee claims) in an insolvency unless certain additional steps are taken. These steps include effecting a registration on the PPSR specifying that the secured party 'controls' the relevant account.

15.4 Receivables (rights under contracts)

Security interests in receivables must generally be perfected by way of registration. It is important that the registration also addresses the proceeds of the receivables in order for the security interest to be perfected in respect of those proceeds.

Security interests in receivables are generally classified as "circulating security interests" and so subject to the claims of preferred creditors in an insolvency of the grantor unless certain additional steps are taken. These additional steps may require effecting a registration which specifies that the secured party "controls" the receivables.

15.5 Insurance

Rights under insurances policies would ordinarily be perfected by registration on the PPSR. Payments of proceeds under the insurance policies may be classified as circulating assets depending on how they are paid.

15.6 Tangible assets such as motor vehicles, ships, aircraft etc.

Security interests over tangible assets must generally be perfected by registration on the PPSR. The registration should also address the proceeds of the relevant tangible asset(s).

Security interests in certain classes of tangible assets are either permitted or required to be registered by serial number.

Where a tangible asset is permitted but not required to be registered by serial number, registration against the grantor is sufficient to perfect the security interest. In these cases, failure to register against the serial number of the asset will not generally affect the validity of the security interest in an insolvency of the grantor, or the priority of the security interest as against other security interests, but will mean that the security interest is generally not protected against acquirers of other types of interests in the asset (eg purchasers). The principal tangible asset classes that fall into this category are motor vehicles and watercraft.

Where a tangible asset is required to be registered by serial number, registration against the grantor alone is not sufficient to perfect the security interest. Assets in this category include (i) an aircraft engine; (ii) an airframe; (iii) a helicopter; and (iv) a small aircraft. Difficulties arise in taking effective security over such assets under general security agreements or general charges as the serial numbers may not be known at the time the security is entered into and so an effective registration is not possible. A further difficulty is that the required details may not become known until more than 20 business days after the security is granted, meaning the security will generally be at risk for a further 6 months after a serial number registration is effected. For this reason, a further specific security may be taken and perfected at the time assets of this kind are acquired notwithstanding that the secured party may already hold a general security over all of the grantor's assets.

In the case of security interests affecting aircraft, informal registration may also be advisable on the Register of Statutory Liens (established under the Air Services Act 1995 (Cth)) which is maintained by Airservices Australia. We also note that the Capetown Convention will alter registration requirements for security interests affecting aircraft, although this has not yet commenced to operate in Australia.

15.7 Intellectual Property

Prior to the commencement of the PPSA, security interests in relation to trade marks, patents and designs were recorded on the Australian Trade Marks Register, Patents Register and Designs Register respectively (together, "**IP Registers**"). Security against other types of intellectual property (such as copyright) could only be recorded when the grantor was a corporation and the security interest was registered as a charge under the Corporations Act.

Following the commencement of the PPSA, the PPSR is now the only register in Australia on which security interests in intellectual

property and intellectual property licences ("**IP Rights**") can be recorded to ensure perfection of such security interests, although a secured party may still wish to register its interest on the IP Registers (as applicable) for the purpose of receiving certain notifications.

Certain IP Rights (in large part, those which were previously registered on the IP Registers) are serial numbered assets for the purposes of the PPSA, although in most circumstances, the secured party can elect whether or not to specify the relevant serial number when registering the security interest (ie they are permitted rather than required to be registered by serial number). See the discussion above in relation to the significance of serial number registration.

15.8 Stock

Security interests in inventory are generally deemed to be circulating security interests (and so rank after the claims of preferred creditors such as employees in an insolvency of the grantor) unless certain additional steps are taken. The additional steps include effecting a registration on the PPSR recording that the secured party has control of the inventory.

15.9 PMSIs

Certain security interests may be classified as PMSIs and benefit from certain super-priority rules. In order to obtain such super-priority, additional registration requirements must be complied with. These include the security interest be registered within certain time limits and that be identified by the registration as a PMSI.

15.10 Mining and Petroleum Interests

Rights and titles to petroleum and mineral resources are typically granted by the Crown in rights of a state or territory or of the Commonwealth. The taking of security over such rights and titles generally requires both registration and Ministerial consent. In certain jurisdictions, an instrument which purports to provide security over a mining or petroleum interest without Ministerial consent may be void in its entirety.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Yes.

Under current law, mortgage duty is imposed on an instrument creating security over property located in New South Wales (but not, under current law, any other Australian state or territory). The rate of mortgage duty is 0.4% of the amount of advances secured by the security, rather than the value of the assets over which security is taken.

Generally speaking, where there are secured assets in New South Wales as well as outside New South Wales, the duty payable reduces proportionately and is calculated as: 0.4% x NSW proportion x amount of advances secured, where the "NSW proportion" is the value of New South Wales secured property expressed as a proportion of the total value of all secured property, less a credit for NSW duty previously paid.

A stamp duty liability may arise despite neither the borrower nor the lender being a resident in Australia.

Unsecured guarantees are not dutiable and therefore do not give rise to any stamp duty.

If any of the loan or security documents contain a declaration of trust, stamp duty will also be imposed on that declaration of trust. The duty is generally a fixed amount (no more than A$500) provided the property over which the trust is declared is only of nominal value or is not dutiable property. If a trust is declared over valuable dutiable property, *ad valorem* rates of duty will apply.

Registration of security interests does incur fees, which vary according to the relevant register and (in the case of the PPSR) length of registration.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes, it is possible for a person to grant a lender security over an asset which has already had security granted over it to another person. The security interest would be documented in the same way as any other security over the relevant asset.

Where security has been given over the same asset to two or more lenders, the rules governing the priority of these lenders with respect to the asset will depend on the nature of the asset. For an asset subject to a security interest under the PPSA, there is a statutory regime that, in the absence of any contractual agreement to the contrary, would determine the priority of the lenders to the asset on the insolvency of the person granting the security interests. The relevant parties can, however, agree to vary their respective priority to such an asset. The usual means of documenting such an agreement is by a priority deed, which would generally set out the respective priority of the lenders to the proceeds of the asset on enforcement and include various agreements between the lenders intended to ensure orderly enforcement of the respective security interests.

Absent agreement between the respective secured parties, the rules that apply at law to determine the respective priorities of competing secured parties are complex and beyond the scope of this guide.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

Other than the general restrictions noted in paragraph 19A below, there are no specific restrictions on the acquisition of shares in companies in the oil or gas industries or on the acquisition of the general equipment assets of an oil or gas company. However:

- operational or construction licences may be required to operate the business and these may not be transferable or transferable without regulatory consent;
- the relevant legislation for the different jurisdictions requires transfers and "dealings" in the oil and gas interests themselves to be approved and registered by the Minister or other relevant authority. A "dealing" includes the creation of any legal or equitable interest in the title and extends to arrangements that establish contractual rights such as royalties and production entitlements and to any agreements;
- the acquisition of interests in key infrastructure assets such as pipelines, together with the associated licences, may also require the consent of the Minister or other relevant authority; and

- legislation requires companies involved in the exploration, production, transmission, distribution and sale of gas to hold licences. These licences generally require consent of the appropriate regulator before they can be transferred. Some jurisdictions place restrictions on the cross-ownership of interests within the gas industry. Legislation in some cases prohibits a gas company from having a "controlling interest" or "substantial interest" in one or more other gas companies, with various exceptions.

18.2 Electricity

Other than the general restrictions noted in paragraph 19A below, there are no specific restrictions on the acquisition of shares in companies in the electricity industry.

However, all Australian states and territories have passed legislation that requires companies involved in the generation, transmission, distribution and sale of electricity to hold a licence. Each jurisdiction has a regulator that is responsible for the issue of these licences.

Legislation in some jurisdictions within Australia places restrictions on the cross-ownership of interests within the electricity industry. Legislation in some cases prohibits a licensee from having a "controlling interest" in one or more other licensees or from having a "substantial interest" in two or more licensees, with various exceptions.

These licences generally require the consent of the appropriate regulator before they can be transferred. Further, in some states, licences may be issued subject to conditions. The consequences of this are twofold:

- an investor proposing to acquire a company in the electricity industry should check its licence for any relevant conditions. While such licences will usually run with the company, the conditions imposed on a particular licence may mean that this is not the case; and
- the restrictions on the transfer of licences mean that an investor cannot purchase an existing licence. Accordingly, the acquisition of a business in the electricity industry by way of an asset purchase will require the investor to apply for its own licence or to obtain the consent of the relevant regulator to a transfer of the licence. The criteria for obtaining a licence relate mainly to the investor's personal suitability and technical and financial capacity to operate the relevant business.

In addition, some Australian states and territories (other than Western Australia and the Northern Territory) participate in the National Electricity Market (the "**NEM**"). A business wishing to trade in the NEM must be registered with the Australian Energy Market Operator (the "**AEMO**"). An investor that wishes to operate an electricity business in a jurisdiction that participates in the NEM will therefore be required to register with the AEMO, regardless of whether it acquires the business by way of a share sale or an asset sale. AEMO's decision to register a company is made by reference to criteria such as technical and financial capacity, compliance with the National Electricity Rules and compliance with the specific requirement of the states and territories in which it operates.

Separate to the NEM, in the south west of Western Australia where the distribution infrastructure is sufficiently interconnected, the Wholesale Electricity Market (the "**WEM**") operates in a similar fashion to the NEM. Market participants are required to register with the Independent Market Operator (the "**IMO**") unless they are granted an exception. The IMO determines applications for registration according to the WEM market rules, which apply similar criteria to the National Electricity Rules under the NEM.

The electricity industry is now operating as a privatised industry to some extent in Queensland and New South Wales and is fully privatised in South Australia and Victoria. South Australia has privatised its electricity industry by way of long leases granted by the South Australian government. Consequently, such leases may contain restrictions on the acquisition of interests in privatised companies by foreign investors.

If an electricity market participant engages in electricity commodity derivatives trading, it may be carrying on a "financial service business" and be required to hold an AFSL.

18.3 Natural resources/mines

Other than the general restrictions noted in paragraph 19A below, there are no specific restrictions on the acquisition of shares in companies in the natural resources or mining industries. However:

- operational or construction licences may be required to operate the business and these may not be transferable or transferable without regulatory consent; and
- the relevant legislation for each state and for the Commonwealth requires transfers and "dealings" in mining or exploration interests to be approved and registered by the relevant authority. A "dealing" includes the creation of any legal or equitable interest in the title and extends to arrangements that establish contractual rights such as royalties and production entitlements and to any agreements.

18.4 Telecommunications

Aggregate foreign ownership of Australia's principal telecommunications company, Telstra Corporation Limited ("**Telstra**"), which remains partly government-owned, is restricted to 35% of the privatised equity (including certain instalment receipts) and individual foreign investors are allowed to acquire a holding of no more than 5% of this privatised equity.

Other than the restrictions specific to Telstra noted above and the general comments in paragraph 19A below, there are no specific restrictions on the acquisition of shares in companies in the telecommunications industry or on the acquisition of the general equipment and infrastructure assets of a telecommunications company.

However, there are restrictions on the acquisition of some of the licences that are required to operate in the telecommunications industry.

Generally, these licences will pass with ownership of the company that holds them. However, it is possible for some licences to be granted with conditions, including foreign ownership restrictions. This makes it necessary to check the licences held by the company that the investor proposes to acquire for any relevant restrictions.

Telecommunications licences are non-transferable. This may cause difficulty if the investor proposes to acquire a business in the telecommunications industry by way of an asset purchase or later on, if a lender attempts to enforce its security over the telecommunications assets.

18.5 Other regulated industries

Certain other industries are subject to specific limitations related to specific participants or participation generally in the relevant industry. These include:

- airlines/airports – specific limits apply to acquisition of interests in Qantas Airways Limited and to other Australian international carriers. The acquisition of interests in Australia's airports is also restricted. The Airports Act 1996 (Cth) stipulates a foreign ownership limit and airline ownership and cross ownership limits between Sydney airports and Melbourne, Brisbane and Perth airports;
- media – specific restrictions apply to limit concentration of ownership and foreign ownership in the media sector;
- gambling – there are limited licences to operate casinos in Australia which are subject to significant conditions; and
- ships – the Shipping Registration Act 1981 (Cth) specifies that for a vessel to be registrable in Australia, its majority interest must be Australian owned or it must be chartered to an Australian-based operator.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

There are no specific laws relating to taking or enforcing security in relation to the shares of oil and gas companies. However, the restrictions on dealings in oil or gas interests, as well as those in certain infrastructure assets, referred to in paragraph 18.1 above mean that:

- a security interest over such interests (as opposed to the company which owns them) generally requires regulatory consent; and
- consent may also be needed to sell such interests upon an enforcement of the security interest.

19.2 Electricity

There are no specific laws relating to taking or enforcing security in relation to the shares of electricity companies. However, the need for regulatory consent to the transfer of most relevant licences means that consent would be needed to sell such licences (and therefore possibly the business) upon an enforcement of the security. In some jurisdictions, such as Queensland, a direct security over a licence cannot be taken.

19.3 Natural resources/mines

There are no specific laws relating to taking or enforcing security in relation to the shares of natural resources or mining companies. However, the restrictions on dealings in mining interests referred to in paragraph 18.3 above mean that:

- a security interest over such interests (as opposed to the company which owns them) generally requires regulatory consent; and
- consent will also be needed to sell such interests upon an enforcement of the security interest.

19.4 Telecommunications

There are no specific laws relating to taking or enforcing security in relation to the shares of telecommunications companies. However there are restrictions on the acquisition of some of the licences that are required to operate in the telecommunications industry and licences are non-transferable. This may cause difficulty if a lender attempts to enforce its security over telecommunications assets.

19.5 Other restricted industries

Restrictions on acquisitions of interests in certain other industries will also constrain enforcement of security taken in those other industries.

19A General restrictions on acquisitions

19A.1 The FATA

Foreign investment in Australia is principally regulated by the FATA. The Government has the power under the FATA to block transactions subject to the FATA and/or order that acquisitions within the scope of FATA and regarded as contrary to the national interest be disposed of.

Generally, transactions subject to the FATA are those involving a foreign person acquiring (directly or indirectly) a substantial interest in (broadly, a shareholding of 15% or more) or control of an Australian corporation, acquiring a business in Australia or acquiring an interest in urban land in Australia.

The restrictions extend to the acquisition of "interests" in shares, assets of a business or urban land and so can be triggered by the grant of a security interest. However, there are exemptions from some of the conditions of the FATA in the case of interests in shares and assets which are held by persons whose ordinary business includes the lending of money if the interest is held solely by way of security for the purposes of a money-lending agreement. Similarly, a person is not taken to acquire an interest in urban land for the purposes of the FATA if the interest is acquired either as security for a money-lending agreement or by way of enforcement of a security held for the purposes of a money-lending agreement. However, please note the specific regime described in question 6 in relation to entities controlled by foreign governments. The FATA also has annually indexed monetary thresholds below which approval is not required for transactions relating to assets other than land.

The FATA specifies certain transactions within its scope for which notification must be made to the treasurer, and prohibits such transactions proceeding until approval is given or a specified waiting period ends.

A screening process is undertaken by FIRB and enables comments to be obtained from relevant parties and other government agencies in considering whether larger or more sensitive foreign investment proposals are contrary to the national interest.

Penalties apply for non-compliance with the FATA. In the case of a person, a fine can be imposed for up to A$55,000 and/or two years' imprisonment and in the case of a company, a fine can be imposed for up to A$275,000. In addition, the Treasurer has the power under the FATA to order the divestiture of shares or assets acquired in contravention of the FATA or otherwise contrary to the national interest.

19A.2 Competition regulation

Acquiring an Australian company or business will also be subject to the competition law provisions of the Competition and Consumer Act 2010 (Cth) (the "**CCA**"). The CCA prohibits acquisitions of shares and assets that would have the effect or be likely to have the effect of substantially lessening competition in an Australian market for goods and services. The Australian

Competition and Consumer Commission (the "**ACCC**") is the principal competition law regulator in Australia. If shares or assets are acquired in contravention of the CCA, the ACCC can seek orders under the CCA from a court for penalties and the disposition of the shares or assets (amongst other remedies).

There is no compulsory pre-merger notification required in Australia; however, there are a number of options available for an acquirer to obtain comfort that an acquisition does not contravene the competition provisions of the CCA. Further, the ACCC Merger Guidelines recommend that merger parties seek informal merger clearance if their products are substitutes or complements, and the post-merger market share would exceed 20%.

The most common "clearance" option is seeking informal clearance from the ACCC through its informal merger clearance process. A "no action" letter (which is effectively a letter of comfort) will be provided by the ACCC if, following an investigation, it is satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition in any relevant market. This informal process does not confer any legal immunity that would prevent either the ACCC or a third party from commencing proceedings alleging a CCA breach. However, only in very limited circumstances, such as where the ACCC was provided with incorrect information, would the ACCC consider commencing proceedings when informal clearance has been granted.

There are three other ways in which clearance may be obtained:

- a formal statutory clearance process through the ACCC, which has been available from 1 January 2007 and provides formal legal immunity. This formal clearance process has, as of September 2013, not been used;
- an authorisation application to the Australian Competition Tribunal on public benefit grounds, which also confers legal immunity on the applicant, but this is rarely used; and
- an application to the court for a declaration that the acquisition does not contravene the provisions of the CCA. This form of "clearance" has only been obtained once. And it would require the ACCC to oppose the acquisition first.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Australia?

Yes, subject to satisfaction of the applicable requirements for registration under the Foreign Judgments Act 1991 (Cth) (the "**FJA**") or for enforcement of the judgment debt by a common law action.

Judgments given in the House of Lords and the Supreme Court of England and Wales are registrable under the FJA, subject to satisfaction of the applicable FJA criteria. Two important criteria are that:

- the judgment must be a money judgment; and
- the court that rendered the judgment must have had jurisdiction in the case under the Australian rules of private international law. To establish such jurisdiction, it is important that the loan agreement includes an express submission by the borrower to the jurisdiction of the English courts – a choice of law clause alone may not be sufficient.

The judgment must also be final and conclusive and not otherwise subject to appeal, dismissal, reversal, setting aside or stay of execution. The court retains a discretion to refuse to enforce the judgment.

Where registration under the FJA is not available because of the identity of the court, the judgment may nonetheless be enforceable by way of common law action on the judgment debt, subject to satisfaction of common law criteria which are similar to those which apply under the FJA.

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Our Australian team is a recognised leader in the field of finance law. We have a strong team across Melbourne, Sydney, Brisbane and Perth that prides itself on technical excellence, commercial nous and responsiveness in facilitating and negotiating transactions across the spectrum of debt products and asset classes.

Our team have received the following accolades:

- a tier one ranking in Australia for Banking & Finance every year since 2008 - *Asia Pacific Legal 500*
- *'They [the banking lawyers] are commercial, responsive and friendly – all the things you want really. They are also well staffed with lots of good senior associates – they put an appropriate team together.' (Australia) – Chambers Asia Pacific 2014*
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BANGLADESH

DR KAMAL HOSSAIN AND ASSOCIATES

LENDING

1. Does a lender require a licence to lend money to a company based in Bangladesh (the "borrower")? Are there any exemptions available?

Yes. Section 8 of the Moneylenders Act 1940 (the "**1940 Act**") provides that "no moneylender shall carry on any business of money-lending unless he holds an effective licence". Local banks and local financial institutions can carry on a business of lending under the banking and financial institution licence and do not need a separate licence under the 1940 Act. In respect of foreign lending, the borrowers must obtain approval of the loan transaction from the Board of Investment (the "**BOI**"), unless the borrowing company is located in an Export Promotion Zone ("**EPZ**"); is a government entity; or is an authorised dealer (which are generally, banks). If BOI approval is granted to the borrower, then the foreign lenders are not required to obtain any further licence under the 1940 Act.

Section 4 of the Foreign Exchange Regulations Act 1947 (the "**FER Act**") prohibits Bangladesh residents from borrowing in foreign exchange without a general or special permission of the Bangladesh Bank (the central bank of Bangladesh). The Bangladesh Bank has issued instructions under the FER Act which are summarised in the Guidelines for Foreign Exchange Transactions (the "**FER Guidelines**"). Under Chapter 23 of the FER Guidelines, the BOI is the relevant authority for purposes of section 4 of the FER Act. Accordingly, approval of foreign loans by the BOI amounts to approval under the FER Act.

The rules governing approval of foreign loans mainly depend on how the borrower is classified under Bangladesh law. The four classifications are:

1.1 Private sector companies outside the EPZ

Under Chapter 15 of the FER Guidelines, all proposals for borrowing from abroad by private sector industrial enterprises in Bangladesh (including supplier's credit, financial loans from institutions or individuals and debt issues in capital markets abroad) shall require prior authorisation from the BOI. In each case where the supplier's credit/loan is approved by the BOI, a copy of the loan agreement should be forwarded by the concerned authorised dealer to the "External Debt and Grant Section" Foreign Policy Department, Bangladesh Bank, Head Office, Dhaka. However, short-term credit terms up to one year in duration given by suppliers/buyers abroad are subject to the guidelines/ instructions issued by the Bangladesh Bank in regards to settlements for commercial transactions.

1.2 Entities established in the EPZ

The EPZs were established under the Export Processing Zone Authority Act 1980. The following types of industrial units operate in the EPZs:

- Type A: 100% foreign owned including those owned by Bangladesh nationals ordinarily resident abroad;
- Type B: Joint Venture projects between foreign and Bangladesh entrepreneurs resident in Bangladesh; and
- Type C: 100% Bangladesh entrepreneurs resident in Bangladesh.

Type A industries located in the EPZs may obtain short-term foreign currency loans from overseas banks and financial institutions subject to the following conditions:

- the loan shall be received through an authorised dealer in Bangladesh and the loan proceeds will be credited to a Foreign Currency Account maintained by the authorised dealer in the name of the Type A unit, to be used for financing import of capital machinery and raw materials, payment of interest/ service charges, repayment of loans and for crediting a local currency account for meeting local expenses;
- only assets fully owned by the Type A industry may be lodged as collateral for such a loan;
- repayment of principal and interest on such a loan can be remitted from balances available in the Foreign Currency Account without prior Bangladesh Bank approval. No funds can be provided from the authorised dealer's own resources for such repayment except with prior approval from the Bangladesh Bank;
- in cases where the loan is called up by the creditor, the assets charged to a foreign lender will be allowed to be sold only in foreign exchange, and proceeds, after paying off all local liabilities in Bangladesh, may be remitted abroad with Bangladesh Bank's approval; and
- no local currency loan against repatriable short-term foreign currency loan will be allowed to Type A industries.

Type B industries may also obtain foreign currency loans from overseas banks and financial institutions subject to the conditions applicable to Type A industries as noted above. The only exception

is that Type B industries are not permitted to grant security over their fixed assets or raw materials to non-residents.

The FER Guidelines issued by the Bangladesh Bank do not contain express provisions regarding obtaining credit facilities by Type C industries from foreign lenders. Under the current interpretation of the Foreign Exchange Guidelines, Type C industries are subject to the same terms, conditions and restrictions on foreign credit facilities that apply to private sector industries located outside the EPZ.

1.3 Non-banking Financial Institutions

Non-banking Financial Institutions operating in Bangladesh licensed under the Financial Institutions Act 1993 may obtain loans from abroad subject to prior approval of the Bangladesh Bank under the following terms and conditions:

- for obtaining such loans, the effective rate of interest will have to be consistent with foreign loans availed by residents with prior approval of the Bangladesh Bank;
- the repayment period (including any grace period) will not be less than five years; and
- loans thus obtained (in foreign currency) from abroad shall be used as security to obtain a Taka loan from any bank in Bangladesh. Taka loans so obtained shall be used for lending to "manufacturing industries and infrastructure sector" (other than real estate) only.

1.4 Government entities

Borrowing abroad by public sector entities requires approval from the Government. All borrowing on commercial (non-concessional) terms requires specific approval from the Hard Term Loan Committee of the Ministry of Finance.

2. What are the consequences of making a loan to a borrower in Bangladesh without a licence?

If a lender advances a loan without prior approval from the relevant government authorities, as required under the FER Act, the lender would be unable to recover the principal or interest or enforce the agreement made or security taken unless such approval is obtained subsequently. There is also the possibility of the security being confiscated on the ground of violation of the FER Act.

3. Will a borrower based in Bangladesh have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Interest on the loan amount payable to foreign lenders is subject to withholding tax. Banks or financial institutions through which interests are repaid withhold tax at the time of making the outward remittance.

4. Is there any limit to the level of interest that can be charged on loans made in Bangladesh?

The Bangladesh Bank determines the limits on interest that can be charged on loans made in Bangladesh. The FER Guidelines do not set out any limits as to the level of interest that can be charged on loans made in Bangladesh. However, as a matter of practice, the BOI would not approve any foreign loans if the rate of interest exceeds LIBOR +4%.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. It may be possible to subordinate debt in Bangladesh whereby the junior creditor(s) agrees not to be paid by a borrower until the senior creditor(s) has been paid.

This may be done by an arrangement whereby the parties agree to a set of pre-arranged rules in a contract (typically by way of an intercreditor deed or a subordination deed) governing payment and priority. Generally, under this arrangement, the junior creditor undertakes not to collect the junior debt until the senior debt has been paid.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Bangladesh or a guarantee from an entity incorporated in Bangladesh?

A lender does not have to be licensed or registered to create security over assets in Bangladesh or a guarantee from an entity incorporated in Bangladesh. However, as noted above, the supplier's credit/loan agreement must be registered with the BOI.

7. Does the taking of security in Bangladesh result in a lender being liable to tax in Bangladesh?

Taking of security in Bangladesh does not result in the lender being subject to tax. However, stamp duty is payable and the amount payable depends on the nature of the security.

8. Can a security interest be taken in Bangladesh over the following assets?

8.1 Land

Yes. Security can be taken in Bangladesh over land by way of mortgage.

8.2 Shares in a Bangladeshi company

Yes. Security over shares of private limited companies and public listed companies can be taken in Bangladesh by way of pledge, charge or hypothecation.

(a) Shares (in certificated form) in a Bangladeshi company

With regard to shares (in certificated form), security interests can be created by entering into appropriate agreement(s).

(b) Shares and securities listed by a Bangladeshi company in scripless form

Account holders with Central Depository Bangladesh Limited may use the shares in their depository accounts as collateral against a loan without the need to rematerialise the securities (provided the pledgee agrees to take collateral in this form). The pledgee must be a participant or a depository account holder. The pledgor gives instructions to its participant to pledge its shares to the pledgee. The pledgee must confirm acceptance of the pledge. The shares are then 'frozen' in the account of the pledgor and cannot be moved until instructions are received from the pledgee. The instruction from the

pledgee may be to 'release' the pledge (for example if the loan has been repaid) or to move the shares to his own (or a third party's) account (for example, if the pledgor has defaulted on his repayments). As the shares remain in the account of the pledgor (although frozen), the pledgor will receive all benefits (eg dividends and bonus issues) and will still be able to vote. Security over shares can be created through Central Depository Bangladesh Limited in relation to shares in scripless form.

8.3 Bank accounts

Yes. Security over bank accounts may be taken in Bangladesh by way of fixed charge or floating charge.

8.4 Receivables (rights under contracts)

Yes. Subject to any restrictions contained in the contract (in respect of assignment and the creation of security) an assignment of receivables/rights under the contract may be made in favour of an assignee.

8.5 Insurance

Yes. Subject to any restrictions stipulated in the insurance policy (in respect of assignment and the creation of security), rights under insurance (including the payment of the insurance proceeds) may be assigned to an assignee by way of security. However, the Guidelines for Foreign Exchange Transactions, Volume 1, provides that insurance policies may not be assigned by a Bangladesh resident to a non-resident, or by one non-resident to another non-resident, without the prior approval of the Bangladesh Bank.

8.6 Floating charge over all assets

Yes. A floating charge over assets can be created in Bangladesh. With regard to creation of security interest over shares in public listed companies, please refer to paragraph 8.2 above.

9. Are trusts recognised in Bangladesh? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Bangladesh?

Yes, trusts are recognised in Bangladesh. A trust is a legal relationship in respect of trust assets between a trustee and a beneficiary. The trustee holds the trust assets for the benefit of the beneficiary. While the trustee has technical or legal ownership of trust assets, the beneficiary has economic or beneficial ownership.

9.2 Taking security over securities held in a clearing system

Please refer to paragraph 8.2 above.

10. Can a company incorporated in Bangladesh (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Yes. The guarantor can give a guarantee for the debt of the borrower. In a transaction involving a foreign lender: (1) a Bangladesh company may only guarantee the debt of a foreign company with the approval of Bangladesh Bank; and (2) a Bangladesh company may guarantee the debt of another Bangladesh company without the approval of the Bangladesh Bank.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

If the borrower becomes insolvent, the secured assets are protected from general creditors unless the security is invalid or unenforceable as a result of failure to register or other factors. Under the Insolvency Act 1996, the following claims have priority over secured lending:

- administrative expenses including the costs of the receiver, liquidators and/or administrators;
- government taxes;
- wages or salaries, not exceeding BDT2,000 (about USD300), due to any clerk, servant, labour or workmen in respect of any services rendered to the debtor during the six months immediately prior to the Bankruptcy Petition; and
- debts of local banks and financial institutions.

11. (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

If the bank as an intermediary ("**Intermediary**") is insolvent, the secured lender may claim the securities or the value of the securities held for its benefit, provided the securities are held in a segregated account.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

In the event of default, the lender can enforce the security or guarantee after obtaining an order from the court. To enforce a security, the lender must initiate proceedings in the trial court. Once the trial court passes a decree in favour of the lender, whether ex-parte or otherwise, the lender must initiate execution proceedings.

If the proceedings are contested, enforcement of security may take five to six years, assuming none of the parties file interlocutory applications during the proceedings or appeal against the judgment and decree of the trial court.

Section 12 of the Artha Rin Adalat Act 2003 (Money Loan Court Act) (the "**2003 Act**") provides that any financial institution, defined in section 2 of the 2003 Act, holding valid power of attorney authorising enforcement of security without intervention of the court must enforce that security before initiating a claim to recover the loan amount. Where section 12 is applicable, the lender must enforce the security, for instance, by selling the secured property before initiating recovery proceedings.

It should be noted that the provisions of the 2003 Act do not apply to foreign lenders.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

A liquidator or creditor may prevent the enforcement of security if it can be shown that the security was created to defraud the creditors or if the security is invalid as it has not been registered.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

Section 58 of the Companies Act 1994 (the "**Companies Act**") prohibits a company limited by shares, other than a private company or the subsidiary of a public company, from giving, either directly or indirectly, a loan, guarantee, providing security or other financial assistance for the purchase of shares in the company. However, this does not prohibit a company from lending money where money-lending is part of the ordinary business of the company.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

As a matter of general Bangladesh law, failure to register any security required to be registered with the appropriate authority will render the security invalid and void.

Section 159 of the Companies Act provides that every mortgage or charge created by a company after 1994 is void against the liquidator and any creditor of the company unless the particulars of the mortgage or charge and the instrument, if any, by which the mortgage or charge was created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar of Joint Stock and Companies (the "**RJSC**") within 21 days after the date of its creation. Any contract or obligation for repayment of the money thereby secured is not prejudiced and when a mortgage or charge becomes void under section 159, the money that was secured is payable immediately.

A security interest in land must be registered with the office of the relevant Sub-Registrar. As noted above, any security created over land which belongs to a company must also be registered with the RJSC within 21 days after the date of its creation. Failure to register will result in the security being void against the liquidator and any creditor of the company.

Guarantees do not need to be registered or filed with any governmental body/court.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Under the Stamp Act 1899 (the "**Stamp Act**"), certain types of security including agreements relating to deposit of title deeds, pawns, pledges, bills of exchange, mortgage deeds, promissory notes, releases, settlements and insurance guarantees are liable for stamp duty/taxes. The Stamp Act specifies the rate of stamp duty payable and the party liable to pay the duty.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. It may be possible to subordinate debt in Bangladesh whereby the junior creditor(s) agrees not to be paid by a borrower until the senior creditor(s) has been paid.

This may be done by an arrangement whereby the parties agree to a set of pre-arranged rules in a contract (typically by way of an intercreditor deed or subordination deed) governing payment and priority. Generally, under this arrangement, the junior creditor undertakes not to collect the junior debt until the senior debt has been paid.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

There is no statutory prohibition regarding the acquisition of companies or assets in the private/non-government oil or gas industry. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

18.2 Electricity

There is no statutory prohibition regarding the acquisition of companies or assets in the electricity sector. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

18.3 Natural resources/mines

There is no statutory prohibition regarding the acquisition of companies or assets in the natural resources/mining industries. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

18.4 Telecommunications

There is no statutory prohibition on the acquisition of a telecommunications company or assets in the telecommunications industry. Under section 37 of the Telecommunications Act 2001, prior approval must be obtained from the Bangladesh Telecommunications Regulatory Commission for any change in the share capital or ownership of a telecommunications company which has the effect of transferring control of the activities permissible under the licence, or where the licence holder company is merged with another company. In addition, specific prior approval requirements may apply depending on the nature of transactions on a case by case basis.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

There is no specific statutory prohibition regarding taking of or enforcement of security in relation to shares in or assets of oil/gas companies. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

19.2 Electricity

There is no statutory prohibition regarding taking of or enforcement of security in relation to shares in or assets of electricity companies. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

19.3 Natural resources/mines

There is no statutory prohibition on taking of or enforcement of security in relation to shares in or assets of natural resources/mining companies. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

19.4 Telecommunications

There is no statutory prohibition on taking of or enforcement of security in relation to shares in or assets of telecommunications companies. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law is an English law judgment in relation to the loan agreement enforceable in Bangladesh?

Under section 44A of the Code of Civil Procedures 1908 (the "**CPC**"), foreign judgments (including English law judgments) are directly enforceable in Bangladesh only if the judgments are rendered by the courts of reciprocating territories. The CPC defines "reciprocating territory" as any "country or territory as the government may, from time to time, by notification in the official gazette declare to be reciprocating territory" for the purposes of section 44A of the CPC.

An alternative procedure for enforcement of foreign judgments is set out in sections 13 and 14 of the CPC in respect of judgments originating from non-reciprocating jurisdictions. Under section 13 of the CPC, a foreign judgment is conclusive as to any matter adjudicated upon between the parties except where:

- it has not been pronounced by a court of competent jurisdiction;
- it has not been given on the merits of the case;
- it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Bangladesh in cases in which such law is applicable;
- the proceedings in which the judgment was obtained are opposed to natural justice;
- it has been obtained by fraud; and
- it sustains a claim founded on a breach of any law in force in Bangladesh.

Section 14 of the CPC states that the courts of Bangladesh would presume a judgment to have been pronounced by a court of competent jurisdiction upon production of a certified copy of the judgment unless proved to the contrary. To enforce a foreign judgment the decree-holder must institute a suit in Bangladesh. Once the local court passes a judgment in the suit, a separate execution proceeding must be instituted to realise the sum claimed or the security sought to be enforced.

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The firm, established in 1980, is one of the largest law firms in Bangladesh. It provides a comprehensive range of legal services for both national and international clients. Its strength lies not only in the breadth of individual expertise available, but also in more than 30 years of institutional experience of advice and representation in key practice areas which include admiralty and shipping, arbitration, aviation, banking and financial regulation, commercial and corporate law, constitutional and administrative law, employment law, energy, human rights law, intellectual property, revenue law, taxation and telecommunications.

The firm has extensive experience in banking matters including lending and taking of security. The firm provides advisory services to several major multinational banks, insurance companies and financial institutions on a diverse range of matters including central bank regulations on international monetary transactions, negotiation and preparation of documents for local and foreign loans, structuring and issuance of securities including hybrid securities, capital market transactions, negotiation of leasing transactions and foreign trade and other domestic and international financial and banking transactions. The firm has advised and assisted multinational banking companies in their amalgamation, acquisition, reorganising and restructuring process and their internal management and employment issues. As part of litigation work, members of the firm provide representation in loan recovery cases in specialised money loan courts.

CAMBODIA

DFDL

LENDING

1. Does a lender require a licence to lend money to a company based in Cambodia (the "borrower")? Are there any exemptions available?

Under Article 2(3) of the Law on Banking and Financial Institutions 1999 (the "**LBFI**") a legal entity which carries on as its regular business "the provision of means of payment to customers and the processing of said means of payment in national currency or foreign exchange" is deemed to be carrying out banking operations. A legal entity which carries out banking operations is a covered entity under Article 9 of the LBFI. Article 14 of the LBFI requires covered entities to be licensed by the National Bank of Cambodia (the "**NBC**") before commencing their operations.

However, in practice, this requirement is not applied to loans provided by foreign lenders. (Please see commentary on foreign lenders in question 2 below).

2. What are the consequences of making a loan to a borrower in Cambodia without a licence?

Article 55 of the LBFI imposes criminal penalties on "any person who, acting either for his own account or for the account of a legal person, as his regular business and on behalf of the general public carries out banking operations without a licence". Such person shall be liable before the courts to imprisonment from one year to five years and a fine from KHR5 million to KHR250 million or either of these penalties. Article 55 provides for the closure of such an entity.

Article 9(3) of the LBFI provides that "no person other than a covered entity may make use of a business name, corporate name, advertising or in general any expression implying that it is an institution authorised to carry out an activity subject to authorisation in accordance with the provisions of this law." Article 55 similarly penalises any person who contravenes Article 9(3).

Notwithstanding these provisions, a clear and accepted practice has emerged which distinguishes between foreign and local financial institutions. There are numerous instances where foreign lenders have advanced loans to Cambodian entities and have not been required to obtain a licence to conduct banking operations. It is the current practice of the NBC not to raise any objections to such transactions. Money must be transferred through a local bank which has the obligation to report to the NBC. While this is not a common practice, it is possible for foreign lenders to obtain a letter of no objection from the NBC. Please note that the intent of the LBFI was the protection of Cambodian depositors rather than the regulation of foreign financial institutions.

3. Will a borrower based in Cambodia have to deduct amounts for withholding tax on interest payments made to an overseas lender?

The Law on Taxation imposes a withholding tax at a flat rate of 14% on payments of interest to offshore entities.

4. Is there any limit to the level of interest that can be charged on loans made in Cambodia?

There exists a limitation on imposing excessive interest rates under Cambodian law. Interest rates exceeding the permitted maximum interest rate of 18% per annum are not enforceable in Cambodia. All amounts other than the principal received by the lender in relation to the loan agreement is deemed to be interest under Cambodian law, regardless of whether they are described as commission, fees or otherwise (except expenses), reimbursement for the costs of documenting the contract and expenses for repayment). In addition, the liquidated damages for not repaying the loan as contracted are limited to the rate of 27% per annum. Nevertheless, it is not clear whether these limitations apply to (i) local banks and financial institutions which are authorised by the NBC to set interest rates freely, and (ii) international transactions, since to date there is no clear regulatory or judicial guidance on this matter.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes, it is possible for lenders to agree among themselves or together with the borrower on the priority of the repayment of debt irrespective of when that debt was incurred as long as such agreement is not prejudicial to any third party. Such arrangement can be either documented by way of an intercreditor agreement, the syndicated facility agreement itself, or in a separate agreement among the lenders (for example, a subordination agreement).

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Cambodia or a guarantee from an entity incorporated in Cambodia?

A lender does not require a licence or registration to take security over assets in Cambodia or a guarantee from an entity incorporated in Cambodia.

7. Does the taking of security in Cambodia result in a lender being liable to tax in Cambodia?

The mere taking of security by a foreign lender does not make that lender liable for tax in Cambodia. Please note, however, that there is a withholding tax of 14% on interest payments made to offshore lenders.

8. Can a security interest be taken in Cambodia over the following assets?

8.1 Land

Yes. Security over land is taken by way of hypothec or pledge. Security agreements with respect to land and other immovable properties must follow the model security agreement and must be entered into in the presence of a competent authority. Please note that land ownership is only permitted to Cambodian nationals or entities with at least 51% of the voting shares held by Cambodian nationals or companies.

8.2 Shares in a Cambodian company

(a) Shares (in certificated form) in a Cambodian company

Yes. A security interest can be taken over shares in a Cambodian company. There are limitations on foreign ownership of entities operating in particular sectors. For example, foreign ownership of entities owning land in Cambodia is limited to 49% and foreign ownership of entities providing certain telecommunications services is limited to 51%. Foreign secured parties can only enforce their security interests over shares within that limitation (they may need to arrange for a Cambodian individual or entity to hold any remaining shares). Security can be taken over the shares by taking possession of the share certificate or by filing with the Secured Transactions Filing Office.

(b) Shares and securities listed by a Cambodian company in scripless form

Currently, there is no mechanism for taking security interest over publicly traded shares yet. It should also be noted that only one company is listed on the Cambodia Securities Exchange so far.

8.3 Bank accounts

Cambodian law (in particular, the Law on Secured Transactions (the "**LST**")) does not appear to provide for the creation of security interests over deposit accounts. The law was originally drafted in English and in that version it is clear that "an interest in a deposit, checking, savings, passbook, or other cash account, except as provided as to proceeds" is not within the scope of the LST. The Khmer translation, which is the official version of the law and prevails over the English version, reads as "the law does not apply to... an interest payable/earned in a deposit, checking, savings, passbook, or other cash account, except as provided as to proceeds". While the LST may not apply to deposit accounts in general, it is possible to create security interests in deposit accounts which are "proceeds" (which is defined under the LST as "whatever is acquired upon the sale, lease, licence, exchange, or other disposition of collateral; whatever is collected on, or distributed on account of, collateral; rights arising out of collateral; to the extent of the value of collateral, claims arising out of the loss or nonconformity of, defects in, or damage to the collateral; and to the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects in, or damage to the collateral").

8.4 Receivables (rights under contracts)

Yes. Security interests can be created over receivables by way of assignment, subject to any restrictions in respect of assignment and the creation of security interests in the contract. Security interests in receivables can be perfected by filing a notice of the security interest with the Secured Transactions Filing Office (the "**STFO**").

8.5 Insurance

Yes. Security interests can be created over rights under insurance by way of assignment, subject to any restrictions in the insurance policy. The security interests in the rights under insurance can be perfected by filing a notice of the security interests with the STFO. Please note that it is not uncommon for lenders to be endorsed as a loss payee by the insurer in relation to the insurance.

8.6 Floating charge over all assets

Yes. A security package can be put in place to achieve similar objectives as a floating charge.

9. Are trusts recognised in Cambodia? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Cambodia?

Yes, trusts are recognised in Cambodia. However, to date there is no specific regulatory guidance governing this arrangement yet.

9.2 Taking security over securities held in a clearing system

The Negotiable Certificate of Deposit ("**NCD**") which the banks can sell or use as security or guarantee was only introduced by the NBC on 9 September 2013. To date, we are not aware of any instance where security has been taken over NCDs yet.

10. Can a company incorporated in Cambodia (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Yes. A Cambodian company may guarantee the debt of a borrower without regard to the country of formation of the borrower.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

After the opening of an insolvency proceeding, no action, proceeding or execution process may be commenced or continued against the debtor or the estate of the debtor. The administrator may give written authorisation to secured creditors to repossess and sell the encumbered assets in accordance with the applicable law, or in any other way avail themselves of their security right. Employee wages, remuneration for the provisional administrator, administrative fees and court fees have priority over the security.

11. (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

To date, there is no specific regulatory guidance on this matter yet. Under the existing regulations, the securities would not form part of the estate of an intermediary acting as a trustee ("**Intermediary**") in the event of its insolvency and the secured lender should be able to claim directly against the party granting the security.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

12.1 Enforcement of security interests over movable properties (including security interest in guarantee)

In the event of a default, a secured party holding a security interest over the proceeds of an account or other rights to payment (eg receivables or insurance) may, subject to any restrictions in the security document, enforce such security interest without judicial action. Upon enforcement of its security interest, the secured party can require an obligor to make payments directly to the secured party, and also to take control of any proceeds.

For other collateral, a secured party may enforce its security interest by applying to the court for a special, expedited order granting the secured party possession or control over the collateral upon default. Issues at the hearing are limited to confirming the existence of a security agreement covering the collateral and at least one event of default. The secured party may take possession or control of the collateral without legal proceedings if the debtor has agreed to this in writing after default.

12.2 Enforcement of security interests over immovable properties

A secured party can only enforce its security interest against a secured immovable property by applying to the court for the sale of the secured immovable property. The secured party cannot take the ownership of the secured immovable property but will be entitled to repayment from the proceeds of the sale in preference to all other creditors.

Decisions of Cambodian courts are not publicly available so the length of time for the enforcement of a security interest through Cambodian courts is unclear.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

Under Cambodian law, no action, proceedings or execution process or any other action of any kind by or on behalf of a creditor can be commenced or continued against the debtor or its assets after insolvency proceedings have commenced. However, the administrator may allow or disallow the commencement of enforcement actions against the assets of the insolvent company. The administrator is also empowered to continue or discontinue a contract between the insolvent company and the counterparty which has not been fully performed by the parties at the time of the opening of insolvency proceedings. All claims arising from a contract which the administrator has elected to continue shall be treated as administrative claims and, therefore, shall have priority over the secured claims. Although it is not stated clearly in the Insolvency Law, it appears that the administrator is appointed for both the insolvency and liquidation proceedings.

The validity, secured status, amount or other priority of the security interest may also be challenged by the administrator, creditor or debtor. In this situation, the secured creditor must seek a determination of the claim before the court, which is required to hear this matter with utmost expediency.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

No. There are no laws in Cambodia preventing a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

As a general rule, all security interests in movable property must be filed with the STFO for perfection. This requirement does not extend to security interests in certain types of movable property which are specifically excluded under the LST. No separate perfection of the guarantee is required if the collateral supported by the guarantee is already perfected.

All security interests in immovable property must be filed with the Cadastral Office of the Ministry of Land Management, Urban Planning and Construction for perfection.

Guarantees need not be registered or filed with any governmental body or court.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Securities or guarantees that are registered/filed with the government authorities are subject to nominal registration fees. Please note stamp duty is payable in respect of any security or guarantee.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes, it is possible to take a subordinate security interest in the same asset under Cambodian law, except for a security interest which can only be perfected by the secured party taking possession. Documenting a second security interest can be made in the same way as the creation of the first security interest over the assets (see paragraph 8 above).

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

At least 51% of the voting shares of companies owning land in Cambodia must be held by Cambodian nationals. Accordingly, if an oil/gas company owns land, majority foreign ownership is not permitted. No other restrictions apply.

18.2 Electricity

The acquisition of a majority interest in the shares, or a majority of the assets, of an electricity licensee is subject to the approval of the Electricity Authority of Cambodia. In addition, at least 51% of the voting shares of companies owning land in Cambodia must be held by Cambodian nationals. Accordingly, if the electricity company owns land, majority foreign ownership is not permitted.

18.3 Natural resources/mines

At least 51% of the voting shares of companies owning land in Cambodia must be held by Cambodian nationals. Accordingly, if the mining company owns land, majority foreign ownership is not permitted. No other restrictions apply.

18.4 Telecommunications

The Cambodian government has reserved the right to require up to 49% Cambodian equity ownership of telecom operators which provide certain telecommunications services under Cambodia's Schedules of Specific Commitments for World Trade Organization. These services are voice telephone services (including certain types of mobile services), packet-switched data transmission services, circuit-switched data transmission services, telex services, telegraph services, facsimile services and private leased circuit services. The draft telecommunications law also contains provisions which allow the Telecommunication Regulator of Cambodia to impose local shareholder requirements on some licences.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

The restriction on foreign control over companies owning land in Cambodia (noted in paragraph 18.1 above) may limit the lender's ability to take enforcement action in relation to the shares of, or interests in land held by, oil and gas companies in Cambodia.

19.2 Electricity

The restriction on the acquisition of shares in, or assets of, Cambodian electricity licensees and the restriction on foreign control over companies owning land in Cambodia (noted in paragraph 18.2 above) may limit the lender's ability to take enforcement action in relation to the shares or assets of companies in the Cambodian electricity sector.

19.3 Natural resources/mines

The restriction on foreign control over companies owning land in Cambodia (noted in paragraph 18.3 above) may limit a lender's ability to take enforcement action in relation to the shares of, or interests in land held by, natural resources/mining companies in Cambodia.

19.4 Telecommunications

The restriction on foreign ownership of companies engaged in certain telecommunications activities in Cambodia (noted in paragraph 18.4 above) may limit the lender's ability to take enforcement action in relation to the shares of companies in the Cambodian telecommunications sector.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Cambodia?

Cambodia is not a party to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the Hague Convention). In spite of this, the Cambodian Code of Civil Procedures requires Cambodian courts to enforce foreign judgments without a re-examination of the merits of the matter except where:

- the foreign court does not have jurisdiction to hear the matter;
- the foreign court judgment is issued by default;
- the foreign court judgment violates the public order or morals of Cambodia;
- there is no guarantee of reciprocity between Cambodia and the country in which the foreign court is based; or
- the foreign court judgment is not final and conclusive.

There are currently no guarantees of reciprocity between Cambodia and any other countries with respect to the enforcement of court judgments. To date we are unaware of any instance where a foreign judgment has been brought to Cambodian courts for enforcement.

Cambodia is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Law on Commercial Arbitration and the Law on Civil Procedures have been enacted to provide further guidance on the enforcement of foreign arbitral awards.

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CHINA

HERBERT SMITH FREEHILLS

LENDING

1. Does a lender require a licence to lend money to a company based in China (the "borrower")? Are there any exemptions available?

Yes. To make loans in China, a corporate lender requires a financial licence under the Measures for the Administration of Financial Licences (the "**Financial Licences Measures**") and the General Provisions on Lending (the "**Lending Provisions**"). This requirement, however, does not apply to an overseas entity or an individual.

An overseas entity or an individual can lend money to a borrower without holding a financial licence, but such lending is subject to foreign debt registration with the local foreign exchange bureau so that loan repayments may be repatriated out of China. Lending between Chinese enterprises is not permitted.

2. What are the consequences of making a loan to a borrower in China without a licence?

If a lender makes a loan to a borrower without holding a financial licence as required under the Financial Licences Measures and the Lending Provisions (where applicable), such lending may be declared void by the People's Bank of China (the "**PBOC**") or the court. While the lender may recover the principal of the loan, the illegal gains (such as interest on the loan or any other proceeds arising from the loan obtained by the lender) may be confiscated by the PBOC or the court and fines may be imposed. The lender may also be subject to criminal liabilities. In addition, the court may impose on the borrower a fine which is calculated at the then prevailing bank lending rate.

3. Will a borrower based in China have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Yes. Under the Enterprise Income Tax Law, a borrower must deduct withholding tax on any interest payment made to a non-resident enterprise which does not have an office or establishment in China (or, if the China-sourced interest payments are not related to the non-resident enterprise's office or establishment in China). The current withholding tax rate is 10%. This rate may be reduced if any of the China's bilateral tax treaties provides for a reduction. For example, China's tax treaty with Singapore reduces the withholding tax rate on interest paid to financial institutions to 7% and China's tax arrangement with Hong Kong reduces the withholding tax rate to 7% for recipients who are the beneficial owners of the interest.

4. Is there any limit to the level of interest that can be charged on loans made in China?

Yes. The interest rate that can be charged on Renminbi loans made in China by financial institutions is capped at the interest rate published by the PBOC from time to time. Interest rates are, however, being liberalised in the Shanghai Free Trade zone on a trial basis. If the trial is considered successful, interest rate liberalisation may also be introduced to other parts of China.

A Chinese individual can charge an interest rate higher than the limit published by the PBOC, provided that the maximum interest rate charged does not exceed four times of such limit. The amount of interest which exceeds such limit will not be enforceable.

The interest rate on a foreign exchange loan may be agreed between a financial institution lender in China and the borrower, and is not subject to such restrictions.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. It is possible to subordinate debt in China whereby a junior creditor agrees not to be paid by a borrower until the other senior creditor(s) has (have) been paid, irrespective of when the debt is incurred. To do that, the parties need to reach a written contractual arrangement (such as an intercreditor agreement or a subordination agreement) to govern the payment and priority. The junior creditor may agree not to collect the junior debt until the senior debt has been paid and may also undertake to turn over to the senior creditor(s) any monies received from the borrower.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in China or a guarantee from an entity incorporated in China?

No. However, a lender must hold a financial licence to lend money to a borrower, unless it is an overseas entity or an individual (please see answers to question 1 for details). The taking of security by foreign lenders over assets in China is subject to a

number of registration/approval requirements (including registration with and approval by the State Administration of Foreign Exchange (the "**SAFE**")), which makes such a proposition difficult in practice.

7. Does the taking of security in China result in a lender being liable to tax in China?

No. However, enforcement of security in China may result in a lender being liable for stamp duty and other taxes (please see answers to question 16 for details).

8. Can a security interest be taken in China over the following assets?

8.1 Land

Yes. Security interests may be taken over construction land use rights (akin to leasehold) by way of mortgage. Land ownership in China, which belongs either to the state or rural collectives, cannot be used as security.

8.2 Shares in a Chinese company

(a) Shares (in certificated form) in a Chinese company

Not all Chinese companies issue shares. Limited liability companies (including wholly foreign-owned enterprises and Sino-foreign joint ventures) do not issue shares. Rather, investors in limited liability companies hold a portion of the equity interest, and not shares as such. Only companies limited by shares issue shares to their shareholders.

A security interest can be taken over shares, or an equity interest of a Chinese company, by way of pledge. Pledges are required to be in writing. Pledges over listed shares must be registered with the China Securities Depository and Clearing Corporation before being effective. Non-listed shares must be registered at the relevant local branch of the State Administration for Industry and Commerce (the "**SAIC**").

Special rules apply to the pledge of an equity interest in a foreign-invested enterprise established in China (the "**FIE**", a term that includes both wholly foreign-owned enterprises and Sino-foreign joint ventures). First, only that portion of the equity interest which has been paid up may be pledged. Second, the consent of other investors (if any) in an FIE is required before equity interests can be pledged. Finally, the pledge must be approved by the relevant local branch of the Ministry of Commerce (the "**MOFCOM**") and registered with the SAIC.

(b) Shares and securities listed by a Chinese company in scripless form

Only companies limited by shares are permitted to list in China. Listed shares and securities in scripless form may be pledged, with the pledge being effective upon registration with the China Securities Depository and Clearing Corporation.

8.3 Bank accounts

No. Although Chinese law provides for the pledge of fixed deposits, it does not expressly recognise the granting of a security interest over an account with a fluctuating balance.

8.4 Receivables (rights under contracts)

Yes. A security interest can be taken over the following receivables by way of pledge: (i) creditor's rights arising from sales, including sales of goods, supply of water, electricity, gas and heat, and licence of intellectual property rights; (ii) creditor's rights arising from leasing, including leasing of movable and immovable properties; (iii) creditor's rights arising from provision of services; (iv) rights to collect charges in respect of immovable properties such as highways, bridges, tunnels and berths; and (v) creditor's rights arising from provision of loans or other credits.

8.5 Insurance

Security interests can be taken over life insurance policies by way of pledge. Chinese law, however, does not recognise security interests over property insurance policies.

8.6 Floating charge over all assets

No. However, a floating charge can be taken by way of mortgage over existing and future equipment, raw materials and semi-finished and finished products of the borrower. If the borrower fails to repay the debt due, or upon the occurrence of any event that may result in enforcement of the mortgage as agreed between the parties, the lender shall have priority over such property as at the time of enforcement.

9. Are trusts recognised in China? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in China?

Yes, trusts are recognised in China. A trust is a legal relationship in respect of trust assets among a settlor, a trustee and a beneficiary. The settlor, on the basis of confidence in the trustee, entrusts certain property rights it owns to the trustee, and the trustee, in its own name, holds the trust assets for the benefit of the beneficiary.

9.2 Taking security over securities held in a clearing system

In China, security can be taken over securities held in the clearing system. However, the custody of securities held by securities companies on behalf of their clients is not recognised as a trust since the assets entrusted by the clients still belong to the clients. The securities companies are responsible for handling the centralised settlement and delivery between themselves and their own clients. The clearing institution (ie China Securities Depository and Clearing Corporation) is responsible for handling the centralised settlement and delivery between itself and the securities companies.

10. Can a company incorporated in China (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Yes. However, in order for a guarantor to provide a guarantee and/or create a security interest over its assets for the debt of the borrower, a board resolution or shareholders' resolution approving such guarantee and/or security interest must be adopted in accordance with the guarantor's articles of association. In respect of a listed company, if the total amount of security provided by it within one year exceeds 30% of its total assets, provision of such security shall be approved by the shareholders representing two-thirds or more of the voting rights present at the shareholders' general meeting.

A guarantor may provide security to a borrower incorporated in a different country, provided that if the guarantee is given in favour of an overseas lender, the borrower incorporated outside China must meet the following requirements: (i) is established by the guarantor, or its equity interest is directly/indirectly held by the guarantor; (ii) the net asset value shall be positive; (iii) shall make

profits in at least one of the past three years; and (iv) in the case of a trading enterprise, must have a net to gross asset ratio of at least 10% or 15% in respect of a non-trading enterprise. A domestic enterprise may only guarantee the debts of a borrower to the extent of the domestic enterprise's investment in the borrower. A non-financial institution enterprise that is providing a guarantee to an overseas lender must in principle have a net to gross asset ratio of at least 15%.

Furthermore, if the guarantee is given in favour of an overseas lender to secure the indebtedness of a borrower which was incorporated outside China, prior approval from SAFE is required, except where the guarantor is a wholly-foreign owned enterprise incorporated in China, and the amount of secured indebtedness is limited to the lowest of: (i) the value of the security, for which appraisal evidence is required; (ii) 50% of the net assets value of the guarantor; and (iii) the guarantor's foreign exchange earnings for the previous year.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

Yes. Under the Enterprise Bankruptcy Law, if the borrower becomes insolvent, the secured assets will not be available to the general creditors of the borrower. However, the employees' claims against the borrower for salaries, medical expenses, handicap subsidies, pension, medical insurance and compensation payable by the borrower before the effective date of the Enterprise Bankruptcy Law (ie 1 June 2007) will have priority over secured creditors.

11. (b) If an intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

There will be no effect on such securities held in the clearing system since securities companies are not permitted to include clients' funds or securities as part of their own assets. Moreover, the trading settlement funds or securities of its clients may not be sealed-up, frozen, deducted or enforced compulsorily.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

It depends on the type of security taken by the lender.

In case of a pledge, the lender may dispose of the pledged property to enforce its pledge without a court order. The enforcement of a pledge over equity in an FIE will be subject to approval by MOFCOM or its local branch and registration with the SAIC or its local branch.

In the case of a mortgage, unless the lender can reach an agreement with the mortgagee on the sale or auction of the security, it must apply to the court for an order to enforce the mortgage.

In respect of guarantees, if the guarantee contract simply provides that the guarantor will be liable for the borrower's debt in case of the borrower's default, the guarantee will be considered as a "general guarantee", whereby the guarantor will be a secondary obligor and the lender may not claim against the guarantor before exhausting all options against the borrower. On the other hand, if the guarantee contract expressly provides that the guarantor and borrower will have joint and several liabilities or does not specify or is unclear as to whether a "general guarantee" is given, the guarantee will be a "joint and several liability guarantee", in which case the lender may claim against the guarantor before exhausting options against the borrower.

If court involvement is required for the enforcement of security or a guarantee claim, it may take half a year to one year to complete such enforcement.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

Yes. A liquidator may petition the court to revoke any guarantee given for previously unsecured debt within one year before the court has accepted the bankruptcy application. The commencement of the bankruptcy application will automatically stay any enforcement proceedings.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

No. However, there is a general requirement under the Company Law that if a company grants security or gives guarantees for the benefit of its shareholders or de facto controllers, then a shareholder resolution approving such security or guarantee must be adopted by the other shareholders representing a majority of the voting rights present at a shareholders' general meeting.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Yes. The following types of security must be registered with the relevant government authority in order to be effective:

- mortgage over land use rights, which must be registered with the Land Bureau;
- mortgage over buildings (including construction in progress), which must be registered with the Real Property Bureau;
- mortgage over forestry resources, which must be registered with the Forestry Administration Bureau;
- pledge over fund units and equity interest, which should be registered with the relevant unit trusts or securities registry, or for equity interest not registered with a securities registry, with the local branch of the SAIC. (Please also refer to answers to question 8.2 in relation to a pledge of equity interest in an FIE);
- pledge over trademarks, patents and copyrights, which should be registered with the Trademark Bureau or competent intellectual property administration authority;

- pledge over receivables, which must be registered with the PBOC credit agency; and
- a pledge over bills of exchange, cheques, promissory notes, bonds, certificate of deposits, warehouse receipts and bills of lading will become effective upon transfer of the certificate of rights; however, in the absence of a certificate of rights, a pledge over such rights must be registered with the competent authority in order to be effective.

The following types of security are effective as between the parties when the security contract comes into effect, but will not be effective against a bona fide third party until it is registered with the competent registration authority:

- mortgage over means of transportation, including aircraft, vessels and motor vehicles, which should be registered with the Civil Aviation Administration, Maritime Safety Administration and Motor Vehicle Administration Bureau of the Public Security Administration, respectively;
- mortgage over equipment, raw materials and semi-finished and finished products, which should be registered with the local branch of SAIC; and
- floating charge, which should be registered with the local branch of SAIC.

Land use right mortgages must be registered within 15 days upon execution of the mortgage agreement and the Land Bureau may refuse to accept registration if an application for registration is not made within this time period. Mortgage over buildings should be registered within 30 days after execution of the mortgage agreement.

In addition to the general requirements of security registration mentioned above, the giving of security to a foreign party requires registration with SAFE in order to be valid and may also require SAFE's approval before becoming effective. A guarantee given to a foreign party may also be subject to SAFE's approval and registration.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

No stamp duty or other taxes are payable for the granting of security or the giving of a guarantee. However, the grant of security (including a guarantee) may give rise to registration fees. Upon enforcement of a mortgage, pledge, or lien, stamp duty and other taxes will be payable in respect of the proceeds arising from the sale or auction of such assets.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. It is generally possible to grant a second security over an asset. If multiple security interests exist over the same asset, they will rank in the following order:

- if a lien exists on an asset that has been mortgaged or pledged, the lien holder will have priority over the mortgagee or pledgee;
- a mortgage has priority over a pledge if both types of security are registered over the same asset;
- a registered mortgage has priority over an un-registered mortgage;
- registered mortgages rank in the order in which their interest was registered; but if registered at the same time, they will rank *pari passu*; and
- unregistered mortgages rank *pari passu*.

However, subject to proper registration and documentation, creditors may enter into contractual arrangements to modify the priority of security.

Requirements for documenting a second security depend on the type of asset (see question 15).

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

There is no law in China preventing the acquisition of companies or assets in the oil and gas industry by domestic investors. However, such acquisitions may be subject to various government approvals, including approval of the National Development and Reform Commission (the "**NDRC**") or its local branch and approval of state-owned Assets Supervision and Administration Commission of the State Council (the "**SASAC**") or its local branch if it involves state-owned shares or assets.

Foreign investors' acquisitions of companies or assets in certain sectors of the oil and gas industry are still subject to restrictions on shareholdings. For example, foreign investors are not permitted to acquire 100% of the equity interest or shares of a company engaging in oil and gas exploration and development. Furthermore, their acquisition of a Sino-foreign joint venture engaging in oil refining may not result in any one foreign investor holding a greater interest than the cumulative interest held by the Chinese investors. Compared with domestic companies, additional government approval by MOFCOM or its local branch will be required for foreign investors to acquire companies or assets in the oil and gas industry. If such acquisition impacts on national security, it may also be subject to a national security review.

18.2 Electricity

There is no law in China preventing the acquisition of companies or assets in the electricity industry by domestic investors. However, such acquisition may be subject to various government approvals, including approval of the NDRC or its local branch and approval of the SASAC or its local branch if it involves state-owned shares or assets.

Foreign investors' acquisitions of companies or assets in certain sectors of the electricity industry are subject to restrictions on shareholdings. For example, foreign investors may not acquire 50% or more of a company engaging in the construction and operation of a nuclear power station or power grid. Furthermore, they are prohibited from acquiring companies or assets involving coal-fired power generating units with an installed capacity less than certain thresholds. Compared with domestic companies, additional government approvals will be required for foreign investors to acquire companies or assets in the electricity industry, including the approval by MOFCOM or its local branch and the approval by the State Electricity Regulatory Commission or its local branch. If a foreign investor's acquisition impacts on national security, it may also be subject to a national security review.

18.3 Natural resources/mines

There is no law in China preventing the acquisition of companies or assets in the natural resources and mining industry by domestic investors. However, such acquisition may be subject to various government approvals, mainly including the approval of the NDRC or its local branch and approval of the SASAC or its local branch if it involves state-owned shares or assets.

Foreign investors' acquisitions of companies or assets in certain sectors of the natural resources and mining industry are subject to restrictions on shareholdings. For example, foreign investors are not permitted to acquire 100% of the companies engaged in the exploration and mining of combustible ice and barite, or 50% or more of companies engaged in the mining of special and rare types of coal, ocean manganese nodules or sea sand. Furthermore, they are prohibited from acquiring companies or assets involving the exploration and mining of tungsten, molybdenum, tin, antimony, fluorite, rare earth metal and radioactive mineral products. Compared with domestic companies, additional government approvals will be required for foreign investors to acquire companies or assets in the natural resources and mining industry, including approval by MOFCOM or its local branch in coordination with the Ministry of Land Resources or its local branch. If a foreign investor's acquisition impacts on national security, it may also be subject to a national security review.

18.4 Telecommunications

There is no law in China preventing the acquisition of companies or assets in the telecommunications industry by domestic investors. However, such acquisition may be subject to various government approvals, mainly including the approval of the NDRC or its local branch, and approval of the SASAC or its local branch if it involves state-owned shares or assets.

Although China has increasingly opened up the telecommunications industry to foreign investors under the terms of its accession to the WTO, foreign investors' acquisition of companies or assets in the telecommunications industry is still subject to restrictions on shareholdings. Foreign investment in companies engaging in value-added telecommunications businesses (including wireless paging business) is limited to 50% shareholding, while foreign investment in companies engaging in basic telecommunications businesses (excluding wireless paging business) may not exceed 49%. In addition, there are certain requirements on foreign investors' qualifications. For example, in order to acquire companies engaging in basic telecommunications services, the largest foreign investor holding more than 30% equity interest or shares of the cumulative equity interest or shares of foreign investors must have obtained a licence to carry out basic telecommunications services in its place of incorporation. Compared with domestic companies, additional government approvals will be required for foreign investors to acquire companies or assets in the telecommunications industry, including the approval by MOFCOM or its local branch and the approval by the Ministry of Industry and Information Technology. If a foreign investor's acquisition impacts on national security, it may also be subject to a national security review.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

There is no law in China preventing the taking or enforcement of security in relation to shares in or assets of companies in the oil or gas industry.

However, if the enforcement of security involves state-owned shares or assets, it will be subject to the requirements and procedures applicable to the transfer of state-owned shares or assets, which may include approval of the SASAC or its local branch, assets evaluation and public bidding or auction at recognised property exchanges.

In addition, the taking or enforcement of security by foreign companies in relation to shares in or assets of companies in the oil and gas industry may be subject to the approval of MOFCOM or its local branch. Furthermore, enforcement of such security by foreign companies may not result in the violation of the restrictions on foreign shareholdings in certain sectors of the oil and gas industry (please see question 18.1 above for details).

19.2 Electricity

There is no law in China preventing the taking or enforcement of security in relation to shares or assets of companies in the electricity industry.

However, if the enforcement of security involves state-owned shares or assets, it will be subject to the requirements and procedures applicable to the transfer of state-owned shares or assets, which may include approval of the SASAC or its local branch, assets evaluation and public bidding or auction at recognised property exchanges.

In addition, the taking or enforcement of security by foreign companies in relation to shares in or assets of companies in the electricity industry may be subject to the approval of MOFCOM or its local branch. Furthermore, enforcement of such security by foreign companies may not result in the violation of the restrictions on foreign shareholdings in certain sectors of the electricity industry (please see question 18.2 above for details).

19.3 Natural resources/mines

There is no law in China preventing the taking or enforcement of security in relation to shares or assets of companies in the natural resources and mining industry.

However, if the enforcement of security involves state-owned shares or assets, it will be subject to the requirements and procedures applicable to the transfer of state-owned shares or assets, which may include approval of the SASAC or its local branch, assets evaluation and public bidding or auction at recognised property exchanges.

In addition, the taking or enforcement of security by foreign companies in relation to shares in or assets of companies in the natural resources and mining industry may be subject to the approval of MOFCOM or its local branch. Furthermore, enforcement of such security by foreign companies may not result in the violation of the restrictions on foreign shareholdings in certain sectors of the natural resources and mining industry (please see question 18.3 above for details).

19.4 Telecommunications

There is no law in China preventing the taking or enforcement of security in relation to shares or assets of companies in the telecommunications industry.

However, if such taking and enforcement of security involves state-owned shares or assets, it will be subject to the requirements and procedures applicable to the transfer of state-owned shares or assets, which may include approval of the

SASAC or its local branch, assets evaluation and public bidding or auction at recognised property exchanges.

In addition, the taking or enforcement of security by foreign companies in relation to shares in or assets of companies in the telecommunications industry may be subject to approval of MOFCOM or its local branch. Furthermore, enforcement of such security by foreign companies may not result in the violation of the restrictions on foreign shareholdings in certain sectors of the telecommunications industry (please see question 18.4 above for details).

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in China?

No. China in practice does not enforce foreign judgments without a reciprocal enforcement of judgment treaty with the relevant foreign jurisdiction. There are as yet only a relatively small number of these, which however do not cover England and Wales.

On the other hand, since China has acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), an arbitral award rendered in a member state of the New York Convention is enforceable in China save with limited exceptions. Therefore, parties to a loan agreement and/or a guarantee governed by English law may consider choosing arbitration in a member state of the New York Convention. Furthermore, since 1 August 2008, a Hong Kong court judgment on a loan agreement and/or a guarantee governed by English law will be enforceable in China if certain conditions are satisfied. Among others, such judgment must be final and conclusive, and there must be a valid written agreement between the parties which expressly designates a court of Hong Kong to have the exclusive jurisdiction over the dispute concerned. In addition, an application for recognising and enforcing such judgment must be filed with a competent court in China within two years as of the date of the judgment.

However, it should be noted that under Chinese law, parties may only opt for non-Chinese governing law and dispute resolution outside China if the contract is "foreign-related". A contract is generally considered as "foreign-related" if at least one of the parties is foreign, if the subject matter of the contract is outside mainland China or if the occurrence, modification or termination of the civil relationship between the parties takes place outside mainland China.

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HONG KONG

HERBERT SMITH FREEHILLS

LENDING

1. Does a lender require a licence to lend money to a company based in Hong Kong (the "borrower")? Are there any exemptions available?

Yes. A lender carrying on the business of making loans in Hong Kong must hold a money lenders' licence under the Money Lenders Ordinance (Cap. 163, Laws of Hong Kong) (the "**MLO**"). The requirement to hold a licence under the MLO does not apply to authorised institutions who hold a banking licence under the Banking Ordinance (Cap. 155, Laws of Hong Kong) (the "**Banking Ordinance**").

By way of exemptions, the MLO provides that:

- certain persons are not required to hold a money lenders' licence (such as an entity which is registered and regulated by certain other specified supervisory bodies in Hong Kong or a bank which is established or incorporated outside Hong Kong and is recognised as a bank and regulated by a banking supervisory authority and carries on banking business in the place where that banking supervisory authority is located); and
- certain types of loans do not require the lender to hold a money lenders' licence (amongst others): (i) a loan made to a company whose shares are listed on a recognised stock exchange; (ii) a loan made to a company that has a paid up share capital of not less than HKD 1 million or an equivalent amount in any other approved currency; (iii) a loan made by a holding company to its subsidiary or by its subsidiary to its holding company or another subsidiary of the same holding company; and (iv) a loan made to a company secured by a mortgage, charge, lien or other encumbrance registered or to be registered, under the Companies Ordinance as in force at the time.

Please note that the new Companies Ordinance, being Cap. 622 of the Laws of Hong Kong (the "**New CO**") came into force on 3 March 2014. Upon the enactment of the New CO, the old Companies Ordinance, being Cap. 32 of the Laws of Hong Kong (the "**Old CO**") has been retitled as the "Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32, Laws of Hong Kong)" (the "**CWUMPO**"), with the majority of the provisions repealed, leaving only those relating to winding-up and insolvency of companies and prospectuses in the CWUMPO.

2. What are the consequences of making a loan to a borrower in Hong Kong without a licence?

As a general rule, if a lender is not exempted under the MLO and makes a loan to a borrower without the required licence, then such lender will not be entitled to recover any principal or interest in respect to that loan or enforce any agreement made or security taken in respect of that loan in any court. Lending without a licence is also an offence which would attract a fine and imprisonment.

However, if the court is satisfied that in all the circumstances it would be inequitable if such lender is not entitled to recover its money or interest or enforce its security, the court may in its discretion permit such lender to recover its money or interest or to enforce its security.

3. Will a borrower based in Hong Kong have to deduct amounts for withholding tax on interest payments made to an overseas lender?

There is currently no withholding tax in Hong Kong.

4. Is there any limit to the level of interest that can be charged on loans made in Hong Kong?

Yes. Under the MLO, it is an offence if any person (whether a money lender or not) lends money at an effective rate of interest which exceeds 60% per annum. No agreement for repayment of any loan or for the payment of interest on any loan and no security given in respect of such agreement or loan shall be enforceable in any case in which the effective rate of interest exceeds 60% per annum. The MLO further provides that the lending of money at an effective rate of more than 48% per annum or more will raise a rebuttable presumption that the transaction is extortionate and liable to be reopened by the court.

Also, extortionate credit transactions entered into by a company within three years of it being wound up may be set aside by the court. Please see our answers in relation to question 13 for further details.

As regards to default interest generally, if the default interest rate on a loan is too high, it may be construed by the Hong Kong courts as a penalty and liable to be made unenforceable.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. It is possible and valid to subordinate debt in Hong Kong. This may be achieved structurally or contractually.

5.1 Contractual subordination

By contractual subordination, we refer to an arrangement whereby senior creditors, junior creditors and the borrower/debtor agree to a set of pre-arranged rules in a contract (typically by way of an intercreditor deed or subordination deed) governing payment and priority. They may also agree to restrictions in relation to the priority and enforcement of any security held by a junior creditor. Typically in a total subordination, the junior creditor undertakes not to collect or accelerate the junior debt until the senior debt has been paid in full. It is usual for the junior creditors to undertake to turnover any monies received from the borrower in breach of the subordination/intercreditor deed. The junior creditor usually agrees to be subordinated in relation to their rights on enforcement and on insolvency of the borrower/debtor (whereby the senior creditor will generally direct the junior creditor as to the application of proceeds). Where the junior lenders are commercial lenders, the precise ambit of the restrictions on the junior creditors in an intercreditor/subordination deed are closely negotiated to retain ability for the junior creditor to preserve its position. Where the junior creditor is a related party to the borrower/debtor (such as its parent), the junior creditor usually has little or no rights.

5.2 Structural subordination

Structural subordination is the term which describes the subordinating effect of lending to a company which is a holding company of another asset owning company. Hong Kong law treats the assets and liabilities of companies in a group individually and not on a group basis. Therefore, a creditor of the holding company will only be able to look to the assets of the holding company itself and not directly to the assets of the subsidiary. For that reason a creditor of the asset owning subsidiary will effectively rank ahead of the holding company as the asset owning company will need to be liquidated (and therefore its own creditors satisfied) before its assets may be distributed to its parent for satisfaction of the holding company's creditors. This concept is commonly used in acquisition finance transactions, the more junior debt being lent further up the chain of holding companies and therefore further away from the assets.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Hong Kong or a guarantee from an entity incorporated in Hong Kong?

Subject to our comments on the licences required to make a loan in Hong Kong above, a foreign lender does not need to be licensed or registered in Hong Kong in order to take security over assets in Hong Kong or benefit from a guarantee given by an entity incorporated in Hong Kong.

7. Does the taking of security in Hong Kong result in a lender being liable to tax in Hong Kong?

No. The mere taking of security in Hong Kong by a foreign lender will not by itself cause the secured foreign lender to be liable to Hong Kong tax.

However, there are various fees payable for registering security interests in Hong Kong.

Upon enforcement of the respective security, stamp duty may be payable in relation to the transfer of shares and property. Where a legal mortgage or charge is enforced and the charge takes over:

- shares in a Hong Kong company, a fixed duty of $5 and an *ad valorem* stamp duty by reference to the value of shares transferred are payable upon the transfer (by way of security) of the legal title in shares; or
- property in Hong Kong, stamp duty is payable at varying rates (depending on the value of the property) upon the transfer (by way of security) of legal title in the property.

On 22 February 2013, the Hong Kong Government proposed to adjust the stamp duty rates payable upon the transfer of legal title in the property. Under the Hong Kong Government's proposed amendments, any residential property (except that acquired by a Hong Kong permanent resident who does not own any other residential property in Hong Kong at the time of acquisition) and any non-residential property acquired on or after 23 February 2013 by any person (including a limited company), will be subject to the new higher rates of stamp duty. Any transfer of legal title in the property which took place before 23 February 2013 or where the purchaser, being a Hong Kong permanent resident and does not hold any other property in Hong Kong will be subject to the original stamp duty regime. These proposals are fully set out in the Stamp Duty (Amendment) Bill 2013 which is now under the scrutiny of the Bills Committee of the Legislative Council and may be amended.

In relation to residential properties in Hong Kong, it should also be noted that the liability to Special Stamp Duty (the "**SSD**") will arise if: (i) the transaction involves the sale and purchase or transfer of a residential property; (ii) the property is acquired by the seller or transferor on or after 20 November 2010; and (iii) the property is disposed of (which includes a resale or transfer) by the seller or transferor within 24 months (if the property was acquired between 20 November 2010 and 26 October 2012) or 36 months (if the property was acquired on or after 27 October 2012) from the date of acquisition, unless the transaction is exempted from SDD.

In addition, the Buyer's Stamp Duty (the "**BSD**") is payable on an agreement for sale or a conveyance on sale for the acquisition of any residential property if the residential property is acquired by any person (including a limited company) on or after 27 October 2012, except a Hong Kong permanent resident acquiring the property on his/her own behalf.

8. Can a security interest be taken in Hong Kong over the following assets?

8.1 Land

Yes. Security over land is taken by way of legal charge, which is typically referred to as a mortgage in Hong Kong. The mortgage should be registered with the Land Registry within one month of its creation.

Where a charge or a mortgage is granted by a company incorporated in Hong Kong or a company registered under the Companies Ordinance as a non-Hong Kong company (the "**Registered Non-Hong Kong Company**"), the same must also be registered with the Companies Registry within one month of its creation. Please refer to our answers to question 15 for further details.

8.2 Shares in a Hong Kong company

(a) Shares (in certificated form) in a Hong Kong company

Yes. Security over shares in certificated form is typically taken by way of mortgage or charge (which has the same effect under the Conveyancing and Property Ordinance (Cap. 219, Laws of Hong Kong) (the "**CPO**")).

Such mortgage may be in the form of a legal mortgage, where the mortgagee or its nominee becomes the registered holder of the shares. Such mortgage may also be in the form of an equitable mortgage where the lender does not become the registered holder of the shares and legal title remains with the mortgagor.

(b) Shares and securities listed by a Hong Kong company in scripless form

Yes. Shares and securities held in scripless form with the Central Clearing and Settlement System (the "**CCASS**") operated in Hong Kong by Hong Kong Securities Clearing Co. Ltd. ("**HKSCC**") are generally secured by way of a charge over the rights of the chargor in respect of such shares, including the chargor's rights against CCASS, rights to delivery of any securities relating to the charged shares and any rights and remedies against any financial intermediary or any other third party arising from the charged shares. Please also refer to our answers to question 13.

CCASS is the scripless shares and securities transfer system in Hong Kong, catering for the book-entry settlement of transactions in listed shares and securities between CCASS participants (the "**CCASS Participants**"). All shares and securities deposited in CCASS by CCASS Participants are registered in the name of HKSCC Nominees Limited, the nominee company of HKSCC, which provides nominee services to the CCASS Participants. To the extent the security trustee (for the lender) is not an authorised CCASS Participant, it will appoint a third party custodian to hold the secured shares and securities on account for it under CCASS. Legal title to shares and securities deposited under CCASS is held with HKSCC Nominees Limited. Control of the equitable interest to shares and securities deposited under CCASS rests with the CCASS Participant or the third party custodian (each an "**Intermediary**"), who acts according to the instruction of the equitable owner of the shares and securities.

A lender taking securities over such listed shares and securities will usually only have an equitable interest, in which case the only form of security that can be taken by the lender over such listed securities is an equitable mortgage or charge. In practice, to effect an equitable mortgage, the equitable mortgagor will need to give instructions to the Intermediary to transfer its equitable interest into the account of the equitable mortgagee with the same Intermediary or another Intermediary. The equitable mortgagee and the equitable mortgagor will typically also sign a separate security document evidencing the creation of security interest over such securities.

A charge granted by a company incorporated in Hong Kong or a Registered Non-Hong Kong Company must be registered with the Companies Registry within one month of its creation. Please refer to our answers to question 15 for further details.

8.3 Bank accounts

Yes. Security over a bank account may be created by way of a fixed charge or a floating charge. On insolvency, secured creditors benefitting from a fixed charge will rank in priority to unsecured creditors and floating charge holders in respect of the assets covered by such fixed charge. Secured creditors benefitting from a floating charge may be subject to certain preferential claims. Please see our answers to question 11(a) for further information.

In order to effect a fixed charge over a bank account, the chargee must exercise sufficient control over that bank account and any proceeds in such account. If there is insufficient control by the chargee over the bank account, the Hong Kong courts may deem the charge in question to be a floating charge instead of a fixed charge. Please also refer to our answers to question 13.

A fixed charge over a bank account is not registrable under the New CO. However, a floating charge granted by a company incorporated in Hong Kong or a Registered Non-Hong Kong Company over a bank account must still be registered with the Companies Registry within one month of its creation. Please refer to our answers to question 15 for further details.

8.4 Receivables (rights under contracts)

Yes. Subject to any restrictions in respect of assignment and the creation of security interests in the contract, an assignment by way of security of receivables/rights under a contract may be made in favour of an assignee.

A legal assignment must be perfected by the service of a notice of such assignment to the corresponding obligor under such contracts. An equitable assignment need not be perfected by way of notice, but is only effective in equity.

An assignment granted by a company incorporated in Hong Kong or a Registered Non-Hong Kong Company must be registered with the Companies Registry within one month of its creation.

8.5 Insurance

Yes. Subject to any restrictions in respect of assignment and the creation of security interests set out in that insurance policy, rights under insurances (including the payment of insurance proceeds) may be assigned to an assignee by way of security.

A legal assignment must be perfected by the service of a notice of such assignment on the insurer. An equitable assignment need not be perfected by way of notice, but is only effective in equity. It is also not uncommon for the lender to request that it be endorsed as a loss payee by the insurer in relation to the insurances.

An assignment granted by a company incorporated in Hong Kong or a Registered Non-Hong Kong Company must be registered with the Companies Registry within one month of its creation.

8.6 Floating charge over all assets

Yes. A company (but not an individual) may create a floating charge over all or certain of its assets in favour of a chargee. Please also refer to our answers to question 13.

A charge granted by a company incorporated in Hong Kong or a Registered Non-Hong Kong Company must be registered with the Companies Registry within one month of its creation. Please refer to our answers to question 15 for further details.

9. Are trusts recognised in Hong Kong? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Hong Kong?

Yes, trusts are recognised in Hong Kong. A trust is a legal relationship in respect of trust assets made between a trustee and a beneficiary. The trustee holds the trust assets for the benefit of the beneficiary. While the trustee has technical or legal ownership of trust assets, the beneficiary has economic or beneficial ownership. Assets held under a trust can be tangible or intangible.

Trustee structures are commonly used in Hong Kong and regionally to hold security for a pool of creditors as the beneficiaries. The relationship between the parties would typically be governed by a security trust deed, setting out the security trustee's powers and obligations, and consent requirements where the security trustee is taking certain actions on behalf of the beneficiaries. The security trust deed usually allows for the beneficiaries to change from time to time, so that the security would not need to be transferred or amended in such instances.

9.2 Taking security over securities held in a clearing system

Each beneficiary to the securities held in a clearing system will have a separate trust over these securities. The Intermediary takes on the role of a trustee in holding the listed securities in a clearing system for the benefit of the beneficiary.

A valid trust can be established in favour of each of the beneficiaries to the securities, though the securities in a clearing system are typically held in one commingled pool by the Intermediary and are not clearly segregated on behalf of each beneficiary. An Intermediary is not required to segregate the securities held in its account so long as the parties involved know the quantity of securities which are to form the subject matter of each separate trust.

It is important to note that an arrangement by the Intermediary to keep the beneficiary's securities segregated from its own assets is an important indication of a trustee-beneficiary relationship, giving rise to a trust.

10. Can a company incorporated in Hong Kong (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

A company incorporated in Hong Kong may give a guarantee for the debt of a borrower if it is authorised to do so under the terms of its constitutional documents (including for the debt incurred by a borrower incorporated in a different country). All Hong Kong companies incorporated after 31 August 1984 have the power to give a guarantee unless such power is expressly excluded or modified by the company's constitutional documents.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

Where the borrower is insolvent, the claims of a secured creditor benefiting from a valid perfected fixed charge will rank in priority to all other creditors in respect of the fixed charge assets. Where the borrower's assets available for payment of general creditors are insufficient to meet preferential claims (such as employee claims, certain statutory debts, costs of liquidation, small depositors of banks and persons claiming under contracts of insurance), floating charge assets can be used first for payment of preferential claims (in priority to the claims of the floating charge holder).

The secured assets will be protected from the general unsecured creditors of the borrower except (i) in respect of assets charged under a floating charge, payments to the floating charge holder will be postponed and paid after claims of the preferential creditors, and (ii) to the extent that any security over the secured assets is challenged successfully (and set aside) by a liquidator of the borrower. Please refer to our answers to questions 12 and 13 below for further information.

11. (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

Where an Intermediary is insolvent, the secured lender may have various means of claiming or recovering the securities or the value of the securities held for its benefit.

If the securities held by an Intermediary are kept in a segregated account, this may confer on the chargor, and therefore the secured lender, a right to trace into that account in the event of the Intermediary's insolvency.

However, an Intermediary typically holds securities in a clearing system on a commingled and non-segregated basis. Please refer to our answers in question 9 above for further information. Where an Intermediary does not keep these securities in a segregated account, the secured lender may suffer losses if there is a shortfall in the overall pool of securities held by the Intermediary.

In particular, if an Intermediary account was active, it is likely that the loss resulting from the shortfall of securities would be borne pro-rata among all the affected clients of the Intermediary. The secured lender will thus have to share in the shortfall with other clients of the Intermediary. However, if an Intermediary account was inactive, so that it would be easy to identify the transactions that had caused the shortfall, the court may apply tracing rules to attribute the 'missing' shares to particular client(s), and the secured lender will not have to share the losses with other clients of the Intermediary on a pro-rata basis.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

Subject to compliance with the terms of the security, a lender can generally enforce its security freely after default by the borrower without the need to obtain a court order or involve a court official.

In the case of a guarantee given by a company, subject to compliance with the terms of the guarantee, a lender can make a demand for payment under a guarantee without the need for a court order. If the guarantor fails to pay under the guarantee, then (i) the lender can serve a written demand requiring payment within three weeks and if such demand is not satisfied, the lender may then apply to the court to wind-up the guarantor; and (ii) the lender may institute court proceedings against the guarantor. The amount of time involved in pursuing such an action will depend on the circumstances and whether it is contested.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

Generally no, unless the security or guarantee was invalid or was liable to be set aside or the lender's enforcement action did not conform with the terms of the security or guarantee. A liquidator or a creditor of the borrower may prevent an enforcement of security if they are successful in setting aside the security based on any of the following grounds:

13.1 Unfair preference

A liquidator may make an application to the court under sections 266 and 266B of the CWUMPO (which are retained from the Old CO) to set aside transactions entered into by the borrower with a desire to put a particular creditor (including a surety or guarantor) or group of creditors in a better position than they otherwise would have been in the event of the borrower's insolvency (an "**unfair preference**"). Those transactions include any conveyance, mortgage, encumbrance, delivery of goods, payment, execution or other acts relating to assets of the borrower.

Under sections 266 and 266B of the CWUMPO, the court may set aside transactions on the basis that they are unfair preferences if they are entered into by the borrower during the (i) six months prior to the commencement of winding up of the borrower (being the date of the winding-up petition), or (ii) if the counterparty is an "associate" as defined under the CWUMPO (eg, if the counterparty is (a) a person who is in partnership with the borrower, (b) an employee of the borrower, or (c) a company which the borrower has control of (the borrower has control of a company if the directors of that company is accustomed to act in accordance with the directions or instructions of the borrower, or the borrower is entitled to exercise or control the exercise of one-third or more of the voting power at any general meeting of the company), two years prior to the commencement of winding up of the borrower). However, any charge or security created by the borrower to secure new monies advanced by a creditor will not be affected by section 266 of the CWUMPO.

The above applies to a borrower incorporated in Hong Kong and also outside of Hong Kong if it has a place of business in Hong Kong.

13.2 Floating charge

Section 267 of the CWUMPO (which is retained from the Old CO) provides that where a company is being wound up, a charge which when created was a floating charge on the undertaking or property of the company and which was created within 12 months of the commencement of the winding up of that company (being the date of the winding-up petition), shall be invalid, unless it is proved that the company was solvent immediately after the creation of the floating charge. However, any such charge created by the borrower to secure new monies advanced by a creditor will not be affected to the extent of that advance. Please also see our answers to question 11(a).

The above applies to a borrower incorporated in Hong Kong and also outside of Hong Kong if it has a place of business in Hong Kong.

13.3 Transactions to defraud creditors

Under section 60 of the CPO, any disposition of property made with the intention of defrauding creditors may be set aside on the application of any person adversely affected by the transaction. This will not apply to any bona fide purchaser for good or valuable consideration. An application under section 60 of the CPO may be made at any time as there is no time limit for such an application and the company does not have to be insolvent at the time or become insolvent as a result of the conveyance.

The question of whether there is an "intention to defraud" is a matter of fact to be determined having regard to the circumstances surrounding the transaction.

The above applies to a borrower incorporated in Hong Kong and also outside of Hong Kong if it has a place of business in Hong Kong.

13.4 Commercial benefit

Each director of a company owes a duty to act bona fide in the best interests of the company. Therefore the directors of the borrower should only enter into a transaction on behalf of the borrower if the transaction is likely to be of commercial benefit to the borrower.

Where a director has entered into a transaction where no commercial benefit accrues to the borrower, he is acting in breach of his fiduciary duties. If the counterparty (ie, the lender) to the transaction has actual or constructive notice of such breach, a liquidator may be able to apply to the court to set aside the transaction and recover any benefits conferred on the counterparty (eg, upon any enforcement of security).

The question of whether there is any commercial benefit is a matter of fact to be determined having regards to the circumstances surrounding the transaction.

The above only applies to a borrower incorporated in Hong Kong.

13.5 Extortionate credit transactions

An extortionate transaction entered into by a company within three years of it being wound up may be liable to be set aside by the court. A transaction is extortionate if, having regard to the risk accepted by the person providing the credit:

- it requires grossly exorbitant payments to be made; or
- otherwise grossly contravenes ordinary principles of fair dealing.

Section 264B(3) of the CWUMPO (which is retained from the Old CO) provides that where an application is made by a liquidator under this provision, it is presumed that the transaction is extortionate unless the contrary is proved.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

Yes. Where a person has acquired shares in a Hong Kong company and any liability has been incurred (by that or any other person), for the purpose of that acquisition, it is not lawful for the Hong Kong company or any of its Hong Kong subsidiaries to give financial assistance directly or indirectly for the purpose of reducing or discharging the liability so incurred. Financial assistance includes guarantees, security or indemnities. Therefore, the granting of security or guarantee by the acquired company to secure a loan used by the borrower to acquire such company is prohibited.

However, a company is not prohibited from giving financial assistance for the purpose of an acquisition of shares in its holding company if the holding company is incorporated outside Hong Kong.

Please note that the broad prohibition is subject to certain exceptions as set out in sections 277 to 282 of the New CO, some of which are more restrictive in relation to listed companies. The New CO also allows all types of companies (listed or unlisted) to provide financial assistance subject to the satisfaction of the solvency test and one of the three procedures as set out below:

- the first procedure, under section 283 of the New CO, provides that a company may give financial assistance if the assistance and all other financial assistance previously given and not repaid, is in aggregate less than 5% of the shareholders' funds. This giving of assistance must be supported by a solvency statement and a resolution of the directors in favour of giving the assistance. The assistance must be given not more than 12 months after the solvency statement is made. Within 15 days after giving the assistance, the company must notify its members of the details of the assistance.
- the second procedure, under section 284 of the New CO, provides that a company may give financial assistance if it is approved by written resolution of all members of the company. The giving of assistance must be supported by solvency statement and resolution of the directors in favour of giving the assistance. The assistance must be given not more than 12 months after the solvency statement is made.
- the third procedure, under section 285 of the New CO, provides that a company may give financial assistance if it is approved by an ordinary resolution. The giving of assistance must be supported by a solvency statement and the board of directors must resolve that giving the assistance is in the interests of the company. The company must send to each member at least 14 days before the resolution a notice which contains all information necessary for the members to understand the nature of the assistance and the implications of giving it to the company. The assistance may only be given not less than 28 days after the resolution is passed and not more than 12 months after the day on which the solvency statement is made. Shareholders holding at least 5% of the total voting rights or members representing at least 5% of the total members of the company may, within the 28-day period, apply to the court to restrain the giving of the assistance.

Please also refer to our answers to question 12 above.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Yes. Under the New CO, every charge or mortgage created by a company incorporated in Hong Kong or a Registered Non-Hong Kong Company, which gives security on its property (in relation to a Registered Non-Hong Kong Company, only to the extent of property in Hong Kong), must be registered with the Companies Registry within one month of its creation (and, in the case of a Registered Non-Hong Kong Company, within one month after the registration of the company as a Registered Non-Hong Kong Company if the charge or mortgage was granted before the Registered Non-Hong Kong Company is so registered). Under Section 337 of the New CO, failure to register in time will cause the charge or mortgage in question to be void as against the liquidator and any other creditor of such company. Any company or its officer who is in default in complying with this registration requirement under the New CO shall be liable to a fine. The New CO replaces the "automatic" acceleration provision with "discretionary" acceleration provision, giving a choice to the lender as to whether the secured amount is to become immediately payable.

It should be noted that the New CO has shortened the time period for registration of a charge from five weeks to one month. Additional requirements are also imposed to enhance disclosure. For example, a certified copy of the charge instrument is now required to be registered and made available for public inspection. Please refer to sections 333 to 356 of the New CO for further details.

In respect of security over real property and land in Hong Kong, such security should be registered at the Land Registry in Hong Kong within one month of its creation. Late registration will affect the priority of the security. If such security is not registered at all, it will be null and void as against any bona fide purchaser or mortgagee for valuable consideration.

Security in respect of intellectual property rights and ships must also be registered with the relevant government authority.

Guarantees need not be registered or filed in Hong Kong.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

No stamp duty or other taxes are payable for the granting of security over assets or for the giving of guarantee. However, upon enforcement of a mortgage or charge over shares in a company incorporated in Hong Kong or listed on the Hong Kong Stock Exchange, or a mortgage over real property, stamp duty will be payable in respect of the transfer of such shares or real property to the purchaser.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. It is possible to grant second ranking security over an asset as a matter of Hong Kong law. Generally, where there are several competing creditors with security interests over the same asset, they will, subject to compliance with any applicable perfection requirements and/or notice and provided that no contractual subordination has been entered into to alter the priority at law, rank in the order in which their interest was created and/or registered.

Documenting a second ranking security would be in the same way as any other security interest is documented over the type of asset (see question 8).

Both secured and unsecured creditors may enter into contractual arrangements to modify the priority position that the law confers on them in the event of the borrower's insolvency (see question 13). However, it is not possible to alter the ranking of a creditor by an intercreditor or subordination deed where that creditor is not a party.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

New merger control rules are to be introduced by the Competition Ordinance (Cap. 619, Laws of Hong Kong). The new competition regime, which will initially be focused on the telecommunications sector, is expected to come into force in 2014. In addition to merger control, the Competition Ordinance will also regulate all anti-competitive agreements and practices and abuses of market power that could affect competition in Hong Kong, including agreements to fix prices and allocate or share customers/markets.

18.1 Oil/gas

No. There is no law in Hong Kong preventing the acquisition of companies or assets in the oil or gas industry. However, a buyer of such company or asset may need to apply for a licence from the Hong Kong Government in order to operate such business.

18.2 Electricity

No. There is no law in Hong Kong preventing the acquisition of electricity companies in Hong Kong. The existing regulatory framework of the electricity companies in Hong Kong is based on bilateral agreements entered into between the Hong Kong Government and the electricity companies. A buyer of such companies would be subject to the pre-existing contractual arrangement between the company and the Hong Kong Government.

18.3 Natural resources/mines

No. There is no law in Hong Kong preventing the acquisition of companies or assets in the natural resources or mining industry. However, a buyer of such companies or assets may need to apply for licence from the Hong Kong Government in order to operate such business.

18.4 Telecommunications

In Hong Kong, the acquisition of shares in a carrier licensee (ie, a company which holds a carrier licence, such as a 3G licence), or in a company which controls a carrier licensee, is subject to the new merger control rules introduced by the Competition Ordinance upon its commencement. This replaces the existing merger control regime set forth in the Telecommunications Ordinance (Cap. 106, Laws of Hong Kong) and prohibits any such acquisition if it is likely to have the effect of substantially lessening competition in Hong Kong.

In addition, certain telecommunications licensees (albeit the number of such licensees is decreasing) in Hong Kong are required to seek prior approval from the Office of Communications Authority (the "**OFCA**") before their ownership structure can be modified or before they can register any transfer of their shares. Such requirements are usually prescribed in the relevant telecommunications licences.

In Hong Kong, the acquisition of assets from a carrier licensee, or a company which holds a carrier licensee, will be subject to the new merger control rules in the Competition Ordinance provided that the target carrier licensee has been replaced (or substantially replaced) by the acquiring entity in the relevant telecommunication business. Further, the target telecommunications company is often required under its telecommunications licence to obtain approval from the OFCA prior to any disposal or transfer of its assets or telecommunications licences.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

No, there is no law in Hong Kong preventing the taking of or enforcement of security in relation to shares in or assets of oil or gas companies.

19.2 Electricity

No, there is no law in Hong Kong preventing the taking of or enforcement of security in relation to shares in or assets of electricity companies.

19.3 Natural resources/mines

No, there is no law in Hong Kong preventing the taking of or enforcement of security in relation to shares in or assets of natural resources or mining companies.

19.4 Telecommunications

No, there is no law in Hong Kong preventing the taking or enforcement of security over the shares or assets (including telecommunications licences) of telecommunications companies.

However, if the security required by a lender involves a mortgage of shares or an assignment of assets, the prior approval from the OFCA with regard to the creation of such security will be required as such mortgage or assignment, for purposes of Hong Kong law, amounts to a transfer which will fall under the regulatory regime set out in our answers in relation to question 18.4 above, including merger control. Even if the form of security required does not involve any transfer of shares or assets (eg, an equitable mortgage of shares or a fixed charge over shares), it is a common practice in Hong Kong to seek a comfort letter from the OFCA that the creation of such security (and the appointment of a receiver over the assets of or shares in such telecommunications company) will

not constitute a breach of the law or any conditions set forth in the relevant telecommunications licence.

With respect to the enforcement of security, if this results in the transfer of shares in the telecommunications company or disposal of its assets (including its telecommunications licence), such transfer and disposal will be subject to the regulatory control mentioned in our answers in relation to question 18.4, including merger control. In addition, the Hong Kong Government has rights under certain telecommunications licences to acquire the relevant telecommunications company's undertakings and assets if such telecommunications company goes into liquidation or ceases to carry on its business. This right is likely to have an impact on the enforcement of security by a lender.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Hong Kong?

There is no statutory scheme for the registration in Hong Kong of a judgment obtained in the courts of England. The person in whose favour the judgment was given in England may only enforce that judgment in Hong Kong by commencing a common law action in the court for recognition and enforcement of the judgment debt.

The English judgment in question must be final and conclusive and for a fixed sum of money (not being a sum payable in respect of taxes, similar charges, a fine or a penalty). The borrower will not be entitled to call into question the validity of the English judgment or raise defences which were open to it in the proceedings before the English court, except that the action on the judgment debt may be defended on grounds such as fraud, public policy or natural justice.

Under the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap. 46, Laws of Hong Kong), a foreign judgment given in any proceedings will not be recognised or enforced in Hong Kong if (a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and (b) the person against whom the judgment was given: (i) did not bring or agree to the bringing of those proceedings in that court; and (ii) did not counter-claim in the proceedings or otherwise submit to the jurisdiction of the court.

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INDIA

AMARCHAND & MANGALDAS & SURESH A. SHROFF & CO.

LENDING[1]

1. Does a lender require a licence to lend money to a company based in India (the "borrower")? Are there any exemptions available?

Yes. Lending of monies to a borrower can be undertaken by both domestic entities as well as offshore entities. Different licensing requirements apply in respect of foreign currency loans and Indian rupee ("**Rupee**") loans.

1.1 Foreign currency loans

Lending in foreign currency to Indian borrowers by non-Indian lenders is governed by the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations 2000 (the "**ECB Regulation**") enacted by the Reserve Bank of India (the "**RBI**"), in the exercise of its powers under the Foreign Exchange Management Act 1999 (the "**FEMA**"). The Master Circular on External Commercial Borrowings and Trade Credits dated 1 July 2013 (the "**ECB Circular**") issued by the RBI (under the ECB Regulation) sets out its broad policies in respect of lending by non-Indian lenders to Indian borrowers in foreign currency (the "**ECBs**"). The ECB Circular is an annual circular which was issued with a "sunset clause", stating that it expires on 1 July 2014. The RBI then issues a new master circular for the subsequent 12 months.

If the foreign currency lending meets the various pre-specified conditions such as the type of borrower and lender, amount that can be borrowed, interest rate, security provided and use of proceeds, then it falls within the "automatic route" in which case no prior RBI approval is required. However, if these requirements are not met then the lender may be able to deviate from the permitted standard conditions only with prior RBI approval, known as the "approval route". The ECB Circular enables Indian borrowers to raise foreign debt from certain non-Indian lenders which include international banks, international capital markets, multilateral financial institutions such as International Finance Corporation, Asian Development Bank and the CDC Group, regional financial institutions and government owned development financial institutions, export credit agencies, suppliers of equipment, foreign collaborators and foreign equity holders (subject to lending limits). Provided a lender meets the eligibility requirements (and where it does not, an RBI approval is obtained for the relevant lending), there are no further registration/licensing requirements for lending to an Indian borrower. However, the Indian borrower may have certain filing requirements with the RBI which are effected through its authorised dealer so that the RBI can monitor inflow and outflow of foreign currency into India as the Rupee is still not a fully convertible currency.

1.2 Rupee loans

Rupee loans to domestic entities are primarily provided by banking companies, financial institutions or non-banking financial companies ("**NBFCs**"). These entities may be categorised as moneylenders under the relevant Moneylenders Act requiring a money lending licence to operate in the relevant state. While banking companies are usually exempted from the application of the provisions of the Moneylenders Act, some states also exempted the application of the provisions of these Acts to financial institutions and NBFCs. While other entities such as companies, individuals, societies and trusts are, as a matter of law, permitted to give loans, they will be required to obtain a money lending licence under the relevant Moneylenders Act to operate in the relevant state.

Banking companies are governed by the Banking Regulation Act 1949 and the Reserve Bank of India Act 1934 (the "**RBI Act**") but (as noted earlier) are exempted from the application of the Moneylenders Act. The Indian banking sector comprises: (i) nationalised banks (private sector banks that were nationalised by the central government) in 1969 and 1979; (ii) old private sector banks in the nature of banking companies; (iii) new private sector banks that were granted licence post-liberalisation; and (iv) foreign banks. RBI has recently (in February 2013) released guidelines enabling private sector entities to apply for banking licences. Banking companies including foreign banks are required to obtain a licence from the RBI under the Banking Regulation Act 1949 to provide banking services in India.

Loans provided by financial institutions (non-banking company entities other than NBFCs) are regulated by their respective statutes and the RBI.

1 The Companies Act 1956 (the "**Current Companies Act**") will imminently be replaced by a new companies act (the "**New Companies Act**"). The New Companies Act has received legislative sanction in December 2012 and August 2013 from the lower and upper houses, respectively, of the Indian Parliament and presidential assent in August 2013. It has been notified in the official gazette for information purposes on 19 August 2013 but as with the Companies Act 2006 of England, it will be effective in stages as notified from time to time in the official gazette by the central government. The Ministry of Corporate Affairs has notified 99 sections of the New Companies Act and the corresponding provisions of the Current Companies Act have been repealed. Where required we have presented the position under both the Current Companies Act and the New Companies Act.

Under the RBI Act, an NBFC has to fulfill certain requirements including the need to obtain a certificate of registration issued by the RBI and the maintenance of a minimum net worth.

2. What are the consequences of making a loan to a borrower in India without a licence?

Providing ECBs without complying with the terms and conditions of the ECB Circular and/or the terms and conditions of the RBI permission granted under the approval route (if applicable), would invite the imposition of large fiscal penalties under FEMA and/or civil imprisonment in serious cases. The same also applies to banking companies, financial institutions and NBFCs undertaking any activities without the requisite RBI registration.

The penalties under the Moneylenders Act for unlicensed lending vary from state to state. In general, unlicensed moneylenders cannot recover loans through civil action. The moneylender may also be fined and/or imprisoned.

3. Will a borrower based in India have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Tax is withheld in India when interest is paid to a non-resident. Withholding tax rates are determined by the Finance Acts and double taxation treaties with other countries. The current rate of withholding tax is 5% in accordance with Section 194LC of the Income Tax Act 1961 in respect of: (a) monies borrowed in foreign currency by a borrower based in India under a loan agreement; or (b) by way of issue of long-term infrastructure bonds from an overseas lender at any time on or after 1 July 2012 but before 1 July 2015.

4. Is there any limit to the level of interest that can be charged on loans made in India?

4.1 Foreign currency loans

In relation to foreign currency loans, the ECB Circular details the limits on the all-in-cost payable in foreign currencies which includes the rate of interest and all other fees and expenses (excluding commitment fees, prepayment fees and fees payable in Rupees). Indemnities are not subject to this limit. The current all-in-cost ceiling is 350 basis points (for 3 to 5 years average maturity ECB) or 500 basis points (for 5 years or above maturity ECB) above six-month LIBOR. An ECB with an all-in-cost above the specified ceilings requires prior RBI approval.

4.2 Rupee loans

The interest rates charged by banking companies are subject to RBI directives on interest rates on advances. Banking companies are required to arrive at a base rate for a specific tenor based on a benchmark and taking into account all such elements of the lending rates that are common across all categories of borrowers which should be disclosed transparently. Interest charged by banking companies cannot be less than such base rate and the actual interest rate, whether floating or fixed, will be fixed over and above such base rate. Banks are free to choose any methodology for the calculation of their respective base rates, as considered appropriate, provided it is transparent and consistent and is available for RBI, if required.

The interest rate charged by NBFCs is not regulated by RBI. However, the board of directors of an NBFC is required to adopt an interest rate model taking into account relevant factors such as cost of funds, margin and risk premium and determine the rate of interest to be charged for loans and advances. NBFCs are required to make the interest rates and the approach for the gradation of risks available on their web-site or publish them in the relevant newspapers.

Interest rates charged by the moneylenders are fixed by state governments under the applicable state Moneylenders Acts.

The rate of interest on loans made to a body corporate should not be lower than the prevailing bank rate. The bank rate is the standard rate made public by the RBI.

All Indian lenders must also comply with the Usurious Loans Act 1918, which requires the interest not to be excessive, or if it is, a Court may relieve the debtor of liability for any excessive interest. The Usurious Loans Act 1918, however, does not apply to banking companies licensed under the Banking Regulation Act 1949, although they are advised to have a policy in place so that usurious interests, including processing and other charges, are not levied.

Default interest may not be recognised by Indian courts if it is categorised as a penalty. Further, interest on the amount of default interest amounts to a penalty.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Under Indian law, such arrangements are possible and can be documented under inter-creditor or subordination arrangements which provide that one lender will have priority over another lender in repayment and the junior lender will not collect its debt before the senior lender is repaid.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in India or a guarantee from an entity incorporated in India?

No. A lender is not required to be registered in order to take security over assets in India or accept a guarantee from an entity incorporated in India. Please also see our responses relating to the creation and enforcement of security over specific assets in questions 8 and 12 below.

7. Does the taking of security in India result in a lender being liable to tax in India?

The mere taking of security will not result in the lender being liable to pay tax in India (other than the payment of stamp duty on the instrument(s) creating security so that the instrument is admissible as evidence in an Indian court).

8. Can a security interest be taken in India over the following assets?

8.1 Land

Yes. A security interest can be taken over land by way of mortgage under the Transfer of Property Act 1882. Depending on the nature of the interest in the land (freehold, leasehold, assigned lands) and the location, permission may be required from state agencies and the central government. An ECB lender who seeks a mortgage over immovable property must obtain a no-objection certificate

from the relevant "**Authorised Dealer**" (ie persons authorised by the RBI to deal in foreign exchange) prior to the creation of the security.

8.2 Shares in an Indian company

Yes. Shares are regarded as movable property/goods and may be secured by way of pledge. Such pledges can be enforced without any intervention of the court but only after providing reasonable notice to the pledgor.

Share certificates can be pledged by delivery to the pledgee. As a matter of practice, the pledgee will typically also require the pledgor to deliver blank share transfer forms in respect of physical shares which are pledged to facilitate any possible future enforcement actions. Shares in dematerialised form must be pledged through the depository which may be either the National Securities Depository Limited or the Central Depository Services (India) Limited (each referred to as a "**Depository**"), by filing the requisite form.

An ECB lender must obtain a no-objection certificate from the relevant Authorised Dealer before taking a pledge of shares of an Indian borrower. Indian banking companies cannot take security above 30% of the paid-up share capital of a company or 30% of its own paid up capital and reserves, whichever is less. In addition, subject to compliance with certain prescribed conditions, shares of an Indian subsidiary held by a non-resident parent can be pledged in favour of: (i) an Indian bank to secure loans being extended to the resident Indian subsidiary for its bona-fide business; and (ii) an overseas bank to secure loans provided to the non-resident parent of the Indian subsidiary or its overseas group company.

It may be noted that, in relation to a listed Indian company: (i) creation of a share pledge above specified thresholds requires disclosure by the pledgee (other than a scheduled commercial bank or Indian public financial institution) to the stock exchange and the registered office of the company whose shares are being pledged; and (ii) enforcement of a share pledge above specified thresholds by the pledgee (other than a scheduled commercial bank or Indian public financial institution) requires the pledgee or such other acquirers of the pledged shares to make an open offer in relation to the company.

8.3 Bank accounts

Yes. Subject to any stipulations stated in the relevant contract between the customer and the bank for the operation of the account, bank accounts may be secured by way of a charge or mortgage.

8.4 Receivables (rights under contracts)

Yes. Subject to any restrictions stipulated in the underlying contract (in respect of assignment and the creation of security interests), an assignment of receivables/rights under a contract may be made in favour of an assignee by way of a hypothecation or mortgage. No notice to, or consent of, any counterparty under the assigned contract is required to be served or acknowledged for the perfection of the security.

8.5 Insurance

Rights under insurance (including the payment of insurance proceeds) may be assigned as security subject to any restrictions in the insurance policy that may limit the assignment and/or creation of security interests. Notice of any assignment must be served on the insurer who must also endorse the assignee as a "loss payee" of the insurances.

8.6 Floating charge over all assets

A floating charge over all movable assets of a company may be created under the Current Companies Act as well as the New Companies Act (once effective). No floating charge can be created over immovable property in India.

9. Are trusts recognised in India? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in India?

Yes, trusts are recognised in India and are governed by the Indian Trusts Act 1882. A "trust" is an obligation annexed to the ownership of property and arising out of the confidence reposed in the trustee for the benefit of a beneficiary. Indian law vests trustees with certain duties and liabilities as well as certain rights and powers (which may be supplemented in a relevant trust deed). The trustee should not set up a title adverse to the interest of the beneficiary in the trust property and should deal with such property carefully with ordinary prudence. While the trustee has technical or legal ownership of trust assets, the beneficiary has economic or beneficial ownership. Assets held under a trust can be tangible or intangible. Trust structures are commonly used in India to hold security for a pool of creditors.

9.2 Taking security over securities held in a clearing system

In accordance with the Depositories Act 1996 (the "**Depositories Act**") and the Securities and Exchange Board of India (Depositories and Participants) Regulations 1996 (the "**DP Regulations**"), any person may, through a participant, enter into an agreement, in the form prescribed by the Depositories in their bye-laws, with the Depository to avail of its services for the dematerialisation of shares and other securities. The Depository is deemed to be the registered owner of such dematerialised securities for the purposes of effecting the transfer of ownership of the securities on behalf of the beneficial owner. However, it does not have any voting or other rights in respect of the securities held by it. Instead the beneficial owner has all such rights and benefits as well as the liabilities in respect of such securities.

In accordance with the DP Regulations and the bye-laws of the Depositories, depository participants, while acting on behalf of their clients, are under an obligation to open separate accounts for the dematerialized securities held on behalf of each such client and are required to segregate the securities held on behalf of the client from the securities held either on behalf of another client or on behalf of itself. This segregation gives rise to a constructive trust.

Security can be created by way of pledge or hypothecation over the securities held in dematerialized form in accordance with the DP Regulations and the bye-laws of the Depositories and by filing the requisite form. In India, trustee structures can be used and are commonly used for creating a pledge or hypothecation over securities held with the Depositories, provided the trustee or the lenders (where no trustee has been appointed) have an existing account with their respective depository participants.

10. Can a company incorporated in India (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Yes, subject to the comments below.

10.1 Guarantee of Rupee loans between Indian lenders and Indian borrowers

In respect of loans provided by an Indian lender, the guarantor can give a contractual guarantee securing the debt of an Indian borrower, subject to restrictions under Section 372A of the Current Companies Act or Section 186 of the New Companies Act (once effective) and Section 185 of the New Companies Act. These restrictions are broadly around transactions with directors or any other person in whom the director is interested or in excess of 60% of its paid-up share capital and free reserves (subject to certain exceptions or with a special resolution of its shareholders).

10.2 Guarantee of foreign currency loans between foreign lenders and Indian borrowers

A guarantor can only give a guarantee securing an ECB after obtaining a no-objection certificate from the relevant Authorised Dealer (but without needing RBI's approval).

10.3 Guarantee of foreign currency loans between foreign lenders and foreign borrowers

If the borrower is incorporated outside India, the Master Circular on Direct Investment by Residents in Joint Venture/Wholly Owned Subsidiaries Abroad dated 1 July 2013, as amended (the "**ODI Guidelines**") is the governing regulation. Under the current ODI Guidelines, the guarantor is able to give such a guarantee without an approval from the RBI subject to the following conditions:

- the borrower is: (i) an overseas entity in which the guarantor directly holds equity shares, irrespective of whether the borrower is an operating company or a special purpose vehicle; or (ii) an overseas operating company in which the guarantor indirectly holds equity shares though a directly held overseas special purpose vehicle;
- all financial commitments (being equity capital, loan or guarantees) of the guarantor to the borrower including the proposed guarantee should be within the overall ceiling for overseas investment which currently is at 100% of the guarantor's net worth (paid-up share capital and free reserves). However, it may be noted that for financial commitments that have already been contracted or committed for an existing Joint Venture/Wholly Owned Subsidiaries abroad on or before 14 August 2013, the ceiling would be 400% of the guarantor's net worth; and
- the guarantee must be for a specified amount and maturity period, both set out up-front.

Additional restrictions are applicable to entities in the "financial services sector" or investment in the "financial services sector". Such restrictions include, eg registration with or consent from relevant regulatory authorities in India and the requirement of demonstrating net profit in the preceding three years from financial services activities.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

As a general legal principle, a secured creditor has priority over all other unsecured creditors and claimants (except in relation to workmen's dues and statutory dues such as revenues, taxes, wages or salary of employees and holiday remuneration becoming payable to employees) and has the right to enforce the securities and recover the secured loan.

In the event of insolvency or winding up proceedings against the borrower, the secured creditor has a right to enforce its security interest against the secured assets outside of such proceedings.

11. (b) If the Depository becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

In addition to the segregation referred to in paragraph 9.2, the Depositories are statutorily required to keep a record of each beneficial owner's account and update the records on a daily basis.

Similarly, each depository participant is under an obligation to maintain a separate account in respect of each of its clients (ie the beneficial owners) and its own account. The depository participant has to notify the balances held in its own account and its clients' accounts to the Depository on a daily basis. As stated in our response in paragraph 9.2, the practice of keeping segregated accounts for each beneficial owner by the Depository and the depository participants gives rise to a constructive trust.

Indian courts have consistently held that the amount held in the nature of a trust by a company does not form a part of the company's assets in the hands of the liquidator and they are payable in priority to the claims of the creditors. Applying these principles to the Depository-depository participant relationship as well as the depository participant-beneficial owner relationship, it can be inferred from the asset segregation obligation imposed on the Depositories and depository participants that all the securities of the beneficial owners are, in fact, held in trust by the Depository and the depository participants, and will not be considered as assets of the Depository and/or the depository participants in an insolvency. Consequently, if the Depository or the depository participant becomes insolvent, the claims of the secured lenders in relation to the securities held in dematerialized form through such insolvent entity will not get affected. However, due to administrative issues and the insolvency process, the ability of secured creditors to access the securities in a timely manner may be affected.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

12.1 Guarantee

In the event of a default, creditors may demand payment under the guarantee without intervention by the court. However, if the guarantor (except a bank guarantor) does not pay under the deed

of guarantee, the lender must then file a civil suit in the court or where the guarantor is a company, can file a suit for winding up of the guarantor. Indian banks and financial institutions (including any foreign lender having a place of business in India) may also enforce the guarantee in the tribunal constituted under the Recovery of Debts Due to Banks and Financial Institutions Act 1993 (the "**DRT Act**").

12.2 Security

Under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (the "**SARFAESI**"), Indian banks and financial institutions (including any foreign lender having a place of business in India) can enforce security without court intervention. Indian banks and financial institutions (including any foreign lender having a place of business in India) may also enforce security in the tribunal constituted under the DRT Act. Under the DRT Act, the proceedings shall be completed within 180 days unless there are intervening proceedings by secured creditors.

It is also worth noting that Section 67 of the Transfer of Property Act 1882 prohibits a mortgagee of "a railway, canal or other work in which the public are interested" from taking enforcement actions against the asset. In the event of a default, the mortgagee of such mortgage can only recover against the earnings generated by the assets in question. Further, a mortgagee is entitled to appoint a receiver, either by himself or through a court, pursuant to Section 69A of the Transfer of Property Act 1882.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

A security created or a guarantee provided by the company may be set aside on the following grounds:

- fraudulent preference: under Section 531 of the Current Companies Act and Section 328 of the New Companies Act (once effective), any transfer of property, delivery of goods or other payments made, or taken by or against a company within six months of the commencement of winding up proceedings is deemed to be a fraudulent preference and is invalid;
- floating charge: under Section 534 of the Current Companies Act and Section 332 of the New Companies Act (once effective), a floating charge on the undertaking or property of the company created within 12 months of the commencement of winding up proceedings shall be invalid, unless it is proved that the company was solvent immediately after the creation of the charge. The above will not apply to any payment to the company during the charging period, together with interest on that amount at the rate of 5% per annum;
- transfer of entire interest: section 532 of the Current Companies Act and Section 330 of the New Companies Act (once effective) provide that any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void;
- voluntary transfer: section 531A of the Current Companies Act and Section 329 of the New Companies Act (once effective) states that any transfer of property or delivery of goods made within a period of 12 months prior to the initiation of winding up proceedings and which is neither made in the ordinary course of business nor in good faith and for valuable consideration shall be void against the official liquidator; and
- onerous property and contracts: under Section 535 of the Current Companies Act and Section 333 of the New Companies Act (once effective), the liquidator of a wound-up company may in certain cases, with the permission of the National Company Law Tribunal (the "**Tribunal**") disclaim unprofitable contracts (including a guarantee) or not readily saleable properties, within 12 months of the commencement of winding up, or any extended period of time granted by the Tribunal.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

Yes. Section 77(2) of the Current Companies Act and Section 67(2) of the New Companies Act (once effective) prohibit public companies and their subsidiaries from providing security, loans, guarantees or any other financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

15.1 Charge given by companies

Yes. Section 125 of the Current Companies Act provides that a charge (including a mortgage but excluding a pledge), which creates security over the company's property or undertaking, is only valid against the liquidator and creditors if it is filed with the registrar of companies within 30 days of its creation. Section 127 of the Current Companies Act extends this obligation to properties acquired by the company which are acquired subject to a charge. If this filing is not completed within 30 days, the charge would be void. In accordance with Section 77 of the New Companies Act (once effective), all charges (an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage) created over the property of a company, including a pledge over shares, whether situated within or outside India are to be registered within 30 days of the creation of the charge with the registrar of companies. The charge may be registered after this period but within 300 days of the creation of the charge, after payment of a penalty and thereafter with the approval of the central government.

Depending on the nature of the secured asset in question, other registration requirements may be applicable. These are outlined below.

15.2 Land

If an English law style mortgage (ie a transfer of ownership whether or not with possession by way of security) is created on land, it must be registered with the relevant Sub-Registrar of Assurances of the land by paying the applicable registration fees. Some states require a mortgage by deposit of title deeds (equitable mortgage) to be registered with the relevant Sub-Registrar of Assurances as well. Mortgages by deposit of title deeds created in favour of secured creditors notified in accordance with the provisions of the SARFAESI must be registered with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India. Under the proposed amendment to the Registration Act 1908 (which is pending before the Indian Parliament), an agreement for deposit of title deeds where the

deposit is by way of security for repayment of loan or debt will be compulsorily registered.

15.3 Shares

A pledge of dematerialised shares held with a depository must be registered with the relevant Depository. No registration is currently required for a pledge of physical shares. However, in accordance with the New Companies Act (once effective), a pledge created over shares is required to be registered with the registrar of companies.

15.4 Other property

Security over intellectual property, ships and aircraft is also required to be registered with the relevant government authority.

15.5 Guarantee

No registration is required for providing a guarantee. However, any guarantee given by the guarantor for an offshore borrower must be filed in Form ODI to the RBI under the ODI Guidelines.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Yes. The Indian Stamp Act 1899 or the relevant Stamp Act in the state where the charge is created imposes stamp duty in respect of instruments creating securities over properties. Guarantees are subject to a levy of stamp duty. The rates of stamp duty vary in different states. Registration is required only for an English law style mortgage (and for certain states, mortgage by deposit of title deeds (equitable mortgage)) and the registration fee varies in different states. Under the proposed amendment to the Registration Act 1908, an agreement for deposit of title deeds where the deposit is by way of security for repayment of loan or debt will be compulsorily registered.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Under Indian law, it is possible to grant second ranking or *pari passu* security over an asset which is already secured to another lender either under inter-creditor arrangements or by way of a separate letter. Subject to the terms of the instrument creating the first ranking security, the second ranking security can be provided by way of a similar document under which the first ranking security was created and the document may record the ranking of the security. *Pari passu* security can be created by way of a document similar to the document under which the first ranking security was created together with a consent of the first security holder as to the pari passu nature of the security subsequently created.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

Foreign direct investment ("**FDI**") entails investment by a non-resident in the securities of an Indian company by way of subscription to new shares issued (primary acquisition) or purchase of existing shares (secondary acquisition). FDI in India is regulated by the RBI and the Foreign Investment Promotion Board (the "**FIPB**") under the Consolidated Foreign Investment Policy in India dated 5 April 2013 (the "**FDI Policy**") and the various press notes including those discussed below. The two routes of FDI are the "approval route" where prior permission of the FIPB and the RBI is required, and the "automatic route" where no prior approval is required.

The FDI Policy issued by the Department of Industrial Policy and Promotion every year prescribes guidelines for calculating the direct and indirect foreign investment in Indian companies and regulating the transfer of majority stake or control in favour of non-residents in companies operating in sectors with caps. Foreign investment would be the sum of direct and indirect foreign investment with complex rules on FDI. The FDI Policy provides that shares of an Indian company, which are owned and controlled by a foreign company, are considered as a foreign shareholding.

18.1 Oil/gas

FDI up to 100% is permitted for all activities except refining in the petroleum and natural gas sector. FDI up to 49% is allowed for refineries in the public sector and 100% in the private sector. Permissions from the Ministry of Petroleum & Natural Gas must be obtained for undertaking activities/operations in the oil/gas sector.

18.2 Electricity

FDI up to 100% is allowed in the electricity sector for generation, transmission, distribution and trading (except for atomic energy). However, under the Electricity Act 2003, a licence is required for transmission, distribution or trading of electricity. Prior approval from the regulatory commission is required for transfer of an existing licence.

26% FDI investment with FIPB approval and an additional 23% investment by foreign institutional investors (only in the secondary market) without FIPB approval is permitted in power exchanges registered under the Central Electricity Regulatory Commission (Power Market) Regulations 2010, subject to applicable regulations and conditions.

18.3 Natural resources/mines

As a general rule, FDI up to 100% is permitted in the mining sector (other than in respect of the mining of "atomic minerals") without prior approval. Under the provisions of the Mines and Minerals (Development and Regulation) Act 1957 (the "**MMDRA**"), the Mines Act 1952 and the Current Companies Act, a mineral concession can only be granted to an Indian national or a company registered in India. Accordingly, a foreign entity must incorporate an Indian company to procure mineral concessions and operate the mining business. Prior approval from the central government is required to transfer any licence or mining lease granted under the MMDRA.

18.4 Telecommunications

FDI up to 74% is permitted in the telecommunications sector including basic and cellular, unified access services, national/international long distance, v-sat, public mobile radio trunked services, global mobile personal communications services and other value-added telecommunications services. The FDI limit is 100% for infrastructure providers (Category I), electronic and voice-mail providers. These companies which are listed outside India must divest 26% of their equity to the Indian public within five years. FDI up to 74% is also permitted for internet service providers with or without gateways (both for satellite and marine cables), radio paging and end-to-end bandwidth. A foreign entity seeking to acquire more than 49% interest in any telecommunications company must obtain the approval of the FIPB. 100% FDI without FIPB approval is also permitted for other service providers providing services like call centres, business process outsourcing, tele-marketing and tele-education.

Under the Guidelines for Transfer/Merger of various categories of Telecommunication service licences/authorisation under Unified Licence on compromises, arrangements and amalgamation of the companies issued by the Ministry of Communications and Information Technology dated 20 February 2014, any merger or transfer of licences consequent to a compromise, arrangement or amalgamation of companies leading to the resultant entity having a market share of greater than 50%, in terms of subscriber base (for wireless or wire line services) and in terms of adjusted gross revenue in the relevant market, is not permitted. If the market share exceeds 50%, the resultant entity is required to reduce its market share to the limit of 50% within a period of one year from the date of approval of the scheme.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

There are no restrictions under Indian law with respect to taking of or enforcement of security in relation to shares in or assets of companies in the oil/gas sector.

The standard production sharing contract executed with the relevant government under the Oilfields (Regulation and Development) Act 1948 permits a contractor to mortgage, pledge, charge or otherwise encumber its "Participating Interest" with respect to exploration rights. However, the encumbrance created will be subservient to the interests of the government and therefore the relevant mortgagee will be requested to receive prior approval of the government before carrying on any operations (either by itself or through an agent).

Once a pipeline is embedded in the earth, it becomes immoveable property, and as the company only obtains the right of way to use the land to lay the pipeline, security cannot be created over such pipeline. Land over which pipelines for the transport of petroleum, minerals or gas are laid are not transferred to the borrower - instead the borrower merely acquires the rights of a user over the land. Such rights of a user may also be assigned to the lenders. The rights of a user are vested by the central government. Any enforcement or transfer would therefore require the consent of the central government.

19.2 Electricity

There are no restrictions under Indian law with respect to taking of or enforcement of security in relation to shares in or assets of companies in the electricity sector. However, a transfer of a permit, consent or licence is subject to the terms of the relevant permit, consent or licence.

19.3 Natural resources/mines

Subject to our comments below, there are no restrictions under Indian law with respect to the taking of or the enforcement of security in relation to shares in or assets of companies in the natural resources/mines sector.

Mineral concessions in the form of mining leases can be secured with the consent of the government. Depending on the nature of the minerals involved, if the mortgagee is an institution, a bank or a corporation as specified in the Mineral Concession Rules 1960, prior consent of the government is not required. Mineral concessions in the form of a licence (such as a prospecting licence), on the other hand, cannot be secured as a matter of Indian law. As a matter of practice, security is not typically taken over mining leases in India. If security is taken over mining leases, such security interest must be registered with the relevant Sub-Registrar of Assurances.

In relation to enforcement actions, approval from the state government or the central government is required to transfer a prospecting licence or a mining lease to a third party.

19.4 Telecommunications

There are no restrictions under Indian law with respect to the taking of or enforcement of security in relation to shares in or assets of companies in the telecommunications sector. The licence, however, cannot be transferred without the consent of the licensor. A telecommunications licence provides for a tripartite agreement between the licensor, licensee and the lender's agent. The transfer or assignment of the licence may be granted to a selectee of the lenders under the terms and conditions of the licence.

However, a telecommunications licence grants the licensor the right to takeover the entire service or equipment and networks of the licensee or revoke, terminate or suspend the licence in the interest of the public or national security, in the event of national emergency, war, low intensity conflict or other default situations. The lenders do not enjoy superior charges or rights. Lenders do not have the right to decide on the person who could takeover the network. The licensor may also decide not to transfer the licence to the person selected by the lenders under the tripartite agreement.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in India?

Under Indian law, the execution of decrees (or judgments), whether foreign or domestic, is governed by the provisions of the Code of Civil Procedure 1908 (the "**CPC**"). The general rule is that a decree is to be executed either by the court which passes it or by the court which executes it.

The CPC provides two separate procedures for getting a foreign judgment enforced in India: (i) by filing an execution petition under Section 44A of the CPC, where the specified conditions are fulfilled; and (ii) by filing a suit upon the foreign judgment/decree.

Section 44A of the CPC enables judgment creditors/decree holders to execute decrees awarded in "reciprocating territories" without filing another suit. A foreign decree is enforceable in India if:

- the decree is pronounced by a "superior court" of a "reciprocating territory"; or
- the decree is filed before a district court in India for execution.

Under this provision, any decree in respect of taxes or other charges of similar nature or in respect of a fine or other penalties is not enforceable. A "reciprocating territory" is any country or territory outside India which the central government may, by notification in the official gazette, declare to be a reciprocating territory. The United Kingdom, Aden, Fiji, Singapore, Malaysia, Trinidad and Tobago, New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Hong Kong, Papua and New Guinea, Bangladesh and the United Arab

Emirates have been notified by the central government as reciprocating territories.

A judgment under English law by a high court or a superior court in the United Kingdom is an enforceable decree in Indian district courts.

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Amarchand & Mangaldas & Suresh A. Shroff & Co. ("Amarchand Mangaldas") is a full service law firm with over 95 years of experience. Originally founded in Mumbai, it has national coverage with offices at Mumbai, New Delhi, Bangalore, Hyderabad, Kolkata, Chennai and Ahmedabad in India.

It is India's largest law firm with over 600 lawyers (including over 80 partners). It continues to grow in size. Being a full service law firm, its service offerings include a variety of specialisations. Its practice is divided into six main practice groups, being Corporate, Dispute Resolution, Banking and Finance, Capital Markets, Competition and Tax. Amarchand Mangaldas advises a full range of clients including domestic and foreign commercial enterprises, financial institutions, and also state and regulatory bodies.

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INDONESIA

HISWARA BUNJAMIN & TANDJUNG (IN ASSOCIATION WITH HERBERT SMITH LLP)

LENDING

1. Does a lender require a licence to lend money to a company based in Indonesia (the "borrower")? Are there any exemptions available?

As a general rule, an Indonesian national wishing to establish a business of lending money must obtain a licence from Bank Indonesia (the central bank of Indonesia) pursuant to Law No. 7 of 1992 as amended by Law No. 10 of 1998 regarding Banking (the "**Banking Law**"). However, it is also possible for other entities for whom lending money is not their primary business to do so on an incidental basis without a licence from Bank Indonesia. Examples of such incidental lending would include shareholder loans and inter-company loans.

Generally, an offshore lender which provides an offshore loan does not require a licence under Indonesian law.

Under Indonesian law, an onshore loan is a non-cross border loan provided by a local lender and/or a foreign lender which conducts its business in Indonesia and has its domicile in Indonesia, to another party which is also domiciled in Indonesia. Foreign lenders must obtain all necessary licences to conduct business in Indonesia. Other than the general business licence mentioned above, there are no specific licences or approvals required for foreign lenders providing onshore loans.

2. What are the consequences of making a loan to a borrower in Indonesia without a licence?

The Banking Law does not make specific provisions for unlicensed lending. There is, however, an administrative sanction which can be implemented by Bank Indonesia for a bank which does not comply with the Banking Law.

The administrative sanctions provided in the Banking Law do not relate to unlicensed lending. Administrative sanctions implemented by Bank Indonesia for a bank which does not comply with the Banking Law can be in the form of:

- imposition of a fine;
- dispatch of written warnings;
- degradation of bank's soundness rating;
- prohibition from taking part in clearing activities;
- freeze of certain business activities of a bank, both for certain branch offices and for the bank as a whole;
- dismissal of bank's management team and the appointment of temporary members of the team until the General Meeting of Shareholders or the Meeting of Cooperative Members appoint a permanent team with the approval of Bank Indonesia; or
- listing of members of management, bank's employees or shareholders as disreputable (disgraceful) persons in the banking sector.

The enforceability of a loan where related licences are not available is not clearly explained in Indonesian law. Under general contractual principles in the Indonesian Civil Code where a person acts without legal capacity the action is voidable at the option of that person. There is an earlier judicial authority that where a third party deals with a company in good faith (without actual knowledge of any lack of capacity) and with reasonable care, the third party may be protected. This protection means that the parties of the contract should be put in their original position as if the contract had not been entered into. This would be analysed on a case by case basis and subject to the governing law of the contract.

3. Will a borrower based in Indonesia have to deduct amounts for withholding tax on interest payments made to an overseas lender?

The Indonesian tax regulations allow for withholding tax of 20% on interest payments to overseas lenders subject to a reduction under any double tax treaty between the country of the borrower and the country of the lender.

4. Is there any limit to the level of interest that can be charged on loans made in Indonesia?

The determination of interest is a contractual matter. Nevertheless, the interest agreed in a loan agreement should be relatively reasonable, in a sense that it does not extremely exceed the interest commonly used in a similar transaction.

It is not a requirement for the level of interest to be reasonable under the Indonesian Civil Code. It is a common practice in Indonesia that the interest is considered reasonable if it is at the average interest in the market. There are no consequences of an interest rate that is held to be unreasonable. The determination of interest is a contractual matter between the relevant parties.

It is also worth noting that the level of interest must be determined clearly in the loan agreement. If a loan agreement does not determine a level of interest, then under the Indonesian Civil Code the interest will be determined at 6% per annum.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Generally it is possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred. This would be by a contractual arrangement between the lenders (and the borrower (if necessary)) to the relevant agreement. Indonesian contract law upholds the principle of freedom of contract (subject to certain broad mandatory principles, such as illegality of purpose, mistake, duress and the requirement that a contract must be performed in good faith).

Such principle is embedded in Article 1338 of the Indonesian Civil Code which provides that a contract which is lawfully made will bind the parties as if it were a statute. Accordingly, the parties to a contract are free to determine the terms of their agreement.

However, the above contractual arrangement for the payment of debt between the first and the second lender will not extend to the rights under registered security (ie security rights and hypothec) held by each of the first and the second lender. Under Indonesian law, the first ranking holder is the highest security holder. The determination of the ranking of registered security depends on when the security is registered with the relevant authorities. If the first lender holds a first ranking security (the "**First Lender**") and the second lender holds the second ranking security (the "**Second Lender**"), then, if enforcement of security is required, the First Lender will have a preferred right over the Second Lender to the proceeds of the sale of the assets which was encumbered by such security. In principle, the proceeds of sale of the assets will, first, be used to settle the debt due to the First Lender and if there is any remaining balance, such amount will be used to settle the debt due to the Second Lender.

It is possible though for the lenders to enter into a contractual arrangement to the effect that, upon the enforcement of the security, the proceeds would, first, be used to settle the debt of the Second Lender under the concept of freedom of contract as described above.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Indonesia or a guarantee from an entity incorporated in Indonesia?

A foreign lender does not need to be licensed or registered in order to take security over assets in Indonesia. The registration with the Offshore Commercial Loan Coordinating Team (the "**PKLN**") is not required.

Certain types of security must be registered with the relevant government authority. Please see our answers to questions 8 and 14 below for further details.

7. Does the taking of security in Indonesia result in a lender being liable to tax in Indonesia?

No. The taking of security in Indonesia does not result in a beneficiary of the security being liable to Indonesian tax.

8. Can a security interest be taken in Indonesia over the following assets?

8.1 Land

Yes. Security over land is taken in the form of security rights (Hak Tanggungan) by entering into a Deed of Grant of Security Rights (Akta Pemberian Hak). This must be in Indonesian and executed before a Land Deed Official (Pejabat Pembuat Akta Tanah) of the jurisdiction where the land is located.

Following its execution, the Deed of Grant of Security Rights must be registered at the relevant Land Office of the jurisdiction where the land is located (the "**Land Office**"). The security rights become effective after registration. The Land Office will issue a Certificate of Security Rights noting the lender as a secured party over the land.

Security rights can be granted in ranks, with the first ranking holder having the highest rights.

8.2 Shares in an Indonesian company

Yes. Shares in both private and public companies can be offered as security, by entering into a pledge of shares agreement, or as fiduciary security, by entering into a deed of fiduciary security. It should be noted that under Indonesian law the party giving security under a deed of fiduciary security retains possession of the encumbered shares. This raises the possibility of the shares being transferred to another party by the shareholder in spite of the fiduciary security.

A power of attorney to sell shares is normally granted and accompanies a pledge of shares agreement, allowing the lender to sell the shares privately (and not through a public auction).

(a) Shares (in certificated form) in an Indonesian company

Yes. To perfect a pledge of shares, the original share certificates must be delivered by the pledgor to the pledgee (either the lender or its security agent). The pledgor must also forward a notice to the company issuing the shares, advising on the pledge of shares agreement and requesting the company to register the pledge in the company's share register. The pledge becomes effective upon registration.

(b) Shares and securities listed by an Indonesian company in scripless form

Yes. For a public company with "scripless" shares, the pledgor must sign the pledge of shares agreement and forward a notice to the company issuing the shares regarding the signing of the pledge of shares agreement. The pledgor must also instruct the account holder which maintains the share account (where the shares are held) to block the pledgor's share account. Upon receipt of this instruction, the account holder would block the pledged shares account with PT Kustodian Sentral Efek Indonesia (the "**KSEI**"), the Indonesian Central Securities Depository. Once KSEI completes the blocking of the share account, the pledge is effective.

(c) Shares in a Mining Company

It is also important to note that further share pledge provisions are applicable to foreign mining companies in Indonesia which hold a production operation mining business licence (Izin Usaha Pertambangan Operasi Produksi) or production operation special mining business licence (Izin Usaha Pertambangan Khusus Operasi Produksi) ("**Mining Company**"). There is a restriction under the Minister of Energy and Mineral Resources Regulation No. 27 of 2013 on Procedures and Pricing for Share Divestment and Change of Investment in Mineral and Coal Mining Business which was enacted on 13 September 2013 ("**MEMR No.27/2013**"). MEMR No.27/2013 provides that where any of the foreign party already owned more than 49% of shares in a Mining Company before the enactment of MEMR No.27/2013 (the "**Foreign Party**"), the excess out of 49% of its shares would be included as part of divestment obligation (the "**Divested Shares**") and shall not subject to any pledge or encumbrances.

Based on the MEMR No.27/2013, the Foreign Party is required to gradually divest the Divested Shares to an Indonesian party five years after the commencement of production operation until the tenth year of production operation ("**Divestment Period**"). As a result, after the Divestment Period, at least 51% of total ownership in the relevant Mining Company shall be owned by an Indonesian party. Thus, apart from the Divested Shares, all of the shares in a Mining Company could, in principle, be subject to a pledge.

MEMR No.27/2013 is silent on whether or not the Foreign Party can pledge the Divested Shares before the Divestment Period. However, the Directorate General of Mineral and Coal is currently of the view that the shares pledge restriction under MEMR No.27/2013 is already effective prior to the commencement of the Divestment Period and lasts until the completion of the Divestment Period.

8.3 Bank accounts

Yes. Security over a bank account may be created by an assignment of the bank account for security purposes or a pledge of bank accounts agreement.

While it is theoretically possible to create a fiduciary security over bank accounts, at the time of this guide the Fiduciary Registration Office would not accept such registrations.

8.3.1 Assignment of bank account for security purposes

An assignment can be made either under hand or in a notarial deed form (signed before a Notary Public). Please note however that the assignment is a contractual arrangement developed from practice and will not survive the bankruptcy of the assignor.

Under Indonesian law, the assignment does not create a priority security interest over the relevant obligations but creates a contractual arrangement between the assignor and assignee having effect in accordance with its terms. The specific conditions for the bankruptcy situation and also obligation to re-assign the assigned security in such situation may be included in the assignment. The assignment is still effective in a bankruptcy situation, but the assignee will not have any preference rights to enforce its rights under the assignment and will be considered as an unsecured creditor.

Perfection of the assignment requires a notice by the assignor to the bank. The bank must acknowledge receipt of the notice and consent to the assignment. Failure to acknowledge and give consent means the bank is not bound by the assignment. The notice can also be given through a court bailiff where third party acknowledgment and consent are not required, although this approach is rarely adopted.

8.3.2 Pledge of bank accounts

To establish a first priority security interest over a bank account the secured lender (or agent) must have full control and sole management of the account. The pledgor must also notify the bank where the relevant account is registered and the bank must acknowledge receipt of the notice.

As a matter of market practice, lenders will typically also require a power of attorney to withdraw funds to enable the secured lender to withdraw funds from the account on enforcement.

8.4 Receivables (rights under contracts)

Yes. Rights under a contract can be divided into two categories: the receivables (rights to receive a payment, if relevant) and any other rights under the contract.

This section will focus on taking security over the receivables. Other rights under a contract can be secured by way of an assignment. Please see paragraph 8.3 above for further details.

Subject to any restrictions contained in the contract, security over receivables may be created by entering into a Deed of Fiduciary Security over Receivables (made in the Indonesian language) before a Notary Public.

The Deed of Fiduciary Security over receivables must be registered at the Fiduciary Registration Office of the jurisdiction where the security grantor is domiciled. A Certificate of Fiduciary Security will be issued noting the lender as the secured party over the object of the fiduciary security.

It is recommended that the security grantor should serve a notice on the third party (ie the counterparty of the security grantor in the relevant contract), requiring the third party to acknowledge and consent to the fiduciary security. This is a similar requirement to the assignment mentioned above.

As stated above, under Indonesian law, fiduciary security is a registered security. The fiduciary security will be perfected upon the registration with the relevant fiduciary registration office. Therefore, in regard to fiduciary security, the notification for the third parties is not compulsory. Accordingly, the notice served for a fiduciary security is only a recommendation, not a requirement.

With regard to the assignment for security purposes, as stated above, an assignment creates a contractual arrangement between the assignor and assignee having effect in accordance with its terms. A notice in the assignment for security purposes is an obligatory requirement of the perfection of the security. Accordingly, the notice served regarding the execution of the assignment is not only a recommendation but also a requirement.

8.5 Insurance

Yes. Subject to any restrictions in the insurance policy, security can be created over an insurance claim by entering into a Deed of Fiduciary Security over Insurance Claim (made in the Indonesian language) before a Notary Public.

The Deed of Fiduciary Security over Insurance Claim must be registered at the Fiduciary Registration Office of the jurisdiction where the assignor is domiciled. A Certificate of Fiduciary Security will be issued noting the lender as the secured party over the object of the fiduciary security.

A notice must be served by the lender on the insurance company. The insurance company must acknowledge receipt of the notice and consent to the assignment.

8.6 Floating charge over all assets

Strictly speaking, under Indonesian law there is no concept of a "floating charge". Immovable assets can be secured by security rights whilst other assets such as movable assets and inventory may be secured by entering into a Deed of Fiduciary Security over Movable Assets (made in the Indonesian language) before a Notary Public. This is the closest form of security available under Indonesian law to a floating charge.

Minister of Law and Human Rights of Republic of Indonesia issued Circular Letter in early 2013 with regard to the Implementation of Registration Administration System of Fiduciary Security through Online System, which basically declares that all registration of fiduciary security in Indonesia must be conducted via online system and no manual registration in each Fiduciary Registration Office will be processed by the relevant officials. A Certificate of Fiduciary Security will be issued from the online registration system noting the lender as the secured party over the object of the fiduciary security.

9. Are trusts recognised in Indonesia? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Indonesia?

In general, the concept of trust is not recognised under Indonesian law as it is in the common law jurisdiction. However, in banking sector, the concept of trust is known limitedly. Pursuant to Bank Indonesia Regulation on Trust Activities by Banks (the "**Trust Regulation**"), the trust activities governed under the Trust Regulation are limited to trust activities in the Indonesia banking system conducted by Indonesian banks (including branches of foreign banks operating in Indonesia) after fulfilling certain criteria determined by Bank Indonesia. A trust is defined as a depositing activity by way of managing property owned by settlor (the fund owner) based on a written agreement between bank and settlor for the interests of a beneficiary (ie the settlor or any third party). Only banks may offer trust services and only legal entities that have no affiliation with the relevant banks that may take advantage of these trust services. The following are three main activities that may be conducted by a trustee in respect of doing trust business:

- paying agent, which activity includes (i) opening and closing account for and on behalf of the settler, (ii) receiving and depositing fund to the account of the settler, (iii) conducting payment from the settlor's account to the beneficiary or other party, and (iv) recording, filing, and administering documents related to the settlor's account;
- investment agent, is conducted based on clear and express instruction from settlor, in accordance with the type of activities or instrument used; and
- borrowing agent, which activities includes (i) obtaining loan evidenced by credit agreement, (ii) conducting hedging transaction, (iii) reserving fund for the payment of loan on a mechanism set by the settlor, and/or (iv) other activities in relation to loan (under conventional loan or syariah financing scheme).

Unlike trust activities in most common law jurisdictions, which allow a trustee to manage almost any type of asset, trust services under Trust Regulation are limited to cash, receivables and/or commercial papers.

9.2 Taking security over securities held in a clearing system

As mentioned above, the concept of trust in general is not recognised in Indonesia. Therefore the concept of using trust in the context of taking security over securities held in clearing system in Indonesia is not recognised either.

10. Can a company incorporated in Indonesia (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Provided that (i) the guarantor's constitution documents permit the guarantor to guarantee the debt of another party, and (ii) the guarantor has obtained all necessary internal approval, the guarantor may give a guarantee for the debt of a borrower (whether incorporated in Indonesia or in a different country). Where specific requirements are imposed by the guarantor's constitution documents in respect of the giving of a guarantee, such requirements must be satisfied before the guarantee can be provided. Lenders should check if the above are complied with and, as a matter of practice, would typically require the borrower and the guarantor to provide written confirmation of the same as a pre-condition to drawdown. Failure to comply with the above will result in the guarantee being unenforceable against the guarantor, however, the director who signs the guarantee on the guarantor's behalf will be fixed with personal liability under such guarantee.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

Assets secured under security rights, a fiduciary security, a hypothec and a pledge are protected from general creditors. This security may be challenged by creditors or a receiver (Kurator)/ an administrator (Pengurus) under a clawback/actio pauliana petition. Please see our answer to question 12 below.

11. (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

In general, in the event of trustee (ie. in the context of a trust under Indonesian banking law) ("**Intermediary**") becoming insolvent, the trust assets will not be included in the bankruptcy assets (boedel pailit) of the Intermediary. The assets will further be returned to the settlor or assigned to another Intermediary nominated by the settlor. The claims of the secured lender, therefore, would not be affected by the Intermediary since the trust assets are recorded and reported separately from the Intermediary's assets.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

In an event of default by the borrower, the lender must serve demand letters (normally three times) and can then enforce its security by seeking court intervention. In certain cases, the lender may enforce the security without obtaining a court order. However, as a matter of practice, it is advisable for the lender to obtain the court order to enforce the security to avoid any challenge by the borrower on the enforcement.

Relevant security documents which do not require a demand letter, should be honoured by the parties. A lender should serve demand letters prior to the enforcement of the security. The demand letter can be used by the lender as evidence to prove the good faith of the lender in informing the borrower of an event of default.

In the case of bankruptcy, the lender may enforce its security (other than an assignment – please see paragraph 8.3 above) within two months of the borrower being declared insolvent. If after two months the security is still not enforced, then the receiver (who will be appointed by the court to manage the bankruptcy assets) will take over the enforcement of the security.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

A receiver or a creditor of the borrower may prevent an enforcement of security based on the clawback (actio pauliana) petition.

Under Indonesian law, the clawback action is applicable in a bankruptcy situation whereby the process will be conducted by a receiver and not by a liquidator. The liquidator is relevant to the liquidation process of a company.

Under Law No. 37 of 2004 regarding Bankruptcy and Suspension of Payment, a claw back (actio pauliana) petition may be commenced by a liquidator or a creditor of the borrower to challenge actions taken by an insolvent borrower which may harm the interests of the creditors. This petition may only be submitted if the legal action is conducted within one year prior to a bankruptcy and it can be proven that the borrower and its counterparty have actual or constructive knowledge that the legal action in question would harm the interest of the creditors.

The petition, however, can be exempted if the legal action is conducted based on an agreement and/or law.

The clawback (actio pauliana) action entitles a liquidator or a creditor of the insolvent company to challenge actions undertaken by the insolvent company prior to it becoming insolvent (up to a period of one year), but if such action is required by an existing agreement or law, then such action would not be subject to the clawback action.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

There is no concept of "financial assistance" under Indonesian law. However, Law No. 40 of 2007 regarding Limited Liability Company requires the directors of a company to act in the interests of the company. Accordingly, any financial assistance made by a company must be in the interests of that company.

Under the Decision of Directors of Jakarta Stock Exchange No.:Kep-315/BEJ/06-2000 dated 30 June 2000, as amended by the Decision of Directors of Jakarta Stock Exchange No.:339/BEJ/07-2001 dated 20 July 2001, an issuer is prohibited from securing loans for its subsidiary, affiliate and/or controlling shareholder without reasonable terms or compensation. This means that a public company, listed on the Jakarta Stock Exchange, cannot secure loans for its controlling shareholder unless there is reasonable compensation to the company. Examples of reasonable terms or compensation may include the provision of an inter-company loan by the borrower to the company as compensation for securing the loan by the company.

Current Capital Market Supervisory Board (*Badan Pengawas Pasar Modal* – Bapepam) or currently known as Indonesia Financial Services Authority (*Otoritas Jasa Keuangan* – OJK) policy is that a public company can secure the loan used by its subsidiary in favour of certain lenders only up to the shareholding portion of that shareholder in the company.

The percentage is calculated using the "percentage test" (ie the ownership of the shares by the shareholders against all issued shares by the company).

State-owned companies cannot guarantee or grant security for the repayment of an offshore loan received by a state-owned company or a private company.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Yes. Both security rights over land (*Hak Tanggungan*) and fiduciary securities must be registered with the relevant government body. A hypothec over any vessel (with gross tonnage of $20m^3$ or more) must also be registered with the relevant governmental body. These securities will only be perfected upon registration.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

A nominal stamp duty of IDR6,000 is payable when signing each of the security documents.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

This depends on the type of security provided by the security provider over its asset(s).

Under Indonesian law, it is possible to grant subsequent ranking security over land and hypothec over vessels. In these cases, the new creditor will, subject to compliance with any applicable perfection requirements, rank in the order in which their interest is registered. For second ranking security over land and vessels, the new creditor is required to enter into a separate second ranking deed of security before the relevant authorities and to register the second ranking securities with such relevant authorities.

For other types of security (ie pledge and fiduciary security), it is not possible for second and subsequent security to be granted.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

Indonesian law does not prevent the acquisition of companies or assets in the oil or gas industry.

However, most oil and gas exploration and exploitation of activities are undertaken by a permanent establishment (a foreign legal entity, the "**Contractor**") under a contract with the state (under a Technical Assistance Contract or a Production Sharing Contract). If an interest is transferred by the Contractor to a third party, then approval must be sought from the Implementing Body for Oil and Gas Upstream Business Activities ("*Badan Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi*" – "**BP Migas**") which has been replaced by Special Task Force for Upstream Oil and Gas Business Activities Republic of Indonesia ("*Satuan Kerja Khusus Pelaksana Kegiatan Usaha Hulu Migas*" – "**SKK Migas**") and the Government of the Republic of Indonesia (through the Minister of Energy and Mineral Resources). SKK Migas' approval is generally required if the transfer is to an affiliate. In some cases, for Production Sharing Contracts entered into before 2008, a transfer to an affiliate will only require prior notification to SKK Migas.

18.2 Electricity

There is no law in Indonesia preventing the acquisition of companies or assets in the electricity industry.

Electricity in Indonesia is provided by the State Electricity Company (*Perusahaan Listrik Negara* – "**PLN**"). Theoretically it is possible for electricity to be provided by another company (including a joint venture company) which would supply electricity to the PLN (under a Power Purchase Agreement) for distribution. There are certain limitations on the foreign shareholding ownership of a joint venture company.

18.3 Natural resources/mines

There is no law in Indonesia preventing the acquisition of companies or assets in the mining industry.

Law No. 4 of 2009 regarding Mineral and Coal Mining (known as the "**Minerba Law**") replaces the previous system of "contracts of work" and mining authorisations called *Kuasa Pertambangan* ("**KP**"). The Minerba Law introduced a new mining business licence (*Izin Usaha Pertambangan* – "**IUP**") and specific mining business licence (*Izin Usaha Pertambangan Khusus* – "**IUPK**"). This new licensing regime applies equally to foreign and Indonesian investors. Foreigners can own shares in companies holding IUPs/ IUPKs.

Currently Presidential Decree on Negative List of Investment (the "**Negative List**") does not stipulate any limitations on the foreign shareholding ownership of a joint venture company holding IUPs/ IUPKs. However, we note that in the recent practice, the Ministry of Energy and Mineral Resources has started to apply certain limitations on foreign shareholding ownership in joint venture companies holding IUPs/IUPKs, although it has not been captured in the Negative List.

18.4 Telecommunications

There is no law in Indonesia preventing the acquisition of companies or assets in the telecommunications industry.

However, there are limitations on the foreign shareholding ownership for a joint venture company operating in the telecommunications industry. PT Telkom, the state-owned company, is the single operator of fixed telephone lines. A proposed transfer of shares in a joint venture company operating in the telecommunications sector may create some issues arising from the cooperation contract with PT Telkom.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

Aside from the points noted in 18.1 above, there is no law in Indonesia preventing the taking of security in relation to shares in or assets of an oil or gas company.

Security can be created in respect of a Technical Assistance Contract or a Production Sharing Contract by way of Assignment or by way of Fiduciary Security. For the purpose of the creation of security, it is recommended to serve a notice on and obtain consent from SKK Migas.

As for the enforcement, if there is any transfer of interest (from the contractor to the lender), the approvals set forth in paragraph 18.1 must be obtained.

19.2 Electricity

Other than the limitation on the acquisition of a company noted in paragraph 18.2 above, there is no law in Indonesia preventing the taking of or enforcement of security in relation to shares in or assets of an electricity company.

Security cannot be created in respect of the governmental concession.

19.3 Natural resources/mines

Other than the limitation on the acquisition of a company noted in paragraph 18.3 above, there is no law in Indonesia preventing the taking of or enforcement of security in relation to shares in or assets of a mining company.

Security cannot be created over an IUP or IUPK.

19.4 Telecommunications

Other than the limitation on the acquisition of a company noted in paragraph 18.4 above, there is no law in Indonesia preventing the taking of or enforcement of security in relation to shares in or assets of a telecommunications company.

Security cannot be created in respect of the governmental concession.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Indonesia?

A foreign court judgment is not enforceable in Indonesia. Action against the borrower must be commenced in a competent court in Indonesia and a judgment obtained for enforcement from such court. The court will attribute such importance to the foreign court judgment as it deems appropriate.

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JAPAN

ANDERSON MORI & TOMOTSUNE

LENDING

1. Does a lender require a licence to lend money to a company based in Japan (the "borrower")? Are there any exemptions available?

Yes. Under the Money Lending Business Act (the "**MLBA**"), a person conducting a money-lending business must, as a general rule, be registered as a moneylender. While the MLBA is unclear on whether a foreign lender lending to a company based in Japan will be subject to the MLBA, as a matter of good practice and due to the possible penalties for non-compliance, a foreign lender lending to a company based in Japan should, unless exempted, seek to be registered as a moneylender under the MLBA in the event that such lending is considered to be made as part of its money-lending business in Japan.

Certain types of lending are exempted under the MLBA. These exemptions include, eg lending by government bodies, lending relating to the sale, transportation, storage or brokerage of goods, and in many cases, lending by a parent company to its subsidiary.

Licensed Japanese banks and financial institutions and Japan branches of foreign banks are also permitted to conduct money-lending business in Japan without registration under the MLBA.

2. What are the consequences of making a loan to a borrower in Japan without a licence?

A lender who conducts a money-lending business without registration under the MLBA may be subject to a criminal penalty of imprisonment of up to 10 years and/or a criminal fine of up to JPY30 million in the case of a person, or in the case of a company, up to JPY100 million where a representative, agent, employee of the company conducted the business in connection with the business of the company. These criminal sanctions may also apply to direct lending by a foreign lender in the absence of registration.

3. Will a borrower based in Japan have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Yes. An interest payment to a foreign lender is taxable income under the Income Tax Act and the Finance Resources Keeping Act for Reconstruction from Great Earthquake (*fukko-tokubetsu-sochi hou*) and subject to a 20.42 % withholding tax. The amount of withholding tax may be reduced where a double taxation treaty exists between Japan and the country of the lender (eg the United States and the United Kingdom where withholding tax is 10% or, in the case of a bank or an insurance company, none).

4. Is there any limit to the level of interest that can be charged on loans made in Japan?

Yes. The limit of interest that can be charged on loans made in Japan depends on the amount of the principal of the loan as follows under the Interest Rate Restriction Act.

AMOUNT OF LOAN PRINCIPAL	INTEREST RATE LIMIT
LESS THAN JPY100,000	20%
FROM (INCLUDING) JPY100,000 TO (EXCLUDING) JPY1,000,000	18%
JPY1,000,000 OR MORE	15%

If a lender and a borrower agree to an interest rate that exceeds the relevant limit, the agreement is invalid to the extent of the portion in excess of the limit.

Following recent amendments to the MLBA, all lending with an interest in excess of the limit provided in the Interest Rate Restriction Act is prohibited and may be subject to administrative sanctions. Meanwhile, the Investment Deposit and Interest Rate Act, which imposes criminal sanctions, has also been amended to tighten restrictions on usurious lending. Under such amendment to the Investment Deposit and Interest Rate Act, the threshold interest rate above which criminal sanctions may be imposed has been reduced to 20%.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. It is possible to subordinate debt in Japan whereby the junior lender(s) agrees not to be paid by a borrower until the senior lender(s) has been paid. Generally, the senior lender and the junior lender agree to a set of pre-arranged rules in an intercreditor agreement which governs payment and priority. Under the terms of such pre-arranged rules, the junior lender(s) undertakes not to collect the junior debt until the senior debt has been paid. Also, the junior lender usually undertakes to turn over to the senior creditor

any monies received from the borrower where such payment would not have been made pursuant to the pre-arranged rules. Japanese insolvency laws explicitly permit contractual subordination to the extent that, in essence, if agreed in advance, the relevant debt is subordinated to all other debts. Because of this legislation, a subordination to that effect in case of insolvency proceedings is built in the contractual arrangement if the subordinated lender accepts such subordination. However, it is generally considered that multiple-layer subordination (which is not necessarily envisaged under Japanese insolvency laws) might not be valid and enforceable as against the insolvency trustee, while such subordination would be valid during the life of the loan as a contractual arrangement among the parties.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Japan or a guarantee from an entity incorporated in Japan?

As a general rule and subject to our answers to question 1 above, a foreign lender taking security over assets in Japan or a guarantee from an entity incorporated in Japan is not required to be licensed or registered, though there may be registration requirements applicable to assets related to specific businesses, as set out in our answers to question 19 below.

7. Does the taking of security in Japan result in a lender being liable to tax in Japan?

The mere taking of security in Japan by a foreign lender will not result in such lender being liable to tax in Japan. However, registration tax may be charged on taking security for the perfection thereof. Please see our answers to question 16 below for further details.

8. Can a security interest be taken in Japan over the following assets?

8.1 Land

Yes. A security interest over land can be created in the form of a mortgage (*teitou-ken*), a pledge (*shichi-ken*) or a transfer by way of security (*jouto-tanpo-ken*). As a matter of practice, security by way of a mortgage is the most common way of taking security over land. A mortgage over land must be registered at the relevant land registry office in order to be perfected.

8.2 Shares in a Japanese company

(a) Shares (in certificated form) in a Japanese company

Yes. A security interest over certificated shares in a Japanese company (irrespective of shares in listed companies or non-listed companies) can be created in the form of a pledge or a transfer by way of security.

(b) Shares and securities listed by a Japanese company in scripless form

Yes. However, the procedure for the creation and perfection of security in scripless form are different to those applicable to certificated shares.

The book-entry transfer system for stocks refers to the computerised management (issuance, transfer and redemption) of shareholders' ownership rights through accounts established by Japan Securities Depository Center, Inc. ("**JASDEC**") and securities companies in accordance with the Act on Transfer of Bonds, Shares, etc. which abolished stock certificates for the stocks of publicly listed companies. Having obtained the consent of issuers to do so, JASDEC conducts transactions through this book-entry transfer system for shares in shares listed publicly on securities exchanges, warrants for new shares, corporate bonds with warrants for new share, investment units, preferred shares, beneficial interests in investment trusts and other items pertaining to these instruments.

Pledge and collateral by way of security can be created over shares in scripless form, and such shares are limited to those of listed companies. Transfers of rights in the stock of listed companies must be recorded electronically in the transfer account registry under the transfer system under the JASDEC, and an assignment or pledge of stock is made effective by recording an increase in the balance of the respective stock holding or pledge section in the account of the assignee or pledgee upon application for an account transfer by the assignor or pledgor.

8.3 Receivables (rights under contracts)

Yes. Japanese law recognises security interests over receivables. Receivables can be secured by way of pledge or transferred by way of security. Consent from the counterparty under the contract is not necessary to create a pledge or transfer by way of security over receivables, unless the receivables are otherwise prohibited from being pledged or transferred. Perfection of the security against the counterparty under a contract requires a notice to, or consent from, the counterparty. Against third parties, a certification of date (*kakutei-hizuke*, obtained from a notary public officer) is required in addition to the notice to or consent from the obligor.

In addition to the above, receivables can be secured by way of register (*touki*), so long as (i) such receivables belong to a cooperation and (ii) such receivables are those for cash. In this case, perfection against third parties is the registration of the security with the regional legal affairs bureau under Act for Registration of Assignment of Movables and Registration of Assignment of Claims (*dousan/saiken jyoto touki hou*).

8.4 Bank accounts

Yes. Bank accounts can, as a matter of law, be taken over by pledge or transferred by way of security. As a matter of practice, however, as the terms and conditions governing most Japanese bank accounts will typically prohibit the creation of such security, the bank's consent is necessary to create a security over a bank account.

8.5 Insurance

Yes. A security interest over rights under insurance policies can, as a matter of law, be created in the form of a pledge or a transfer by way of security. As a matter of practice, however, as the terms of insurance will typically prohibit the creation of such security, the insurance company's consent is necessary for the creation of a security over rights under insurance policies.

8.6 Floating charge over all assets

No. Japanese law does not recognise equitable floating charges as a form of security. However, accounts receivable and inventories, including future receivables and after-acquired property can be pledged over or transferred by way of security as long as certain additional requirements, such as that the assets can be identified, can be satisfied under Japanese law.

9. Are trusts recognised in Japan? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Japan?

Yes, trusts are recognised in Japan. Although Japanese law is not based on common law system and the concept of law of equity is not considered as a part of Japanese law, a statutory of the Trust Act allows trusts. A trust is a legal relationship in respect of trust assets between a trustee and a beneficiary. The trustee holds the trust assets for the benefit of the beneficiary. While the trustee has technical or legal ownership of trust assets, the beneficiary has economic or beneficial ownership. Assets held under a trust can be tangible or intangible. Trustee structures are commonly used in Japan and regionally to hold security for a pool of creditors.

9.2 Taking security over securities held in a clearing system

As described in our answers to question 8.2(b), transfers of rights, including taking securities over securities, in the stock of listed companies must be recorded electronically in the transfer account registry under the transfer system, and it is not necessary to use a trust in the context of taking security over securities held in a clearing system. As to certain foreign stocks, JASDEC provides custody services for foreign stock certificates, etc. at a local custodian. The stock certificates in custody are registered at the local custodian in JASDEC's name or in the name of the local custodian.

10. Can a company incorporated in Japan (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Yes. A company incorporated in Japan may give a guarantee to a borrower, whether or not the borrower is incorporated in Japan. As a matter of practice, Japanese companies often give a guarantee for the debt of their subsidiaries irrespective of the governing law of the loan agreement.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

As a general rule, secured creditors may enforce their security in respect of the secured assets in priority over the claims of all other unsecured creditors outside bankruptcy or civil rehabilitation proceedings. The borrower or a liquidator has certain limited powers under the Civil Rehabilitation Act to prevent the enforcement of a security interest. Please also refer to our answers to question 12 for further details.

Where the Corporate Reorganisation Act applies, however, secured creditors will generally be prohibited from enforcing their security and their rights will be altered by, and can only be exercised pursuant to, the applicable corporate reorganisation plan. Under corporate reorganisation proceedings, certain claims such as certain tax claims, salary and retirement benefits and fees and remuneration for administration of assets must be paid in priority over claims held by secured creditors.

11. (b) If an intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

This question is not applicable to the jurisdiction of Japan.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

12.1 Security over real estate

With respect to a mortgage, which is normally used as security over real estate, the Civil Execution Act provides two methods for enforcement of security over real estate: sale through public auction, and redirection of earnings from real property to repayment of the secured claim. In each case, a court order must be obtained by the secured creditor. The time that the court may take between receipt of a petition seeking order to sell a secured asset and the appropriation of consideration for the sale by the secured creditor may be six months or more. In the case of a redirection of the earnings from real property, the time taken between receipt of a petition and the commencement of the allotment may be three months or more.

12.2 Security over movable assets including company shares

Under the Civil Execution Act, rights under a pledge over movable assets may be enforced by way of public auction. A court order must be obtained by the secured creditor to commence such public auction. The estimated time that the court may take from a petition to reach an order to sell a secured asset to the appropriation of consideration for the sale to a secured creditor is approximately a month or more.

12.3 Security over receivables including bank accounts and insurance

Under the Civil Execution Act, a court order must be obtained by the secured creditor to enforce a security over receivables. The time a court may take to make an order may be a week or more.

Notwithstanding the foregoing answers to questions 12.1 to 12.3, where the secured creditor and the granter of the security have agreed in the security document that the lender will be entitled to enforce its security freely (in addition to the means of enforcement provided by the law) in the case of default by the borrower, the secured creditor will not be required to obtain a court order in order to enforce its security.

12.4 Guarantee

In the case of default by the borrower, a creditor may call upon a guarantor to perform its obligations under a guarantee without obtaining a court order. However, if the guarantor refuses to perform these obligations, the lender will need to commence civil action in the court to enforce its rights.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

As noted in our answers to question 11(a) above, as a general rule, in an insolvency situation the secured asset will not be subject to

recourse by general creditors. However, a borrower or borrower's trustee may exercise certain exceptional rights to prevent the enforcement for retaining the assets of the borrower. Such exceptional rights are as follows:

- under the Civil Rehabilitation Act, a debtor can seek extinguishment of a security interest on assets that are essential to the continuance of its business operations by delivering a sum of money that it deems objectively fair, with the permission of the court. The Corporate Reorganisation Act provides a similar system for the extinguishment of security interests as well as the alteration of an existing security interest pursuant to a court approved plan of corporate reorganisation as explained in question 11(a); and
- where a security interest exists over a bankrupt's property at the time bankruptcy proceedings are initiated, and where such property forms part of the bankrupt estate, the trustee can file a petition to the court for a permission to extinguish the security, provided that the extinguishing of the security and the proposed sale of the secured property serve the general interests of the creditors in bankruptcy proceedings, and that part of the proceeds from the sale of the secured property is paid to the court.

With respect to a guarantee, the borrower or a liquidator cannot prevent the exercise of a lender's rights under a guarantee unless there are grounds such as termination, invalidity or cancellation of the guarantee.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

There is no specific prohibition concerning the provision of financial assistance, grant of security or provisions of guarantee by a target company for a loan which is used for the acquisition of the target company. However, if the transaction does not result in any benefit to the target company, such transaction may result in a breach of fiduciary duties of directors of the target company.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

15.1 Immovable assets

Security over immovable assets is perfected upon registration with the relevant land registry office. A failure to register will result in the security interest being void against third parties.

15.2 Movable assets (including shares in a Japanese company)

Taking security over movable assets generally does not require registration or filing with a government body/court, but requires only an agreement between parties. Security over certain types of assets (such as vehicles, ships and aircrafts) are subject to different registration requirements under the special act for each business and must be registered to be perfected.

Taking security over movable assets was not commonly used because it could not clearly make public who the security interest holder is. Notwithstanding that, in 2005, a new registration system was introduced. Security taken over movable assets can now be registered or filed so long as such movable assets belong to a corporation, in which case it can be perfected by registration against that corporation.

15.3 Receivables

As noted in our answers to question 8.3 above, perfection of the security over receivables against third parties may be by way of consent from or notice to a counterparty under the contract with a certification of date (*kakutei-hizuke*, obtained from a notary public officer) or the registration of the security with a competent authority. Failure to perfect the security will result in the security being void against third parties.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Yes. A nominal stamp duty is payable in relation to guarantees and transfer of receivables. Stamp duty is generally not payable in respect of security documents, but registration tax is payable in respect of security interests that must be registered. The amount of registration tax payable varies depending on the asset and the type of security interest. For example, the amount of the registration tax for a mortgage over real estate is 0.4% of the secured loan amount (or the maximum amount of the lending which is secured); for a transfer by way of security, it is 2% of the fixed asset valuation amount; and for a pledge, it is 0.4% of the secured loan amount.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. It is possible to grant second ranking security over an asset except where the security interest is in the form of transfer by way of security. Generally, where there are several competing lenders with security interests over the same asset, they will rank in the order of perfection of the security interests. Documenting a second security would be in the same way as how security interests are usually taken depending on the type of asset (see question 8). Such competing secured lenders may transfer the ranking of their security interests to the other secured lenders or modify the priority position of their security interests. Further, such lenders may also enter into contractual arrangements to change the priority position of their security interests with consent from interested parties who might be prejudiced by such change.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

A foreign company proposing to acquire shares in a Japanese company in the oil and gas industry is required to file a notification at least 30 days prior to and in respect of the acquisition under the Foreign Exchange and Foreign Trade Act. A proposed acquisition may be prohibited if the acquisition is determined to be contrary to public policy or likely to have an adverse effect on the security or economy of Japan.

Further, under the Mining Act (which also applies to the oil and gas sector), mining rights may not be held by foreign companies unless otherwise provided for in a relevant treaty.

18.2 Electricity

A foreign company proposing to acquire shares in a Japanese company conducting electricity business is required to file a notification at least 30 days prior to and in respect of the acquisition under the Foreign Exchange and Foreign Trade Act. A proposed acquisition may be prohibited if the acquisition is determined to be contrary to public policy or likely to have an adverse effect on the security or economy of Japan.

Any merger, demerger or transfer of the whole of an electricity business will not be effective unless approved by the Minister of Economy, Trade and Industry. Further, a company conducting electricity business proposing to transfer an asset used in that electricity business is required to notify the Minister of Economy, Trade and Industry in advance.

18.3 Natural resources/mines

A foreign company proposing to acquire shares in a Japanese company conducting a nuclear resource mining business is required to file a notification at least 30 days prior to and in respect of the acquisition under the Foreign Exchange and Foreign Trade Act. A proposed acquisition may be prohibited if the acquisition is determined to be contrary to public policy or likely to have an adverse effect on the security or economy of Japan. Natural resources other than gas, oil and nuclear resources are generally not subject to such requirement. In addition, mining rights on certain areas in Japan shall be held only by the people of Japan or juridical persons of Japan.

18.4 Telecommunications

A foreign company proposing to acquire shares in a company conducting telecommunications business is required to file a notification at least 30 days prior to and in the same manner in respect of the acquisition as set out in our answers to question 18.1. A proposed acquisition may be prohibited if the acquisition is determined to be contrary to public policy or likely to have an adverse effect on the security or economy of Japan. In addition, if a company conducting telecommunications business has received a request to enter the name and address in its register of shareholders from a foreign company who has acquired its shares, such telecommunication company shall not do so if the aggregate of the ratios of the voting rights directly or indirectly held by foreign countries or other companies etc. reaches or exceeds one-third upon acceptance of the request.

Further, when a company acquires a telecommunications company which holds a licence to conduct the telecommunications business by way of a merger, a demerger or a transfer of entire business of the telecommunications company, the licence will automatically be transferred to the acquiring company, which is required to file a notification of the transfer to the Minister for Internal Affairs and Communications. In addition, if the target company holds a licence for establishing radio stations, such licence can be transferred to the acquiring company upon obtaining a permit from the Minister for Internal Affairs and Communications.

Please note, however, that a licence for the establishment of a radio station may not be obtained by a foreign company. For this purpose, a Japanese company is deemed to be a foreign company where more than one-third of its voting shares are owned by foreign individuals/companies, where its legal representative is a foreign person or more than one-third of such company's directors are foreign individuals or companies.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

There is no law preventing the taking of security over shares in or assets of companies in the oil and gas industry. As it falls under the regime for share transfers, enforcement of a security over shares is subject to the conditions set out in our answers to question 18.1 above.

19.2 Electricity

There is no law preventing the taking of security over shares in companies in the electricity industry, but the taking of security over assets which are used for electricity business attracts an obligation to notify the Minister of Economy, Trade and Industry. This falls under the regime for transfer of shares or assets and the enforcement of a security is therefore subject to the conditions set out in our answers to question 18.2 above.

19.3 Natural resources/mines

There is no law preventing the taking of security over shares in or assets of companies in the natural resources or mining industry. This falls under the regime for transfer of shares and the enforcement of a security over shares is therefore subject to the conditions set out in our answers to question 18.3 above.

19.4 Telecommunications

There is no law preventing the taking of security over shares in or assets of companies in the telecommunications industry and this falls under the regime for share transfer. As such, enforcement of a security over shares is subject to the conditions set out in our answers to question 18.4 above.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Japan?

A judgment of the courts of England in relation to English law governed agreements would be enforced by the Japanese courts without further consideration or re-examination of the merits if all the following conditions are fulfilled:

- such judgment is final and conclusive;
- the jurisdiction of the court of England is recognised by law or treaty;
- the respondent has either been served by summons (either in accordance with the requirements of Japanese law or pursuant to any applicable treaty) and not by public notice or has appeared in the action in England without receiving service;
- the English judgment (its contents as well as its proceedings) is not contrary to public policy in Japan; and
- the relevant jurisdiction guarantees reciprocal recognition of Japanese judgments.

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KOREA

KIM & CHANG

LENDING

1. Does a lender require a licence to lend money to a company based in Korea (the "borrower")? Are there any exemptions available?

The Lending Business Registration and Consumer Protection Act (the "**Lending Business Act**") applies to commercial lending transactions with Korean borrowers in business activities (ie continuously and repeatedly for profit making purposes). An entity that intends to engage in: (i) the business of providing loans to Korean residents; (ii) the business of acquiring claims arising from loan agreements and collecting them; or (iii) the loan "brokerage" business in Korea, must register with the relevant municipal government in which such lender intends to engage therein. If an entity holds a lending licence issued under other relevant laws such as a banking licence or a credit specialty business licence, under the Lending Business Act, a separate registration is not required to engage in the lending business.

Certain loan transactions not included in the definition of "lending business" under the Lending Business Act are exempt from the registration requirement. Such transactions include loans made to employees by employers, loans made to members of a labour union by the labour union, loans made by the government or local governments, and loans made by non-profit organisations according to their purpose of establishment. While a specific exemption was not provided in respect of foreign lenders lending to a company based in Korea, the prevailing view in Korea is that the provision of syndicated loans to Korean institutions by foreign lending entities is generally not "doing lending business in Korea" and thus will not trigger the registration requirement.

2. What are the consequences of making a loan to a borrower in Korea without a licence?

Engagement in the lending business without either registering under the Lending Business Act or obtaining a licence pursuant to any other law is punishable by an imprisonment of up to five years in prison or fines of KRW50 million.

3. Will a borrower based in Korea have to deduct amounts for withholding tax on interest payments made to an overseas lender?

In principle, a borrower based in Korea will have to deduct amounts for withholding tax on interest payments made to an overseas lender. However, if the borrower qualifies under the Foreign Exchange Transactions Act as an institution engaged in "foreign exchange affairs" (as most Korean financial institutions do) and receives a foreign currency loan to be redeemed in foreign currency from a foreign financial institution (ie the lender) as prescribed by the Foreign Exchange Transactions Act, then such withholding tax on interest paid to the lender would be exempted with certain exceptions. Please also note that such withholding tax may be exempted subject to certain applicable tax treaties.

4. Is there any limit to the level of interest that can be charged on loans made in Korea?

In the case of loans made by a company registered under the Lending Business Act to individual persons or certain small companies as enumerated in the Lending Business Act, the level of interest charged on loans may not exceed 39% per annum.

In the case of loans made by credit financial companies holding a lending licence issued under any other relevant laws, the level of default interest rate charged on loans may not exceed 39% per annum. In addition, if the default interest rate imposed by banks exceeds 25% per annum, then the maximum default interest rate may not be greater than 1.3 times the normal interest rate. In the case of other credit financial companies other than banks, if the default interest rate exceeds 25% per annum, then the difference between the normal interest rate and the default interest rate may not be greater than 12% per annum.

Loans not subject to any of the above laws (ie private lending transactions for non-business purposes) may not charge an interest rate of more than 30%.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes, such priority may be set in the form of an agreement between the first and second lender (which may or may not include the borrower) whereby the first lender acknowledges priority of the second lender and agrees to transfer any payments to the second lender in case relevant payments are made to the first lender before the full repayment of the second lender. However, such agreement will only be binding on the relevant parties and will not be applicable to any third parties.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Korea or a guarantee from an entity incorporated in Korea?

No. However, a foreign exchange report may be required to be filed in certain cases as required by the Foreign Exchange Transactions Act (eg transactions between a Korean resident and a non-resident).

7. Does the taking of security in Korea result in a lender being liable to tax in Korea?

No, except as described in question 16 below.

8. Can a security interest be taken in Korea over the following assets?

8.1 Land

Yes. Security over land is typically taken by way of mortgage (in practice, security interests commonly take the form of a kun-mortgage 根抵).

To create a mortgage, the parties must first enter into a mortgage agreement and then file a joint application to record the mortgage in the court registry. A mortgage is automatically perfected upon creation (ie a mortgage agreement and a public recordation) and no further action is required for perfection.

A kun-mortgage is a special type of mortgage and can be used to secure any type of debt. In practice, parties enter into a kun-mortgage (rather than ordinary mortgage) in almost all cases. It is distinct because it secures debt in an amount of up to a certain maximum or ceiling amount without regard to any intermediate increases or decreases in the debt so long as the amount remains below such predetermined ceiling amount. If the amount of principal outstanding plus interest at any given time happens to fall below the registered maximum secured amount, the kun-mortgage will only secure such amount of the debt, but no more. If the amount of principal outstanding plus interest at any given time exceeds the registered maximum secured amount, then any amounts exceeding limit will not be secured. Accordingly, it is advisable to fix the maximum amount at a level that exceeds the principal by an adequate margin.

8.2 Shares in a Korean company

(a) Shares (in certificated form) in a Korean company

Yes. Security interest may be created over shares in a Korean company in the form of a pledge or kun-pledge.

With respect to the former method, the Commercial Code provides for two types of share pledges: a registered pledge and an unregistered pledge. The key difference between the two is that the pledgee of a registered pledge is entitled by law to a security interest in (i) the cash or stock dividends declared in respect of the pledged shares, and (ii) liquidation proceeds in respect of the pledged shares, with a priority over other creditors, without attaching such dividends, liquidation proceeds or distributions, while the pledgee of an unregistered pledge will not be entitled to such rights.

A security interest is created and perfected by an "unregistered" pledge when: (i) a pledge agreement is entered into by and between the pledgor and the pledgee and (ii) the certificates representing the pledged shares are delivered by the pledgor to the pledgee.

In order to create and perfect a security interest created by a "registered" pledge, in addition to items (i) and (ii) immediately above, the pledge must be registered in the shareholders' registry maintained by the issuer of the shares by recording the pledgee's name and address, and the pledgee's name must be registered on the share certificates.

There is no other filing or registration requirement other than as described above with respect to the creation and/or perfection of a pledge of shares.

A kun-pledge, as opposed to a general pledge, is a pledge which secures floating debt obligations, which is to be fixed at some future date, up to a maximum amount. Please also refer to the description of kun-mortgage in question 8.1 above.

(b) Shares and securities listed by a Korean company in scripless form

Yes, a security interest can be created in the book-entry securities deposited with the Korea Securities Depository (the "**KSD**") by pledge.

A holder of securities may: (i) open an account with the KSD and deposit securities directly with the KSD; or (ii) open an account with a participant (ie a custodian for the ultimate holder, the "**Intermediary**") of the KSD and deposit securities with the Intermediary so that the Intermediary may deposit such securities to the KSD in the account of the Intermediary. Each of the holder and the Intermediary shall be deemed to own the pro rata share of undivided interest in such type, issue and quantity of book-entry securities as is recorded in the book of the KSD and the Intermediary. Therefore, the holder of the account (either with the KSD or the Intermediary) is presumed to be the owner of the securities that are credited to the account.

A pledge of book-entry securities deposited with the KSD can be created and perfected when (i) a pledge agreement containing an adequate description of the pledged securities is executed and (ii) (x) if the pledgor is a participant of the KSD, the pledgor instructs the KSD to place a notation on the pledgor's account with the KSD indicating that the specified securities are pledged in favor of the pledgee together with the pledgee's name and the pledgee's address or (y) if the pledgor is not a participant of the KSD, the pledgor opens an account with the Intermediary that is a participant of the KSD and instruct the Intermediary to place a notation on the pledgor's account with the Intermediary indicating that the specified securities are pledged in favor of the pledgee together with the pledgee's name and the pledgee's address.

8.3 Bank accounts

Yes. A bank deposit is considered the depositor's claim against the depository bank and a pledge or a kun-pledge may be established over such claim. The depositor (pledgor) may pledge its claims to a third party (secured party) via a pledge agreement or kun-pledge agreement and perfection is achieved when the pledgor sends a fixed-date stamped[2] notice of pledge to its obligor and/or a written consent (which should be fixed-date stamped by a notary) is obtained from the obligor. In addition, any instruments relating to the claim should be delivered to the secured party, although it is a generally accepted practice that such delivery will be deemed made if the pledgor agrees to hold such instruments on behalf of the secured party.

Banks' deposit agreements usually prohibit a pledge of a bank account without the bank's consent, and thus the consent of the depository bank would be required (the consent should also be fixed-date stamped).

8.4 Receivables (rights under contracts)

Yes. Under Korean law, a secured creditor may take a security interest over receivables or any other rights under contracts and perfect such interests thereon. The security interest is created by executing a pledge (or kun-pledge) which will require the pledgor to send a fixed-date stamped notice of pledge to its obligor under the claim and/or obtain the obligor's consent (which should be fixed-date stamped by a notary) to the pledge. In addition, any instrument evidencing the claim should be delivered to the secured party, although such instrument may be held by the pledgor on behalf of the secured party. If a pledge or transfer of the receivable or contractual right is restricted in the relevant agreement, then the obligor's consent should be obtained.

In addition, in accordance with the Act on Security over Movable Property, Claims, etc. effective since June 2012, a security interest over receivables can also be created upon the execution of a security agreement where the parties agree to provide receivables as security in accordance with the Act aforementioned and the registration of such security on the collateral security register. The security interest will be perfected at the time of such registration.

8.5 Insurance

Yes. Insurance is considered the beneficiary's claim again the insurer. The same discussion under question 8.4 will apply.

8.6 Floating charge over all assets

Korean law does not recognise the concept of a floating charge. However, there is the concept of a kun-mortgage or kun-pledge to secure the debts with values that may fluctuate. A kun-mortgage or kun-pledge secures debts of up to a fixed amount agreed upon by the lender and the borrower ("**Maximum Amount**") notwithstanding any fluctuations in the value of the debt so long as such value does not exceed the Maximum Amount. Please also refer to question 8.1 above.

Furthermore, Korean law requires that the collateral be specifically identifiable. Therefore, in principle, a valid security interest cannot be granted over a fluctuating pool of assets under Korean law. Certain exceptions are recognised by courts and laws. For example, a valid security interest can be granted in fungible property such as grain, oil and fishery held in a segregated storage facility. Korean law also recognises a special security interest in a factory (ie land, building and equipment) that is created by registering a mortgage on the plots of land, buildings and equipment. This "factory foundation mortgage" also creates a security interest over any leasehold or industrial property rights related to such factory's operations.

9. Are trusts recognised in Korea? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Korea?

Yes, trusts are recognised in Korea. A trust is a legal relationship in respect of trust assets between a trustor, a trustee and a beneficiary. The trustee holds the trust assets for the benefit of the beneficiary. While the trustee has technical or legal ownership of trust assets, the beneficiary has beneficial interest over trust assets. Both tangible and intangible assets can be held under a trust. Trust structures are commonly used in Korea for the purposes of security.

9.2 Taking security over securities held in a clearing system

Trust structures, however, are not used in the context of taking security over securities held in a clearing system.

Instead, a pledge of book-entry securities deposited with the KSD can be created and perfected. Please refer to the response to question 8.2(b).

10. Can a company incorporated in Korea (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

The guarantor is generally permitted to give a guarantee for the debt of a borrower so long as such guarantee can be justified on the basis of corporate benefit from the guarantor's perspective. A parent company's guarantee for the benefit of its subsidiary is usually recognised as justifiable. However, a so-called upstream guarantee (ie where a subsidiary guarantees the debt of a parent), will require specific grounds for justification.

In addition, a publicly listed company is generally prohibited from providing a guarantee for the benefit of its major shareholders or specially related persons. However, as an exception to such general prohibition, a listed company is permitted to provide a guarantee to its major shareholders or specially related parties if such guarantee is: (i) not expected to undermine the soundness of the listed company's business; (ii) necessary in order to achieve the business purpose of the listed company; and (iii) provided in accordance with appropriate lawful procedures and not otherwise contrary to the law.

If the borrower was incorporated in a different country (ie a non-Korean resident), in addition to the restrictions above, the Foreign Exchange Transactions Act also applies and thus, certain foreign exchange reports along with other reports may need to be filed.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

In principle, a secured party will have priority over all subsequent secured creditors and all unsecured creditors and claimants, priority being determined by the time of completion of perfection procedures.

However, preferential creditors holding statutory preferred claims are deemed to have priority over secured creditors. Statutory preferred claims include certain tax liens, certain employee wage claims, small-sized residential lessee claims for security deposit refunds and certain other rights set out in the Korean Civil Code and other laws.

2 Fixed-date stamping of a document is done by a notary public or content-certified mail (Naeyong Jeungmyung) and constitutes legal evidence that the stamped document existed on the date of the fixed-date of the stamp. In the case where the pledge is perfected by notice, the notification itself must be made by a fixed-date stamped documentation. Content-certified mail (Naeyong Jeungmyung) qualifies as a means of fixed-date stamped notification.

11. (b) If the Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

If the Intermediary becomes subject to a bankruptcy proceeding, the owners (including the pledgee) of securities deposited at and physically held by the Intermediary have a legal right to recover such securities; provided that such securities are clearly identified as belonging to such owners either (i) in the form of physical segregation from other securities owned or held by the Intermediary or its other customers or (ii) by recording the serial numbers of the certificates of the concerned securities in the books and records of the Intermediary clearly indicating that such securities are being held on behalf of such owners.

However, the Intermediary typically deposits securities with and held at the KSD on a commingled and non-segregated basis. The KSD maintains an account for the Intermediary, the record of which lists the securities deposited by the Intermediary as classified under two categories: one for the securities deposited to the account of the Intermediary and the other for the securities deposited to the account of the Intermediary's clients as a whole.

Under the Financial Investment Services and Capital Markets Act, the Intermediary's clients as well as the Intermediary are deemed to own pro rata shares of undivided interests in all securities of the same type and same class deposited with the KSD (the "**Deposited Securities**"), with the pro rata share to be determined on the basis of the records of the KSD and the records of the Intermediary. As a result, Intermediary's client (ie the pledgor and, together with the pledgee, the "**Client**") as well as the Intermediary cannot reclaim from the KSD the identical share certificates that they deposited. However, they would be entitled to reclaim their pro rata share of the Deposited Securities.

In view of the depository system of the KSD as described above, the Client's right to its pro rata share of the Deposited Securities will not become part of the Intermediary's property. Therefore, in the event of the Intermediary's insolvency, the Client's interest in its pro rata share of the Deposited Securities will not be subject to the Intermediary's insolvency proceeding, and, consequently, the Intermediary's creditors will have no claim against it.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

Enforcement of security: In the event of a default, the secured party may take certain remedial actions to enforce its interest in the secured collateral. First, it may initiate enforcement actions through the courts, which typically consists of a public auction. The time required for the completion of the auction process varies depending on the type of property (whether it is land, a building, a house, etc.) and generally takes more than five to six months.

If the debtor agrees, the secured party can take enforcement actions without the involvement of the courts through either a private sale or a transfer of title to the secured party to satisfy the obligations of the debtor.

Enforcement of guarantee: A court order or court involvement is not required for a secured party or beneficiary to demand payment from a guarantor under a guarantee. However, in the event that the guarantor fails to make payments of the guaranteed obligations and the lender needs to enforce its rights under the guarantee against the guarantor's assets, a court order and court involvement may then be necessary.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

In the bankruptcy proceedings under the Debtor Rehabilitation and Bankruptcy Law, the Secured Party will be permitted to exercise its security rights at any time notwithstanding the proceedings. A private sale or an acquisition of collateral by a secured creditor would not be affected. The commencement of rehabilitation proceedings will have the effect of an automatic stay so that a secured party would not be permitted to dispose of any collateral located in Korea in any manner except in accordance with a court-approved rehabilitation plan.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

There are no explicit regulations that prohibit such financial assistance etc. However, Korean law states that directors have a fiduciary obligation and a duty of loyalty to act in the best interests of the company in accordance with applicable laws and regulations and the company's articles of incorporation. If the directors of the Korean company cause the company to enter into a transaction (eg providing a guarantee) in breach of their fiduciary duty as determined by a judicial body, the validity and enforceability of such transaction may be challenged and deemed invalid and unenforceable under Korean law. There were several Korean court cases (mostly criminal cases) in which the Korean courts found a breach of fiduciary duty resulting from a director causing the company to provide an upstream guarantee or providing the company's asset as collateral for the shareholder's financing from a third party financial institution.

In addition, as mentioned above, the company is generally permitted to provide financial assistance, grant security or provide guarantee (collectively, the "**Financial Assistance**") so long as such Financial Assistance can be justified as in the best interests of the company. Thus, the Financial Assistance to the borrower (including upstream guarantees) requires specific grounds for justification. If there is no justifiable reason for providing the Financial Assistance to secure the loan used by the borrower to acquire such company, such Financial Assistance would be deemed to fall beyond the scope of authority and power of the company and may be invalidated.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Security interests created over registered assets (such as real estate, ships, automobiles, construction equipment) shall be registered with the appropriate registry. Such registration takes approximately two to three days. If such registration is not made, the security interest will not be adequately created or perfected and the security will be void.

Security interests created over non-registered assets (such as receivables) or guarantees granted by the guarantor do not require a registration or filing with a governmental body or court save for certain foreign exchange reports pursuant to the Foreign Exchange Transactions Act, if applicable.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

The registration of the security interest with the relevant registry is subject to certain registration taxes (including surtax) (ie 0.2% of the recorded maximum secured amount in case of real estate and KRW9,000 per registration in the case of ships) and mandatory purchase of national housing bonds (ie 1% of the recorded maximum secured amount in the case of real estate). In addition, moderate expenses in the form of stamp tax and fees may also be applicable.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. In the case of a mortgage over real estate, relevant law explicitly acknowledges subsequent security interests. As for security over other assets such as shares or monetary claims, although there are no explicit laws permitting such subsequent security, there are also no regulations prohibiting the granting of subsequent security. As such, it is generally interpreted as permissible.

Documenting a second security will generally be in the same way as documenting the first security over such asset (security agreement and perfection). However, as a practical matter, the method of perfecting the subsequent security may differ from the method of perfecting the first security, especially when the perfection is of an exclusive nature such as possession or delivery of the asset.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

A single person (regardless of nationality) may not beneficially own or effectively control more than 15% of the voting shares of the Korea Gas Corporation. In addition, shareholders having a foreign nationality may only hold up to an aggregate of 30% of the shares of Korea Gas Corporation.

There are no prohibitions against the acquisition of other companies in the oil or gas industry. Please note, however, that all oil mining rights within Korea are reserved to the Korean Government.

18.2 Electricity

Foreigners, in the aggregate, may own up to 40% of the total shares of Korea Electric Power Corporation and the ceiling placed on individual ownership of foreigners is up to 3% of the total shares of Korea Electric Power Corporation.

Please also note that a licence under the Electricity Business Act is necessary in order to engage in the power generation business. Furthermore, licences in relation to the nuclear power generation are not granted to foreign investment companies as defined in the Foreign Investment Promotion Law.

18.3 Natural resources/mines

With regard to hydraulic, thermal, wind, solar and tidal power resources, the total amount of foreign investments in Korean power generation through the purchase of power generation plants of the Korea Electric Power Corporation shall not exceed 30% of the total power plants in Korea. Foreign investments in livestock and fishery industries shall not be equal to or exceed 50% of the shares of related companies, while foreign investments in rice and barley cultivation are prohibited.

18.4 Telecommunications

Under the Telecommunications Business Law (the "**TBL**"), foreigners (including foreign entities and foreign governments) and "deemed foreigners" may not own more than 49% of the total issued and outstanding voting shares (including share equivalents such as depositary receipts) of a Korean broadcasting and telecommunications service company. In this regard, if a foreigner (together with its Specially Related Persons) is the largest shareholder of a Korean entity and such largest shareholder holds 15% or more of the total number of issued and outstanding shares of such Korean entity, then such Korean entity will be a "deemed foreigner", whose shareholding in the broadcasting and telecommunications service company will be aggregated for the purpose of applying the 49% rule. However, a company holding less than 1% of the total issued and outstanding voting shares shall not be considered a "deemed foreigner" and thus its shareholding ratio is not counted when applying the 49% rule.

In addition, the TBL provides that a foreigner or a foreign government may not become the largest shareholder of KT Corporation owning 5% or more of KT Corporation shares.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

No. However, should the enforcement of security in relation to shares or assets of the companies result in the violation of the abovementioned investment restrictions, the voting rights of the exceeding shares may be restricted and the shareholder may be required to dispose of the exceeding shares.

19.2 Electricity

No. However, should the enforcement of security in relation to shares or assets of the companies result in the violation of the abovementioned investment restrictions, the voting rights of the exceeding shares may be restricted and the shareholder may be required to dispose of the exceeding shares.

19.3 Natural resources/mines

No. However, should the enforcement of security in relation to shares or assets of the companies result in the violation of the abovementioned investment restrictions, the voting rights of the exceeding shares may be restricted and the shareholder may be required to dispose of the exceeding shares.

19.4 Telecommunications

No. However, should the enforcement of security in relation to shares or assets of the companies result in the violation of the abovementioned investment restrictions, the voting rights of the exceeding shares may be restricted and the shareholder may be required to dispose of the exceeding shares.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Korea?

Korean courts recognise and enforce any monetary judgment against a Korean Party obtained in proceedings in England; provided that: (i) such judgment was finally and conclusively given by a court having valid jurisdiction in accordance with the international jurisdiction principles under Korean law and any applicable treaties; (ii) such Korean Party was duly served with service of process (otherwise by publication or similar means) in sufficient time to enable such Korean Party to prepare its or his defence in conformity with the laws of England (or in conformity with the laws of Korea if it was made to a Korean Party in Korea) or responded to the action without being served with process; (iii) recognition of such judgment is not contrary to the public policy of Korea; and (iv) judgments of the courts of Korea are accorded reciprocal treatment under the laws of England.

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Our success derives from the outstanding quality of our professionals and staff. They include attorneys, patent attorneys, tax attorneys, economists and sector specialists, who number more than 650 today. They are exceptionally talented individuals who have graduated from most prestigious universities in Korea and around the world. They have honed their skills on challenging assignments. They are international in practice and outlook; many Korean attorneys are also licensed to practise in the US and our foreign attorneys have had work experience in the US, Japan, China and the EU countries and speak French, German, Chinese, Japanese, Swedish and Spanish in addition to Korean and English. But perhaps most importantly, our professionals can be distinguished by their singular commitment to providing the highest quality services to the firm's clients as efficiently as possible.

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LAO PDR

DFDL

LENDING

1. Does a lender require a licence to lend money to a company based in the Lao PDR (the "borrower")? Are there any exemptions available?

The laws of the Lao People's Democratic Republic ("**Lao PDR**") require domestic commercial banks and microfinance institutions to be licensed. Establishment of a domestic commercial bank by a foreign investor requires approval as a Lao PDR branch office of a foreign bank or as a Lao PDR limited company from the Bank of Lao PDR (the "**BoL**") under the Law on Commercial Banks (No. 03/NA, 26 December 2006) (the "**Banking Law**"). Establishment of a microfinance institution by a foreign investor requires a joint investment with local individuals or entities and shall obtain approval as a Lao PDR limited company from the BoL pursuant to the Decree on Microfinance Institutions (No. 460/G, 3 October 2012). Licences/approvals are also required from the Ministry of Industry and Commerce in accordance with the Law on Investment Promotion (No. 02/NA, 08 July 2009) (the "**Investment Promotion Law**") and the Enterprise Law (No. 11/NA, 9 November 2005, as amended) (the "**Enterprise Law**") together with approvals/licences from other ministries.

A foreign lender lending money to a borrower is not required to be licensed or registered in the Lao PDR. However, such foreign loans must receive prior approval from the BoL in accordance with the Guideline on the Implementation of the Executive Decree regarding the Management of Foreign Exchange and Precious Metals (No. 01/PO, 17 March 2008) (the "**FX Decree**") (No. 01/BoL, 2 April 2010) (the "**Foreign Exchange Guideline**").

Lending and security arrangements entered into between the foreign lender and the borrower are subject to the general provisions governing loan agreements, security and guarantees under the Contract and Tort Law (No. 01/90/NA, 8 December 2008) (the "**Contract Law**") and the Law on Secured Transactions (No. 06/NA, 20 May 2005) (the "**Secured Transactions Law**").

2. What are the consequences of making a loan to a borrower in the Lao PDR without a licence?

A foreign lender lending money to a borrower is not required to be licensed or registered in the Lao PDR. However, the borrower must obtain the BoL's approval for the foreign loan. Failure to obtain approval means the borrower lacks authorisation to repay the loan to a foreign lender or account outside the Lao PDR.

3. Will a borrower based in the Lao PDR have to deduct amounts for withholding tax on interest payments made to an overseas lender?

The Tax Law (No. 05/NA, 20 December 2011) (the "**Tax Law**") imposes a withholding tax of 10% of the interest payments made to an overseas lender.

The Lao PDR has entered into double taxation agreements ("**DTA**"s) with Thailand, China, Vietnam, Russia, North Korea, South Korea, Brunei, Kuwait, Malaysia and Myanmar.

None of these DTAs provide for an exemption from the withholding tax imposed on interest payable to foreign lenders. However, certain of the DTAs limit the amount of the withholding tax payable to the Lao PDR. The maximum withholding tax on interest per the various DTAs ranges from 5% to 15%. In the case of the DTA with China, the maximum withholding tax rate is 5%. This DTA, therefore, provides a reduction from the 10% rate under the Tax Law. However, in most of the other DTAs no real benefit is provided as the maximum rate is set at 10% to 15%; hence, no reduction from the statutory rate.

4. Is there any limit to the level of interest that can be charged on loans made in the Lao PDR?

The Contract Law and BoL notices set the following limitations in respect of the level of interest on loans:

- for loans provided by Lao PDR commercial banks, the interest rate for a Kip denominated loan must reflect a positive (real) rate of interest after inflation. The interest rate for foreign currency denominated loan is to follow international rates. In both cases, the spread between the interest rate on the relevant currency denominated loans and the interest rate payable on deposits in such currency may not exceed five hundred basis points;
- for loans provided by other types of domestic lenders, the annual interest rate for both Kip and foreign currency denominated loans is to be agreed by the contracting parties;
- for loans provided by domestic lenders, compound interest is prohibited and the aggregate interest payable in respect of a loan cannot exceed the principal; and
- for foreign loans, the interest "calculation" shall be subject to an agreement between the parties. No maximum rate of interest is specified. Capitalisation of interest and compounding should be permitted on foreign loans although the matter has not been tested in the Lao PDR courts.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. The Secured Transactions Law provides that a creditor having preferential rights may waive such rights in favor of another secured creditor, provided that such waiver does not exceed the total value of the debt owed to that creditor. In practice, subordination of a security interest would be done by registering the subordination agreement with the same authority where the security was originally registered.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in the Lao PDR or a guarantee from an entity incorporated in the Lao PDR?

A foreign lender need not be licensed or registered in the Lao PDR in order to take security over assets in Lao PDR or accept a guarantee from an entity incorporated in the Lao PDR.

Security by way of assignment of permits, licences and approvals is not possible under Lao PDR law. New permits, licences and approvals (or government approval of the transfer) are required if enforcement of security implies a continued operation of operating assets. This issue can be avoided by taking security by way of a pledge of 100% of the equity ownership of the borrower and taking enforcement action in relation to such pledged shares upon a default by the borrower.

7. Does the taking of security in the Lao PDR result in a lender being liable to tax in the Lao PDR?

No. The mere taking of security in Lao PDR will not result in a foreign lender being liable to tax in the Lao PDR. Please note, however, that stamp duty, notarisation and registration fees are payable in connection with the perfection of the security interest. In theory, tax may be payable if enforcement of the security results in income being generated by the secured assets (eg if profit arises from the sale of the secured assets). However, as the Secured Transactions Law requires that any recovery in excess of amounts owed and foreclosure costs be paid-over to the debtor, the possibility of attaining taxable profits in a foreclosure situation appears remote.

8. Can a security interest be taken in the Lao PDR over the following assets?

8.1 Land

As a matter of Lao PDR law, all land is owned by the state. Nationals may hold land use rights and usufructs while foreigners and foreign-invested entities may lease or hold concession rights to land. Yet-to-be implemented provisions of the Investment Promotion Law will also allow foreigners and foreign-invested entities to hold land-use rights in limited situations. Security interests cannot be created over land but may be granted over land use rights, usufructs, lease or concession rights. Security over land use rights, usufructs, lease and concession rights is taken by way of an immovable assets security agreement (similar to but not legally equivalent to a "mortgage"), provided that such security agreement is signed in the presence of three witnesses and notarised at the Lao PDR Notary Office.

A security interest over land is perfected when the notarised immovable assets security agreement is registered at the Ministry of Natural Resources and Environment ("**MoNRE**"). For large infrastructure projects such registration is now handled at the central MoNRE level. For other projects, the registration is handled at the Provincial offices of MoNRE.

A Lao PDR law governed grant of a security over immovable property located abroad is not binding under Lao PDR law.

8.2 Shares in a Lao company

(a) Shares (in certificated form) in a Lao company

Yes. The Secured Transactions Law expressly permits the creation of security interests over intangible assets, including shares in a company. Security over shares is taken by way of pledge.

The related movable assets security agreement must be registered with the State Assets Management Department ("**SAMD**") of the Ministry of Finance ("**MOF**") in order to perfect the security interest over the shares. As per the Decree on the Implementation of the Law on Secured Transactions (No. 178/PM, 20 June 2011) (the "**Secured Transactions Decree**"), the registration will be effective for five years and is renewable by a three months' notice to the SAMD prior to the expiration of the registration term.

Please note that the Enterprise Law requires that all shares in a Lao PDR company be represented by physical share certificates. These can be either "bearer shares" (with the name of the shareholder not stated) or "registered shares" (the more common approach).

(b) Shares and securities listed by a Lao company in scripless form

This question is not applicable since there is no provision for the issue of shares in a Lao PDR company in a "scripless" form. (A limited exception may be available for a "public company" listed on the Lao Securities Exchange.)

8.3 Bank accounts

Yes. The Secured Transactions Law expressly allows the creation of a security interest over intangible assets including bank savings accounts. Other forms of bank accounts are not excluded. Security over bank accounts is taken by way of pledge in the form of a movable assets security agreement.

A security interest over the bank accounts must be perfected by a registration of the related movable assets security agreement with the SAMD. As per the Secured Transactions Decree, the registration has a term of five years with possible renewal, provided that a three months' advance notice is submitted to the SAMD.

8.4 Receivables (rights under contracts)

Yes. The Secured Transactions Law expressly allows the creation of a security interest over intangible assets including receivables. Security over receivables and rights under contracts is taken by way of a pledge in the form of a movable assets security agreement.

A registration of the movable assets security agreement is required for the perfection of the security interest over the receivables. As per the Secured Transactions Decree, the registration has a term of five years with possible renewal, provided that a three months' advance notice is submitted to the SAMD.

8.5 Insurance

Yes. The Secured Transactions Law expressly allows the creation of a security interest over intangible assets including contractual rights. Contractual rights under an insurance policy are not excluded. Security over insurance and insurance proceeds is taken by way of pledge in the form of a movable assets security agreement.

A security interest over the insurance must be perfected by a registration of the related movable assets security agreement at the SAMD. The registration has a term of five years with possible renewal, provided that a three months' advance is submitted to the SAMD.

8.6 Floating charge over all assets

Yes. The Secured Transactions Law permits security over assets or gains from "projects or activities that are certain to occur in the future". This provision allows for a floating charge by way of pledge (movable assets security agreement) provided that the project or activity that will generate the assets or proceeds is one that is identified and for which the debtor has authority to engage in, at the time that the security interest is created.

The floating charge must be perfected by a registration of the related movable assets security agreement at the SAMD. The registration is effective for five years and is renewable by a three months' notice submitted to the SAMD prior to the expiration of the registration term.

Please note that the Secured Transactions Law requires that an assessment of the value of the secured assets be stated in the security agreement. In the case of such a floating charge security over future assets or gains, an estimate of such value should be stipulated (perhaps equal to the loan amount).

9. Are trusts recognised in the Lao PDR? How is a trust used in the context of taking security over securities held in a clearing system?

No. The concept of a "trust" has not been recognised under Lao PDR law.

10. Can a company incorporated in the Lao PDR (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

A company established under Lao PDR law may generally provide a guarantee for a borrower's debt if authorised by its articles of association. Amendment of the articles of association requires government approval. However, the Banking Law prohibits Lao PDR commercial bank from providing any guarantee in order to facilitate the purchase of securities underwritten by it or its affiliates.

However, it should be noted that the Contract and Tort Law does not recognise the generally validity of "group company" guarantees. If the guarantor does not "benefit" from the guarantee, such guarantee is subject to nullification upon petition of the guarantor. The required "benefit" to the guarantor must be of more than nominal value.

If the borrower is a non-Lao PDR company, the guarantor (as a contingent debtor) must obtain prior BoL approval before providing a guarantee. Failure to obtain the BoL's approval will result in the guarantor being unable to make any payments under the guarantee to a party outside of the Lao PDR.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

The Law on Bankruptcy of Enterprises (No. 06/94/NA, 14 October 1994) (the "**Bankruptcy Law**") gives the liquidation committee appointed by the court the power to overturn any transfers or agreements concerning a proposed transfer, which occurred prior to the bankruptcy petition and were made on the basis of an illegal contract. Such "illegal contracts" would include the granting of a security interest for a pre-existing unsecured debt. Any attempt by a lender to transfer debtor assets, secured or unsecured, after the acceptance of the petition for bankruptcy or rehabilitation without approval from the court or liquidation committee is prohibited.

Secured creditors may gain greater protection in the event of insolvency or liquidation of the debtor through the perfection of their security interests pursuant to the Secured Transactions Law. Perfected security interests will rank in priority to all unregistered security interests, subsequent registered security interests and unsecured debts. However, contractual security interests and unsecured debts will rank behind certain preferred claims constituting "security pursuant to law". As per the Secured Transactions Law and the Secured Transactions Decree, such preferred claims include tax claims, wage claims and unspecified claims involving the "interests of the nation" and "lien rights" of suppliers of goods and services (akin to a "mechanics' lien").

11. (b) If an intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to shares held in a clearing system?

Please see question 9 above. Lao PDR law does not recognise the concept of a "trust". If a security agent holding collateral or enjoying collateral enforcement rights on behalf of the secured creditors becomes insolvent, the relevant security documents will generally contain provisions for the replacement of the security agent.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

Under the Secured Transactions Decree, secured creditors may obtain a court order to enforce their rights but it is not a requirement as self-enforcement is also possible if agreed by the parties in the security agreement, and the self-enforcement action does not otherwise violate Lao PDR laws prohibiting trespass on private property or using violence or threats against the debtor.

If self-enforcement were relied upon to possess the secured movable assets, the lender may take any action to foreclose on or possess such pledge assets at any time as agreed with the borrower in the security agreement. In light of the self-enforcement, if the borrower subsequently refuses to hand over physical possession of the secured asset, the secured creditor

may be able to rely directly on the Economic Police assistance to seize the assets if this is permitted under the security document. It is unclear whether or not the police will agree to provide such assistance as this method of enforcement has not been tested and is not commonly relied upon in non-criminal matters.

Disposal of the secured movable assets after self-help enforcement is allowed under the Secured Transactions Decree, provided that 10 days written disposal notice must be provided to the borrower, relevant government officer and other creditors with security in the same movable assets and via mass media notice prior to the resale or disposal of the pledge assets by the lender.

In a security interest in immovable assets, 60 days written enforcement notice must be provided to the borrower, relevant government officer, other creditors with security over the same immovable assets and owner of the immovable assets (in cases where the secured assets are not owned by the borrower) prior to possession or control of the secured immovable assets. Disposal of the secured assets after possession of the lender or objection of the borrower to vacate or failure to repay his debt is allowed, provided that 15 days written disposal notice must be provided to the borrower and the persons required above for serving the 60 days enforcement notice.

In the case of a guarantee, upon a default in payment by a borrower and prior demand to the borrower, a lender can make a demand for payment from the guarantor without the need to obtain a court order.

If no agreement can be reached between the parties as to enforcement, the secured creditor must apply for a court order. The Law on Judgment Enforcement (No. 04/NA, 8 July 2008) (the "**Judgment Enforcement Law**") describes the procedure in cases where the enforcement is determined by a court's order:

- the final court orders or judgments must be sent to parties being in charge of the enforcement within 30 days from the date of such orders and judgments;
- within 10 days from the date of receipt of the final court orders or judgments, the Enforcement Office of the Ministry of Justice will summon the litigants to be notified of the judgment enforcement;
- from the date of notification, the borrower has 60 days to comply with the court orders or judgments;
- if the borrower does not meet this deadline the Enforcement Office sends a notification of seizure of the assets and an evaluation committee is assigned to conduct an evaluation of the debtor's assets; and
- assets are sold by public auction.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

Under the Bankruptcy Law, once the borrower or guarantor enters into rehabilitation or liquidation procedures, lenders and creditors (including secured creditors) are prohibited from transferring or selling the assets (whether secured or unsecured) of the insolvent borrower or guarantor after the acceptance of the petition for bankruptcy or rehabilitation of the borrower or guarantor without court or liquidation committee approval. Further, the liquidation committee appointed by the court is authorised to overturn any transfers, or agreements for such, which occurred prior to the petition for bankruptcy and were made on the basis of an illegal contract. Such "illegal contracts" would include the granting of a security interest or guarantee for a pre-existing unsecured debt. Please also refer to the answer to question 11(a) above.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

If the acquired company is a domestic bank, Banking Law prohibits the bank from providing loans to, or the provision of security or guarantees to facilitate the purchase of securities underwritten, placed or distributed by an affiliate. In all other cases, the articles of association of the acquired company may limit or prohibit loans to, or the provision of security or guarantees on behalf of an affiliate. Further, Lao PDR law does not recognise the general validity of "group company" guarantees. As per the Contract and Tort Law, any guarantee by a company that does not provide a "benefit" to the guarantor is subject to nullification upon petition of the guarantor. The required benefit must be more than nominal consideration.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Under the Secured Transactions Law and the Secured Transactions Decree, all grants of security over assets within Lao PDR jurisdiction and guarantees issued by Lao PDR entities must comply with the following notarisation and registration procedures:

- for security agreements relating to immovable assets, the agreement must be executed in the presence of three witnesses. Witnesses may be of any nationality but must be of legal age;
- notarisation of the signed security agreement relating to immovable assets at the Notary Office;
- registration of the non-land related security agreement or guarantee (and any amendments thereto) at the State Assets Management Department of the Ministry of Finance (the "**SAMD**");
- in case of security over immovable assets, registration of the security agreement (and any amendments thereto) at the relevant office of MoNRE; and
- the completion of the above steps perfects the security interest or guarantee and ensures that the security interest or guarantee is enforceable against third parties and that a lender has preferential rights in the secured assets.

Please note the following:

- a full Lao language translation is generally required for notarisation; and
- SAMD registration requires either a Lao language summary or a full Lao translation; a full Lao language translation is generally required for MoNRE registration.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

The following fees and taxes must be paid in order to perfect security interests or guarantees under the Secured Transactions Law:

- nominal stamp duties are payable on each registered document;
- the Notary Office generally charges a flat fee for Lao language contracts, however, as a matter of practice, the fees payable for foreign language contracts with Lao language translations will vary according to the number of pages of the contracts and the attached translations; and
- for registration at the SAMD and MoNRE, flat fees and *ad valorem* fees schedules required for various types of contracts have been promulgated. The MoNRE registration fees for immovable assets security agreements are tied to the value of the secured loan and can be quite substantial.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes, it is possible to take a subordinate security interest in the same asset. This can be done by registering a subordination agreement with the SAMD and the security agreement with either the SAMD (for moveable assets) or with MoNRE (for immoveable assets).

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

The Investment Promotion Law defines three types of investment activities: (i) general business; (ii) concession activities; and (iii) development of special economic zones and specific economic zones.

Restrictions applicable to activities open to foreign investments but under certain conditions (ie the second category above) may include:

- special approval from the government;
- agreement with the government;
- local ownership requirement; and/or
- 100% of the production dedicated to export.

Pursuant to the recent Notification of the Ministry of Industry and Commerce (No. 1591/IC.COMM) issued on 26 August 2013, there are restrictions regarding the maximum level of foreign participation in foreign invested companies involving certain businesses, eg medicines and chemical products manufacturing, wholesale of fabric and clothing, international transportation of goods, road and railway construction, hotel, architecture, engineering and consultancy services. For other activities that are not restricted on the level of foreign participation, the minimum of 10% investment will apply, save for those second category activities where a certain level of local ownership is required. Such amounts vary from time to time according to the government policy.

18.1 Oil/gas

Under the Decree implementing the Investment Promotion Law (No. 119/PM, 20 April 2011) (the "**Investment Promotion Decree**"), crude oil and gas exploration-exploitation activities are included in the list of concession activities in which a concerned foreign invested company must comply with the followings:

- entering into an appropriate agreement with the government;
- if the concession agreement contains the provisions relating to a transfer of concession rights and a transfer of shares, it must be notarised at the Lao PDR Notary Office; and
- the transfer of shares in the company must be notified to the Ministry of Planning and Investment ("**MPI**") for approval.

18.2 Electricity

Lao PDR law does not prohibit the acquisition of electricity companies operating in the Lao PDR. The Electricity Law (No. 19/NA, 20 December 2011) (the "**Electricity Law**") permits an electricity project to be undertaken in various forms, including build, operate and transfer ("**BOT**"); build and transfer ("**BT**"); build, own and operate ("**BOO**"); or state-operated.

However, any onshore acquisition of companies or assets in the electricity sector is generally subject to (i) any required amendment to the concession agreement as required under the Investment Promotion Law, which is subject to approval by the MPI and the relevant authority, (ii) obtaining the appropriate licences to operate the business and (iii) a minimum government equity ownership in the acquired company. However, no concession agreement is required for electricity projects with capacity of utilising substituted energy, solar energy, wind power, biomass from residuum or vegetation oil with capacity of 500 kW and below. Hydropower projects with 15 MW capacity or less are also exempted from the concession agreement requirement provided that such project is owned by a Lao citizen or 100% Lao owned entity.

In cases requiring a concession, while not required by law, the government requires government equity participation in Lao PDR electricity companies in practice. The level of equity participation is subject to negotiation. The term of electricity concessions is limited to 30 years from the commencement of commercial operations.

18.3 Natural resources/mines

Lao PDR law generally does not prohibit the acquisition of mining companies in the Lao PDR except during the prospecting period. Any onshore acquisition of companies or assets in the mining sector is generally subject to (i) any amendment to the concession agreement as required under the Investment Promotion Law, which is subject to approval by the MPI and the relevant authority; (ii) obtaining the appropriate licences to operate the business and (iii) a minimum government equity ownership in the acquired company.

However, under the Law on Minerals (Amendment) (No. 02//NA, 20 December 2011) (the "**Minerals Law**"), artisanal mining (using fewer than 5 horse power machine and no more than 10 laborers), small-scale mining and extraction of industrial minerals and rocks (eg limestone, marble, silicate sand, sulphur, phosphates, granite, etc.) are restricted to Lao citizens and 100% Lao owned entities.

The Minerals Law mandates government equity participation in Lao PDR mining companies in Lao PDR (but it does not state any minimum or maximum equity participation). The Minerals Law authorises funding of the government equity stake via application of the government's share of future project dividends. The term of mining concessions is limited to 20 years. This can be extended for additional periods of 5 years.

18.4 Telecommunications

The Investment Promotion Law and the Law on Telecommunications (Amendment) (No. 09/NA, 21 December 2011) (the "**Telecommunications Law**") do not prohibit the acquisition of telecommunication companies and permit foreign participation in the Lao PDR telecommunications industry. However, any onshore acquisition of companies or assets in the telecommunication sector is generally subject to: (i) amendment of the concession agreement as required under the Investment Promotion Law; subject to approval by the MPI and the relevant authority; (ii) obtaining the appropriate licences to operate the business; and (iii) a minimum government equity ownership in the acquired company.

In cases requiring a concession, while not required by law, the government requires government equity participation in Lao PDR telecommunication companies in practice.

The Telecommunications Law states that the government encourages local and foreign investors to compete and to cooperate in investment in the construction, development and expansion of the telecommunications network and services. To date, the government has been protective of telecommunications companies holding existing licences.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

Assignment of permits, licences and approvals is not possible under Lao PDR law. New permits, licences and approvals (or government approval of the transfer) will be required if enforcement of security implies a continued operation of operating assets. This issue can be avoided by taking security by way of a pledge of 100% of the equity ownership of the borrower and taking enforcement action in relation to such pledged shares in the event of a default.

The Secured Transactions Law permits state companies (initial 100% direct government ownership with sell-down to 51.1% permitted) and joint companies (formed with 50% direct government ownership) (each as defined in the Enterprise Law) to use their assets as collateral for a foreign loan. However, government approval is required for the term or length of the security interest over land owned by the relevant state enterprise. This approval is delegated to the Minister of Finance under the Law on State Assets (No. 14/NA, 5 July 2012).

Where an asset to be assigned or pledged is directly held by the government or a company having any percentage of direct government ownership, the Decree on Management of State Invested Enterprises (No. 54/PM, 9 May 2002) requires approval from the Minister of Finance or the National Assembly in the case of assets of undefined high value or extent. These additional constraints apply to any company with direct government ownership operating in the industries noted below.

19.1 Oil/gas

Subject to the foregoing constraints where direct government ownership is involved, Lao PDR Law permits the taking of or enforcement of security in relation to shares in or assets of an oil or gas company.

19.2 Electricity

Subject to the foregoing constraints where direct government ownership is involved, Lao PDR Law permits the taking of or enforcement of security in relation to shares in or assets of an electricity company.

19.3 Natural resources/mines

Subject to the foregoing constraints where direct government ownership is involved, Lao PDR Law permits the taking of or enforcement of security in relation to shares in or assets of a mining company.

19.4 Telecommunications

Subject to the foregoing constraints where direct government ownership is involved, Lao PDR Law permits the taking or enforcement of security over the shares or assets of a telecommunications company.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in the Lao PDR?

Under Lao PDR law, a loan agreement may be governed by the laws of another jurisdiction (such as England). However, current judicial practice indicates that the Lao PDR courts have no knowledge of such laws and may therefore rely on their understanding of Lao PDR law when considering such a loan agreement.

A guarantee by a Lao PDR entity is a form of security document subject to the terms of the Secured Transactions Law and the Secured Transactions Decree. The guarantee should be governed by Lao PDR law or, at a minimum, conform to the requirements of the Secured Transactions Law and the Contract and Tort Law to ensure enforceability.

Lao PDR courts and administrative bodies with enforcement capacity are not required by law or any treaty to honour, enforce or implement a foreign court judgment or order. The Lao PDR is not a party to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (The Hague 1971). However, the Law on Civil Procedure (No. 13/NA, 4 July 2012) provides for the recognition of foreign court judgments under certain conditions and procedures and there must be a request to a Lao PDR court for recognition of the foreign court judgment. The Lao PDR court will consider and decide to recognise or not to recognise the foreign court judgment.

The Lao PDR court may decide not to recognise the foreign court judgment in the following cases:

- such judgment is subject to continuing proceedings or appeals and is not a final decision;
- the losing party in the foreign judgment did not participate in the proceedings and the judgment was made in default;

- the matter considered by the foreign court was properly under the jurisdiction of the Lao PDR courts;
- such judgment conflicts with the Constitution or Lao PDR laws; and
- other non-specified issues relating to the foreign judgment brought to the attention of the Lao PDR court.

The Judgment Enforcement Law states that foreign court judgments are enforceable only if they are recognised and ordered to be enforced by a Lao PDR court.

Given the foregoing constraining factors, it is likely that a judgment of a foreign court (as opposed to an arbitral award) could not be enforced in the Lao PDR without a complete retrial or retrial of the major issues, in the absence of a relevant treaty to the contrary. The Lao PDR is a party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York 1958). A foreign arbitration award made in a signatory jurisdiction should be enforceable in the Lao PDR without re-examination or re-litigation of the matter on its merits. It is recommended, therefore, that lenders to Lao PDR parties rely upon mandatory international arbitration rather than foreign court judgments.

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- energy, mining & infrastructure
- real estate & construction
- taxation
- corporate & commercial
- mergers & acquisitions
- English law governed transactions

MACAU

RIQUITO ADVOGADOS

LENDING

1. Does a lender require a licence to lend money to a company based in Macau (the "borrower")? Are there any exemptions available?

According to the Macau Financial System Act (*Regime Jurídico do Sistema Financeiro, hereinafter RJSF (Decree Law no. 32/93/M)*) and the Macau Postal Savings Regulation (*Decree Law no. 24/85/M*), only authorised credit institutions (as designated by law) – banks and Macau Postal Savings (*Caixa Económica Postal*) – are allowed to grant loans on a professional basis (as a regular and regulated activity). The above applies to both domestic and foreign lenders. Lending on a non-professional basis does not require any licence. The incorporation of a credit institution requires the authorisation of the Chief Executive on the advice of the Monetary Authority of Macau (*Autoridade Monetária de Macau*). The same applies to the establishment of a branch by non-Macau credit institutions.

2. What are the consequences of making a loan to a borrower in Macau without a licence?

Under sections 122 and 126 of the Macau Financial System Act, the making of a loan by an unauthorised person to a borrower in Macau is punishable by:

- imposition of a fine (between MOP10,000 and MOP 5 million);
- loss of principal; and
- sanctions publication.

Criminal penalties may also be imposed in certain cases.

These sanctions will be applied to any loan granted in Macau notwithstanding the nationality or place of incorporation of the lender.

3. Will a borrower based in Macau have to deduct amounts for withholding tax on interest payments made to an overseas lender?

There are no withholding taxes on interest paid to non-residents.

4. Is there any limit to the level of interest that can be charged on loans made in Macau?

There is no specific regulation imposing a maximum interest rate on loans made in Macau. However, under section 109 of the Macau Financial System Act, default interest on late bank payments cannot exceed the lower of 40% of the agreed interest rate or 3% in addition to the agreed interest rate.

A loan between non-financial parties is considered usurious if the interest rate agreed between such parties exceeds three times the legal interest rate of 9.75% under section 1073 of the Civil Code. Usury is also qualified as a crime under section 219 of the Criminal Code.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. It is possible and valid to subordinate debt in Macau. Such subordination can be arranged by means of a contractual subordination or by unilateral subordination.

By contractual subordination, we refer to an arrangement whereby senior creditors, junior creditors and the debtor agree to a set of pre-arranged rules in a contract governing payment and priority. They may also agree to restrictions in relation to the priority and enforcement of any security held by a junior creditor. Typically, in a total subordination, the junior creditor undertakes not to collect or accelerate the junior debt until the senior debt has been paid in full.

By unilateral subordination, we refer to a contract whereby a junior lender undertakes with the borrower the obligation not to demand repayment of respective credit prior to the repayment of the borrower's debts towards certain senior creditors or a certain class of creditors or certain debts or a certain class of debts, irrespectively of when the debt was incurred. Such undertaking is assumed under section 437 of the Macau Civil code to be in favour of a third party.

In any of these cases, the senior creditor has merely a contractual right towards the debtor and the junior creditor.

However, in accordance with the Macau Law, the general security for creditors is the debtor's assets. In order to ensure that the preference for the repayment of debt is effective towards third parties, it is necessary to create a guarantee over the debtor's assets. The guarantee entitles a respective beneficiary to be paid with preference towards other creditors irrespective of when the debt was incurred. The document to be produced shall depend on the nature of the assets and the type of guarantee.

It is also possible to set up a structure scheme whereby one class of creditors is entitled as a matter of law to recover ahead of other creditors in the event of the borrower's insolvency. In the case of derivative insolvencies, the corporate creditors will be paid out before the private creditors for the sale of corporate assets (where there is no collateral on such assets). However, this mechanism is not very practicable in Macau as derivative insolvencies depend on the assumption that, by one or more shareholders of a commercial company, there is unlimited liability for the debts to the respective companies. In Macau, there are no rules governing group relationships and establishing specific liability regimes between group companies. Therefore, the mechanism depends on the assumption by the shareholders of unlimited liability towards the company's debts.

In the specific circumstances set out in section 225 of the Macau Penal Code, (ie where the borrower is aware of its insolvency and acts with the intention of favoring certain creditors over others), the execution of an agreement may be considered invalid and subject to criminal liability.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Macau or a guarantee from an entity incorporated in Macau?

Subject to our comments in response to question 1 above, a lender can take security over assets in Macau or a guarantee from an entity incorporated in Macau without being licensed or registered.

7. Does the taking of security in Macau result in a lender being liable to tax in Macau?

As a general rule, the mere taking of security in Macau does not result in a lender being liable for tax in Macau. However, in the particular case of assignment of rentals generated by land, the lender is liable for the payment of real estate tax.

Please see our answers to question 16 for further details.

8. Can a security interest be taken in Macau over the following assets?

8.1 Land

Yes. Security over land may be taken by way of mortgage. Mortgages over land must be registered with the Land Register. Please see our answers to question 15 for further details.

8.2 Shares in a Macau company

(a) Shares (in certificated form) in a Macau company

Yes. Security over shares (in certificated form) in a Macau company may be taken by way of pledge. A pledge of shares in a general partnership (*sociedades em nome colectivo*) and in limited companies by quotas (*sociedades por quotas*) must be registered in the company's share register. A pledge of shares in a company limited by shares (*sociedades anónimas*) is done by the transfer of the share certificates (in the case of bearer shares) or by the endorsement of the share certificates and registration in the company share register book (in the case of registered shares). An assignment of rentals can also be taken over shares (other than bearer shares). Please see our answers to question 15 for further details.

(b) Shares and securities listed by a Macau company in scripless form

This question is not applicable because there are no listed companies in Macau.

8.3 Bank accounts

Yes. Security over bank accounts may be taken by way of pledge. A pledge over bank accounts is not subject to registration in Macau.

8.4 Receivables (rights under contracts)

Yes. Security over receivables and rights under contracts may be taken by way of pledge or assignment. A pledge of receivables and certain types of assignment may be subject to registration. Please see our answers to question 15 for further details.

8.5 Insurance

Yes. Security over insurance policies and proceeds may be taken by way of pledge or assignment. Security over insurance policies and proceeds is not subject to registration.

8.6 Floating charge over all assets

Yes. A floating charge can be taken over some or all of the assets (except for real estate) earmarked or that might be earmarked to the operation of an ongoing concern for the purpose of securing debts incurred in the activity of such ongoing concern. Floating charges are subject to registration with the commercial register and, where they include movable assets or rights subject to registration, with the register where such assets or rights must be registered.

8.7 Movable assets

Yes. Movable assets can be secured by way of pledge or, in the case of movable assets subject to registration (automobiles, boats and airplanes) by way of mortgage. Mortgages over movable assets are registered with the register where such assets must be registered.

9. Are trusts recognised in Macau? How is a trust used in the context of taking security over securities held in a clearing system?

Trusts are neither foreseen nor regulated in Macau. However, there are circumstances (depending on its content and effects) under which a trust governed by a foreign law may produce some of its effects in Macau.

10. Can a company incorporated in Macau (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Companies incorporated in Macau (other than credit institutions) can only give guarantees for the debts of third parties if there is a justified own interest to such company for giving such guarantee. Failure to comply with the above may render the guarantee given null and void as against the company. The company's justified own

interest has to be ascertained and declared in writing by resolutions of the board of directors. Failure to comply renders the guarantee null and void. Furthermore, as giving guarantees for third parties' debts cannot be an activity included in the object of a non-financial institution company, a guarantee may be unenforceable by a third party if the company proves that such third party was aware, or should have been aware, of such limitation.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

As a general rule, secured assets are protected from the general creditors of the borrower and may be enforced outside of any insolvency procedure. However, statutory rights of lien (*privilégios especiais*) over secured assets will have priority over the security if the priority claim occurs prior to the issuance of the security. Such priority claims are:

- claim for liability for damages of the victim of such damages over the indemnity owed by the insurance company;
- claim of an author of an intellectual work under a publishing contract over the copies of such work owned by the publisher;
- claims for real estate tax owed to Macau SAR on that year, or on the latest two years, over the taxable property; and
- claims for property transfer tax or for inheritance and gift tax over transferred assets, for two years after such transfer.

The claims for court expenses and certain other expenses (such as those incurred as a result of any bankruptcy or liquidation proceedings) incurred for the common interest of creditors in order to maintain, seize or dispose of certain assets will also have priority even if such securities are prior to such expenses.

11. (b) If an intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

This question is not applicable because Macau does not have an established securities and futures market.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

As a general rule, the enforcement of security in rem (eg a mortgage, a right of lien on goods, a pledge or a guarantee deposit) requires court assistance. However, parties to a pledge may agree (or pre-agree in the pledge document) upon the extra-judicial sale of the pledged asset.

Subject to the terms of the guarantee, a lender may demand payment under a guarantee without a court order. If the demand is not paid by the guarantor in accordance with the guarantee, the lender must seek court assistance.

The amount of time required to enforce a security or guarantee will depend on the factual circumstances and can vary significantly.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

Creditors or liquidators of the borrower or guarantor may apply to the court to cancel or vary the priority of any security, where the security was created due to a fraudulent preference or where the assets of the borrower or guarantor are unable to fully repay all of the creditors or on the ground that there is a legitimate interest to do so.

The creditors or liquidators of the guarantor may also require any enforcement action to be directed against the primary surety before any enforcement action can be commenced against the assets of the guarantor.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

Yes. The granting of security or issuance of a guarantee by a company to secure a loan used by the borrower to acquire such an interest is prohibited under section 177 of the Commercial Code. Please see our answers to question 10 above for further details.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Certain types of security interest must be registered with the relevant authority.

15.1 Mortgages

Mortgages over land must be registered with the Land Register. Mortgage registration has a constitutive effect: in case of non-registration, the mortgage is void between the parties.

Mortgages over chattels must be registered with the Registrar of Chattels. Mortgage registration has a constitutive effect: in case of non-registration, the mortgage is void between the parties

There is no deadline for the registration of mortgages. However, the right granted to the first registered mortgage prevails over any rights granted to later registered mortgages.

15.2 Assignments

As a general rule, assignments must be registered with the registrar's office with whom the underlying assets are registered. For example, assignments over any proceeds in respect of interests in land, such as an assignment of rentals, must be registered with the Land Register. Assignments of registered (ie non-bearer) shares in a company must be registered in the shares itself and in the company's share register book.

15.3 Pledges

As a general rule, pledges over assets are not subject to registration. Pledges in respect of rights, on the other hand, are subject to registration if the underlying rights are subject to registration (eg pledges over mortgage credits and pledges over assignment of rentals over properties have to be registered with the Land Register). Pledges over ongoing concerns and commercial pledges without dispossession of the secured assets are also subject to registration with the commercial register. Pledges over shares in general partnerships (*sociedades em nome colectivo*) and in limited companies by quotas (*sociedades por quotas*) and pledges over rights arising from such shares must be registered in the company's share register within 15 days from the date the security is taken.

15.4 Floating charges

Floating charges are subject to registration with the commercial register and failure to register will render the floating charge void between the parties.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

The registration of security is subject to a fixed charge of MOP50 per security registered and an amount which may vary between MOP1 and MOP2 per fraction of MOP1000 of the amount secured by such security.

Security or guarantees granted by way of public deed give rise to stamp duty (ie MOP20 per deed if the credit secured does not exceed MOP30,000 and MOP100 per deed if it exceeds such amount). Securities or guarantees granted by private deed are subject to stamp duty (ie MOP20 per deed) unless such instrument is entered into by an authorised credit institution.

Security which transfers the ownership or use of certain assets located in Macau to the lender (eg transfer the use of land under an assignment of rentals) also gives rise to stamp duty of 1% to 3% of the value of the immovable asset transferred and 5% of the value of the movable assets transferred (applicable to free transfers of remittable movable assets only).

Furthermore, interests and banking commissions deriving from banking operations give rise to stamp duty (ie 1% of the total yearly income derived from such operations) except if such operations are entered into by and between authorised credit institutions.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. It is possible to grant second ranking security over an asset under Macau law. Generally, where there are several competing creditors with security interests over the same asset, they will, subject to compliance with any applicable perfection requirements, rank in the order in which their interest was created and/or registered. Documenting a second security would be in the same way as how security interests are usually taken depending on the type of asset (see questions 8 and 15).

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

There are no laws preventing the acquisition of companies or assets in the oil/gas industry.

18.2 Electricity

Due to the special characteristics of the Macau Special Administrative Region, the Companhia de Electricidade de Macau – CEM, S.A. (the "**CEM**") is granted a monopoly over the transportation, distribution and sale of electricity in Macau SAR ("**MSAR**"). According to section 7 (2) of the contract which extends CEM's concession, the transmission, split, increase and subscription of CEM shares will require a prior written approval by the MSAR unless: (i) the total shares transmitted between the shareholders is less than 2% of CEM's total shares; (ii) such transmissions do not change CEM's dominant position and; (iii) the accumulation of such transmissions corresponds to less than 2% of CEM's total shares. In such case, prior approval of is not required and CEM is only required to communicate the transmission to the MSAR in writing within one month.

Moreover, under section 10 of the same contract, CEM cannot create a new company, on its own or with a third party or purchase shareholdings in other companies or contribute to other companies' capital. Nevertheless, CEM can set up a consortium in order to participate in the call for tender regarding the production of electrical energy and import of electric energy (these activities are not covered under CEM's right of monopoly).

18.3 Natural resources/mines

There are no laws preventing the acquisition of companies or assets in the natural resources industry.

18.4 Telecommunications

There are some legal provisions preventing the acquisition of companies or assets in the telecommunications industry.

The establishment and operation of fixed public telecommunications networks is a matter of public interest and is subject to a licence granted by the Chief Executive of Macau, under Administrative Regulation nº 41/2011 ("*Regime de instalação e operação de redes públicas de telecomunicações fixas*").

The inter vivos transmission of less than 15% of the shareholdings of the licensee shall be communicated, in writing, to the *Direcção dos Serviços de Regulação de Telecomunicações* (the telecommunications regulator) within 10 days from the date of the transaction (this communication can be exempted by the Chief Executive of Macau under certain circumstances).

The inter vivos transmission of 15% or more of the shareholdings of the licensee shall be authorised by the Chief Executive of Macau. The licensee may have its licence revoked: (i) in the event of a change, without authorisation, in the ownership of capital by an inter vivos shareholding transmission of 15% or more; (ii) in the event of a change, without authorisation, in the ownership of capital by successive inter vivos shareholding transmissions as at the moment in which the accumulation of such transmissions is equal or greater than 15% of such shareholding. Furthermore, according to the Telecommunications Basic Law, the provision of general telecommunications services is subject to a concession contract granted by the government which may or may not

contain restrictive provisions on the transfer or assignment of the licence or of assets affected to the operation of the concession.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

Please see our answers to question 18.1 above.

19.2 Electricity

Please see our answers to question 18.2 above.

19.3 Natural resources/mines

Please see our answers to question 18.3 above.

19.4 Telecommunications

Please see our answers to question 18.4 above.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Macau?

As a general rule, English law judgments may be enforced in Macau subject to a special proceeding for the recognition and enforcement of foreign judgments, under section 1199 of the Civil Procedure Code.

Under section 1200 of the Civil Portuguese Code, to enforce an English law judgment, it is required that:

- there are no doubts on the authenticity and intelligibility of the judgment;
- the judgment is res judicata according to English law;
- English Court jurisdiction should not have been fraudulently assigned and its judgment cannot decide on matters of exclusive jurisdiction of the Courts of Macau;
- it is not possible to call down lis pendens and res judicata exceptions based on the Macau's Court jurisdiction, unless English Court decisions obviate such jurisdiction;
- the defendant has been regularly summoned according to English law and the adversarial and the equality of the parties principles have been observed; and
- the decision to be enforced is not against public order.

The Court of Appeal (*Tribunal de Segunda Instância*) has the jurisdiction for the recognition and enforcement of foreign judgments and it is possible to appeal against its decisions in the Court of Last Appeal (*Tribunal de Última Instância*). The defendant will be summoned to submit its defence and the Public Prosecutors Office will have the right to raise any questions.

Please note, however, that any security created in respect of real estate assets situated in Macau will be subject to the exclusive jurisdiction of the Macau courts and the laws of Macau.

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MALAYSIA
SKRINE

LENDING

1. Does a lender require a licence to lend money to a company based in Malaysia (the "borrower")? Are there any exemptions available?

Yes. In Malaysia, save as excepted under the Moneylenders Act 1951 (the "**Moneylenders Act**"), no person shall carry on or advertise or announce themself or hold themself out in any way as carrying on the business of moneylending unless they are licensed under the Moneylenders Act. A moneylender is defined to mean any person who carries on or advertises or announces themself or holds themselfout in any way as carrying on the business of moneylending, whether or not he carries on any other business. The Moneylenders Act does not apply to persons licensed under the relevant legislations in Malaysia, eg banks, investment banks or insurance companies licensed under the Financial Services Act 2013 (the "**FSA**"), any Islamic bank or takaful operator licensed under the Islamic Financial Services Act 2013 (the "**IFSA**") (section 2A(1) of the Moneylenders Act) and where exemptions are specifically granted. Exemptions include loans by a company to its related corporations (as defined under section 6 of the Companies Act 1965 (the "**Companies Act**")) or to its directors, officers or employees as a benefit accorded to such persons under their terms of employment, subscription or purchase of debt securities by the company; where the company is a holder of licence under the Capital Markets and Services Act 2007 (the "**CMSA**"); where the company is approved by the Securities Commission (the "**SC**") under the Securities Commission Act 1993 to carry out activities relating to unit trust schemes ("unit trust schemes" are now known as "business trusts" and are regulated by the SC under the CMSA); where the company is a scheduled institution under the Banking and Financial Institutions Act 1989 (the "**BAFIA**") (repealed by the FSA) carrying on building credit business, development finance business or factoring business; where the company is a holder of a Labuan banking licence or a Labuan insurance licence under the Labuan Financial Services and Securities Act 2010 or where the company is an issuer of a credit card or a charge card approved under the FSA (P.U.(B) 219/2005 - Exemption under Subsection 2A(2) of the Moneylenders Act).

The Moneylenders Act regulates and controls, *inter alia*, the business of moneylending and the protection of borrowers. "Moneylending" is defined under the Moneylenders Act as the lending of money at interest, with or without security, by a moneylender to a borrower. Whether a person carries on or advertises or announces themself or holds themself out in any way as carrying on the business of moneylending is a question of fact.

There is no decided case law as to whether the Moneylenders Act is applicable to loans by overseas lenders to borrowers in Malaysia. Prior to the 2003 amendments to the Moneylenders Act, a licence must be obtained by any moneylender residing and carrying on business in Malaysia. However, that provision has been amended to read "no person shall conduct business as a moneylender unless they are licensed under the Act." In 2011, that provision was subsequently amended to read "no person shall carry on or advertise or announce themself or hold themself out in any way as carrying on the business of moneylending unless he is licensed under this Act". Comparing the amended provisions against the pre-amendment position, it would seem that a loan by an overseas lender to a borrower would require a licence under the Moneylenders Act save where the exceptions and the exemptions are applicable. However, it is unlikely that a licence will be issued to an overseas lender.

The Moneylenders Act has been extended to Sabah, Sarawak and Labuan from 1 January 2008 onwards.

The FSA and IFSA recently came into operation on the 30 June 2013. The FSA repeals BAFIA, the Exchange Control Act 1953, the Insurance Act 1996 and the Payment Systems Act 2003 whilst the IFSA repeals the Islamic Banking Act 1983 and Takaful Act 1984.

The FSA prescribes, *inter alia*, the licensing, approval and regulation of financial institutions carrying on banking, investment banking and money-broking businesses. Pursuant to section 8(1)(a) of the FSA, no person shall carry on any authorised business unless it is licensed by the Minister of Finance, on the recommendation of the Central Bank of Malaysia ("**BNM**"), under section 10 of the FSA to carry on banking business, insurance business or investment banking business. "Banking business" is defined under the FSA as:

- business of:
  - accepting deposits on current account, deposit account, savings account or other similar account;
  - paying or collecting cheques drawn by or paid in by customers; and
  - provision of finance; and
- such other business as prescribed under section 3 of the FSA.

(Section 3 of the FSA provides that the Minister of Finance may, on the recommendation of BNM prescribe any business or activity as an addition to the definition of "banking business" or "investment banking business".)

The courts have held that the legislature did not intend the definition of "banking business" to be construed disjunctively so that to undertake any one type of business described therein was sufficient to constitute the carrying on of banking business. Case laws have held that a foreign entity cannot be said to have carried on banking business if the lending to the Malaysian resident was undertaken outside Malaysia. Generally, a foreign lender would not be deemed to be carrying on banking business within Malaysia and be subject to the relevant licensing and regulatory provisions under the FSA provided that it performs its lending activities outside Malaysia.

There are foreign exchange issues in relation to a borrower in Malaysia (who is a resident for exchange control purposes) in obtaining credit facilities from non-residents. In respect of borrowing in foreign currency by residents:

- a resident entity is free to borrow any amount in foreign currency from:
  - its resident or non-resident direct shareholder;
  - its resident or non-resident entities within its group of entities;
  - any amount through the issuance of foreign currency debt securities to another resident; and
  - licensed onshore banks and licensed international Islamic banks;

(The first and second sub-paragraphs above do not apply to borrowings in foreign currency by a resident entity from a non-resident financial institution or a non-resident special purpose vehicle which is set up to obtain borrowing from any person which is not part of the resident entity's group of entities.)

- a resident entity is free to obtain any amount of foreign currency supplier's credit for capital goods from non-resident suppliers;
- a resident entity or an individual, sole proprietor or general partnership is free to refinance outstanding approved foreign currency borrowing, including principal and accrued interest or profit subject to the approved limits and provided that the total outstanding approved borrowing in foreign currency including the refinanced amount complies with the approved limits;
- a resident entity is free to borrow in foreign currency up to MYR100 million equivalent in aggregate from other non-residents (the MYR100 million equivalent is based on the aggregate borrowing of the resident entity and other resident entities within its group of entities with parent-subsidiary relationship); and
- a resident individual, sole proprietor or general partnership is allowed to borrow in foreign currency up to MYR10 million equivalent in aggregate from a licensed onshore bank or a non-resident.

In respect of borrowing in Malaysian Ringgit by residents from non-residents:

- a resident entity is allowed to borrow in Malaysian Ringgit:
  - any amount from its non-resident entity within its group of entities or its non-resident direct shareholder to finance activities in the real sector in Malaysia (but excluding borrowing in Malaysian Ringgit by a resident entity from a non-resident financial institution or a non-resident special purpose vehicle which is used to obtain borrowing from any person which is not part of the resident entity's group of entities);
  - up to MYR1 million in aggregate from any non-resident other than a non-resident financial institution for use in Malaysia and the MYR1 million shall be based on the aggregate borrowing of the resident entity and other resident entities within its group of entities with parent-subsidiary relationship;
  - any amount from a non-resident through the issuance of Malaysian Ringgit or Islamic private debt securities under the Private Debt Securities Guidelines or Islamic Private Debt Securities Guidelines issued by the SC and such private or Islamic debt securities shall exclude non-tradable private or Islamic debt securities issued to a non-resident which is not part of its group of entities or a non-resident entity within its group of entities or its non-resident direct shareholder other than for the purposes of financing activities in the real sector in Malaysia; or
  - any amount from a non-resident through the issuance of Malaysian Ringgit or Islamic debt securities by the Federal Government; and
- a resident individual, sole proprietor or general partnership is allowed to borrow in Malaysian Ringgit up to MYR1 million in aggregate from any non-resident other than a non-resident financial institution for use in Malaysia.

2. What are the consequences of making a loan to a borrower in Malaysia without a licence?

Where a moneylender's licence is required and where a loan is made by a lender without such a licence, the moneylending agreement is not enforceable.

A person who carries on business as a moneylender without a valid licence shall be guilty of an offence under the Moneylenders Act and shall be liable to a fine of not less than MYR250,000 but not more than MYR1 million or to imprisonment for a term not exceeding five years or to both, and in the case of a second or subsequent offence, shall also be liable to whipping in addition to such punishment.

According to section 270 of the FSA, except as otherwise provided in the FSA, or in pursuance of any provision of the FSA, no contract, agreement or arrangement entered into in breach or contravention of any provision of the FSA shall be void solely by reason of such breach or contravention, provided that nothing contained in that section shall affect any liability of any person for any administrative, civil or criminal actions under the FSA in respect of such breach or contravention.

A person who carries on banking business without a valid licence shall be guilty of an offence under the FSA and shall be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding MYR50 million or to both.

3. Will a borrower based in Malaysia have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Yes. Income tax is payable by an overseas lender in respect of interest derived from Malaysia if the borrower is resident in Malaysia and the interest is payable in respect of money borrowed

by that person and employed in or laid out on assets used in or held for the production of any gross income of the resident in Malaysia. Where the overseas lender is not a resident of Malaysia, the resident payee has to withhold and deduct from such payment tax at the rate applicable to such interest (currently at 15% of gross interest).

4. Is there any limit to the level of interest that can be charged on loans made in Malaysia?

Where the Moneylenders Act is applicable, interest for a secured loan shall not exceed 12% per annum and the interest for an unsecured loan shall not exceed 18% per annum. Notwithstanding this, interest shall not at any time be recoverable by a moneylender of an amount in excess of the sum then due as principal unless the court otherwise decrees. Provision may also be made in any moneylending agreement that if default is made in the payment by the due date of any sum or instalment, whether in respect of principal or interest, the moneylender is entitled to charge simple interest on the unpaid sum or instalment which shall be calculated at the rate of 8% per annum from day to day from the time and date of default till payment and any interest so charged shall not be reckoned for the purposes of the Moneylenders Act as part of the interest charged in respect of the loan.

There is no similar restriction as regards the limit of interest in respect of loans granted by persons licensed to carry on banking business or insurance business under the FSA whilst interest is not permitted in loans granted under the IFSA.

Under the Civil Law Act 1956 (Revised 1972), the court is at liberty as part of its judgment to order the payment of interest at such rate as it thinks fit, on the whole or part of the debt due for the whole or any part of the period between the date when the cause of action arose and the date of judgment, provided that nothing in that particular section shall, *inter alia*, (i) authorise the giving of interest upon interest or (ii) apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. It is possible for lenders to agree amongst themselves as to the priority of payment of debts by the borrower irrespective of when the debt was incurred. It is usual for the financial institution to require shareholders of the borrower to subordinate the shareholders' loans to that of the financial institution. Such an arrangement would be documented in an intercreditor agreement or a subordination deed.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Malaysia or a guarantee from an entity incorporated in Malaysia?

A lender does not have to be licensed or registered in order to take security over assets in Malaysia or a guarantee from an entity incorporated in Malaysia. However, a lender must hold a valid licence under the FSA, the IFSA or the Moneylenders Act to lend to a borrower in Malaysia.

Where the security over assets in Malaysia is created by a security provider or a guarantee is issued by an entity incorporated in Malaysia to secure the indebtedness of a borrower outside Malaysia, the lender does not have to be licensed or registered in order to take security over assets in Malaysia or a guarantee from an entity incorporated in Malaysia.

7. Does the taking of security in Malaysia result in a lender being liable to tax in Malaysia?

No. The mere taking of security in Malaysia does not result in a lender being liable to Malaysian income tax. However, please refer to the answers to questions 3 and 16.

8. Can a security interest be taken in Malaysia over the following assets?

8.1 Land

Yes. A security interest over land to which a separate document of title has been issued can be taken by way of a legal charge pursuant to the provisions of the relevant land codes. Where no separate document of title has been issued yet, a security interest can be taken by way of assignment over the assignor's rights, title, interest and benefit in the relevant sale and purchase agreement.

A legal charge under the relevant land codes must be registered with the relevant land registry/office. Even if there is a first legal charge over the land, the chargor, with the prior consent of the first chargee, would be in a position to create a second legal charge which ranks in priority over the first legal charge. Chargees as between themselves can enter into a priority agreement notwithstanding the order of creation and registration of the legal charges in the land registry/offices.

However, where the document of title to the subject land has a restriction in interest against charging, the chargor has to seek the prior approval of the relevant state authority prior to the creation of the legal charge.

Please refer to the answer to question 15 as regards the registration of a charge.

8.2 Shares in a Malaysian company

(a) Shares (in certificated form) in a Malaysian company

Yes. Shares in a private limited company may be charged via a Charge of Shares/Memorandum of Deposit instrument where, if the charge is equitable, the chargee does not become the registered holder of the shares and, if the charge is legal, the chargee becomes the registered holder of the shares.

(b) Shares and securities listed by a Malaysian company in scripless form

In the case of scripless securities, membership or an interest in the company's shares is evidenced by the depositor's name appearing on the record of depositors maintained by the central depository pursuant to section 34 of the Securities Industry (Central Depositories) Act 1991 ("**SICDA**"). Bursa Malaysia Depository Sdn Bhd (the "**Depository**") has been granted approval to operate a central depository system which is regulated by the rules determined by the Depository.

Shares in a public listed company (ie scripless shares) may be charged via a Charge of Shares/Memorandum of Deposit instrument. According to section 107C of the Companies Act, the transfer of scripless securities deposited with the Depository is by way of book entry and the issuing company is precluded from

registering and effecting any transfer of securities or class of securities which has been deposited.

Scripless securities are further subject to the Rules of Bursa Malaysia Depository Sdn Bhd (the "**Depository Rules**"). It is noted that shares which are not listed or which are proposed to be listed on the Main Market or Ace Market of Bursa Malaysia may also apply to the Depository to have its securities deposited with the Depository (Rule 17.07 of the Depository Rules).

Section 40 of SICDA sets out the provisions for the charging or pledging of securities. Pursuant to section 40(1) of SICDA, where a deposited security is charged or pledged by a depositor (referred to in that section as a "chargor" or "pledgor") in favour of any person (referred to in that section as a "chargee" or "pledgee"), a central depository or an authorised depository agent ("**ADA**"), with or through whom the securities account of the depositor is maintained, shall, on a request in writing made by the depositor, chargee or pledgee, as the case may be, transfer or cause to be transferred such security into the securities account of the chargee or pledgee, as the case may be (the "**Pledged Securities Account**").

Rule 26.08 of the Depository Rules provides, *inter alia*, that any pledgee intending to accept any deposited securities which have been pledged or charged by another person to the pledgee may use its Pledged Securities Account maintained in the name of any of the following persons to hold the pledged securities:

- the pledgee;
- the pledgee's wholly owned nominee company; or
- a custodian which is a body corporate appointed by the pledgee.

Pursuant to Rule 26.08 of the Depository Rules, the Pledged Securities Account must be used solely to hold pledged securities. Rule 33.04 of the Depository Rules sets out the mechanics of a Pledged Securities Accounts which include the following:

- operation of accounts: a Pledged Securities Accounts shall be credited with any deposited securities pledged, charged, mortgaged or otherwise encumbered (the "pledged deposited securities") by the pledgor in favour of the pledgee and shall be debited with such securities upon any of the following circumstances:
  - a release or discharge of the said pledge, charge, mortgage or encumbrance; or
  - a sale or disposal of such securities by the pledgee; and
- release and discharge: where a pledge, charge, mortgage or an encumbrance over any pledged deposited securities has been released or discharged, the Depository or the ADA, as the case may be, shall upon request by the Pledged Securities Accounts holder transfer such securities into a securities account held by or for the pledgor.

According to Rule 39.09(1A) of the Depository Rules, subject to any exemptions made pursuant to any securities laws, an ADA is required to ensure that all deposited securities held in each securities account of an authorised nominee shall only be for one beneficial owner and an ADA shall, in respect of an authorised nominee who intends to open securities accounts with the Depository, make entries of the names of the beneficial owners of the securities as furnished by the authorised nominee.

Ordinarily, the charged shares are credited into a Pledged Securities Account opened by an ADA who is the chargee. However, where the lender is an overseas lender, the procedure is not so simple. The overseas lender would not qualify to be an ADA and a custodian arrangement may need to be entered into whereby the custodian (ADA) appointed pursuant to the agreement would act in accordance with the instructions of the overseas lender.

Please refer to the answer to question 15 as regards the registration of a charge.

8.3 Bank accounts

Yes. Security over bank accounts may be created by way of a fixed charge or a floating charge under a debenture or by way of a fixed charge/assignment of a charge over bank accounts.

The chargor is permitted, in a floating charge, to utilise and operate the monies in the bank account until the crystallisation of the floating charge into a fixed charge. If the chargee does not have total control over the bank account and any proceeds thereunder, the Malaysian courts may construe that such security is a floating charge and not a fixed charge.

Please refer to the answer to question 8.6 in respect of floating charges over assets created within six months of the commencement of the winding-up of the chargor.

Please refer to the answer to question 15 as regards the registration of a charge.

8.4 Receivables (rights under contracts)

Yes, by way of assignment of the receivables under the relevant contracts subject to the following:

- where the assignment is over export proceeds, the prior approval of BNM is required if the notice of assignment requires the other contracting party to pay the proceeds into an account outside Malaysia as all export proceeds must be repatriated to Malaysia in full in accordance with the sales contract which must not exceed six months from the date of export;
- where there is a provision in the governing contract prohibiting assignment, an assignment is not possible;
- where there is a provision in the governing contract prohibiting assignment save with prior consent in writing of the contracting party, such prior permission must be sought; and
- where there is no provision in the governing contract prohibiting assignment, notice of such assignment has to be given to the other contracting party.

Please refer to the answer to question 15 as regards the registration of a charge.

8.5 Insurance

Yes, by way of assignment in respect of the insurance policies and proceeds thereof but subject to any restrictions stipulated in the insurance policy. Notice of such assignment would need to be served on the insurer and the interests of the lender as co-insured should be endorsed on the insurance policy.

Please refer to the answer to question 15 as regards the registration of a charge.

8.6 Floating charge over all assets

Yes, a floating charge can be created over all assets. However, a floating charge on any asset created within six months of the commencement of the winding up of the chargor shall be, unless it is proved that the chargor immediately after the creation of the charge was solvent, invalid except to the amount of any cash paid to the chargor at the time of or subsequently to the creation of and in consideration of the charge together with interest on that amount at the rate of 5% per annum.

Please refer to the answer to question 15 as regards the registration of a charge.

9. Are trusts recognised in Malaysia? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Malaysia?

Yes, trusts are recognised in Malaysia as an equitable obligation binding on a trustee to deal with property over which he has control (ie the trust property) for the benefit of beneficiaries (of whom the trustee may himself be one) and any one of whom may enforce the obligation. Legal ownership over the trust property is vested in the trustee whilst beneficial ownership is vested in the beneficiary. Properties held under a trust may be tangible or intangible. Trustee structures are commonly used in Malaysia to hold security for a group of creditors.

9.2 Taking security over securities held in a clearing system

The Depository Rules expressly require an ADA to ensure that all deposited securities held in each securities account of an authorised nominee shall only be for one beneficial owner only. Where security is taken by a lender over scripless securities, the chargor/pledgor is required to transfer the charged securities into a Pledged Securities Account in favour of the chargee/pledgee. Such charged securities would generally be segregated and clearly identifiable from other securities held in a clearing system.

Where the lender is an overseas lender and a custodian arrangement is entered into with a custodian (ADA), a trust would be established whereby the custodian would hold the pledged securities for and on behalf of the overseas lender and be required to act in accordance with the instructions of the overseas lender.

10. Can a company incorporated in Malaysia (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Subject to the approval or registration requirements specified in the answer to question 15 below, a company incorporated in Malaysia is able to guarantee the debt of the borrower provided that:

- the power to guarantee is within the objects of the guarantor under its memorandum of association;
- the relationship between guarantor and borrower is that of holding company and subsidiary or subsidiary of a holding company; and/or
- where the relationship is not as set out in the preceding point and the guarantor is an exempt private company (as defined under the Companies Act) and the guarantee is not issued to secure a loan made to any person connected with a director of the guarantor or of its holding company. Notwithstanding that the guarantor is not an exempt private company, and/or the relationship between the guarantor and the borrower is not that of holding company and subsidiary company or subsidiary of holding company, the guarantor is permitted to guarantee the loan made to a person connected with the guarantor or its holding company if the guarantor is in the business of giving loans or guarantees and is licensed for such activities.

Subject to the above and the approval or registration requirements specified in the answer to question 15 below, the guarantor is able to issue a guarantee for a debt of a borrower which is incorporated outside Malaysia.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

The secured assets will be protected from the general creditors of the borrower save for (i) assets charged under a floating charge within six months of the commencement of the winding-up, and (ii) to the extent that any security over the secured assets is challenged successfully by creditors or liquidators of the borrower. Please refer to the answer to questions 8, 13 and 15.

If the borrower at the time of the appointment of a receiver by the debenture holder is not in the course of winding up, priority debts and payments which in every winding up are preferential debts or payments which have to be made in priority shall be paid out of the assets which comprise the floating charge in priority of principal and interest payable to the debenture holder.

In a winding up situation, in so far as the assets of the borrower available for payment to general creditors are insufficient to meet any preferential debts as set out under section 292(1)(b), (d) and (e) and any amount payable under section 292(3) of the Companies Act, those debts would have priority over the claims of the debenture holders under any floating charge created by the borrower.

11. (b) If the ADA or custodian becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

As discussed in our answer to question 8.2(b) and 9 above, an ADA is required to ensure that all deposited securities held in each securities account of an authorised nominee shall only be for one beneficial owner only. Where security is taken by a secured lender over scripless securities, the chargor/pledgor is required to transfer the charged securities into a Pledged Securities Account in favour of the chargee/pledgee (ie the secured lender). Such charged securities would generally be segregated and clearly identifiable from other securities held in a clearing system. The secured lender would accordingly have a right to trace into that Pledged Securities Account in the event of the ADA's insolvency.

Where the secured lender is an overseas lender, a custodian arrangement is entered into with a custodian (ADA) and a trust would be established whereby the custodian would hold the pledged securities for and on behalf of the overseas lender in designated nominee accounts. In the event the custodian becomes insolvent, the securities remain in these designated nominee accounts and are ring-fenced and consequently protected from creditors as the custodian does not have a beneficial interest in the securities.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

12.1 Land charges

The enforcement of land charges registered pursuant to the relevant codes has to be in accordance with the procedure set out in the relevant codes, which procedure includes foreclosure proceedings in the High Court and sale of the lands by auction.

In respect of enforcement proceedings under the National Land Code 1965, a non-citizen or foreign company (including a company, corporation, society, association or other bodies incorporated outside Malaysia), whether a chargee or not, is not entitled to bid at the sale where the land is subject to the category "agriculture" or "building" or to any condition requiring its use for only agricultural or building purposes, without the prior approval of the state authority.

Enforcement proceedings may take between five to nine months and vary from state to state.

The enforcement of assignment of the borrower's rights, title and interest in the principal sale and purchase agreement in favour of the lender is by way of a sale of the subject property and assignment of the lender's rights, interest, title and benefit in the principal sale and purchase agreement to the purchaser.

If the land is under a fixed charge in a debenture and a receiver and manager has been appointed over the charged assets, the receiver and manager is at liberty to sell and transfer the land by way of a private treaty.

12.2 Other types of security

A lender can enforce security without the need for a court order or court involvement.

Where the enforcement is in respect of a charge over shares in a Malaysian company, the following issues will need to be addressed:

- approval of the board of directors of the Malaysian company in respect of the transfer of shares to the lender or its nominee and the issuance of new share certificates to the transferee of the shares;
- if the Malaysian company, being a licensed manufacturing company, has restrictions on its manufacturing licence as regards its equity, prior approval of the Ministry of International Trade and Industry may be required for the transfer of the shares;
- if the Malaysian company is subject to other licences which have imposed conditions as regards its equity, prior approval of the applicable authority may be required for the transfer of the shares; and
- if the transferee of the shares in the Malaysian company is a foreign interest, prior approval of relevant authorities may be required for the acquisition of the shares if it is a condition imposed by the relevant service regulator. The prior approval of the Economic Planning Unit of the Prime Minister's Department of Malaysia ("**EPU**") is also required if the acquisition of shares involves a Malaysian company owned by Bumiputera interest and/or government agency having property more than 50% of its total assets, and the said property (except for residential units) is valued at more than MYR20 million, and the acquisition by the foreign interest (being a party other than Bumiputera interest) results in a change of control of the Malaysian company.

A lender can make a claim under the guarantee without a court order or involvement and if the guarantor does not pay on demand, the lender will have to institute proceedings and sue on the guarantee.

Summary judgments (including proceedings in respect of guarantees) will be heard and disposed of in the High Court between six and twelve months. A trial, where no attempt is made to apply for summary judgment beforehand, may take about nine to twenty-four months to be heard.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

A liquidator or creditor of the borrower (being a Malaysian company) may prevent an enforcement of security on the following grounds:

- if the creation of the charge which is required to be registered pursuant to section 108 of the Companies Act is not so registered, that charge is void against the liquidator and any creditor of the borrower;
- if the floating charge on any asset is created within six months of the commencement of the winding up of the chargor and the chargor was not solvent immediately after the creation of the charge, the charge is void;
- if the charge or other obligation (transfer, delivery of goods, execution or any other act relating to property) was created or incurred within six months before the presentation of the winding-up petition or the date on which a resolution to wind up the borrower has been voluntarily passed, whichever is earlier (in the case of winding-up by the court) or within six months before the resolution to voluntarily wind-up the company (in the case of voluntary winding-up); or
- if the business of the company has been carried on with the intention to defraud creditors.

A liquidator or creditor of the guarantor (being a Malaysian company) may prevent an enforcement of the guarantee if the guarantee was created or incurred within six months before the presentation of the winding-up petition or the date on which a resolution to wind up the guarantor has been voluntarily passed, whichever is earlier (in the case of a winding-up by the court) or within six months before the resolution to voluntarily wind up the company (in the case of voluntarily winding-up).

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

Yes. Except as otherwise provided under the Companies Act, no Malaysian company shall provide any financial assistance, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, for the

purpose of or in connection with a purchase or a subscription made of or for any shares in the Malaysian company or where the Malaysian company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares.

The exceptions are:

- where lending of money is in the ordinary course of business of that Malaysian company and the lending is pursuant to such ordinary course of business;
- where pursuant to a scheme for the time being in force, the Malaysian company provides financial assistance for the purchase of or a subscription of fully paid shares in the Malaysian company or its holding company, being a purchase or subscription of shares by trustees of or for shares to be held by or for the benefit of its employees or its subsidiary including any director holding a salaried employment in that Malaysian company or its subsidiary; or
- where financial assistance is to persons, other than directors, *bona fide* in the employment of the Malaysian company or of a subsidiary of the Malaysian company with a view to enabling such persons to purchase and own beneficially fully paid up shares in the Malaysian company or its holding company.

A Labuan company under the Labuan Companies Act 1990 may provide financial assistance, whether directly or indirectly, for the purpose of or in connection with the purchase of its own shares or the shares of any of its subsidiaries or of its holding company in any of the following instances:

- in the ordinary course of business, if lending of money is part of the ordinary course of business of the Labuan company;
- where the transaction has been approved by a special resolution of the company and the directors have certified to the meeting, in writing, to the effect that there are no reasonable grounds for believing that:
  - the company is, or would after giving the financial assistance be, insolvent; or
  - the realisable value of the company's assets, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, would after giving the financial assistance or loan, be less than the aggregate of the company's liabilities and stated capital; or
- to employees (other than an employee who is also a director) of the company or of any of its subsidiaries or of its holding company.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

The following charges created by Malaysian companies need to be filed for registration with the Companies Commission of Malaysia within 30 days of the creation of the charges:

- a charge to secure any issue of debentures;
- a charge on uncalled share capital;
- a charge on shares of a subsidiary;
- a charge or assignment created or evidenced by an instrument which, if executed by an individual within West Malaysia and affecting property within West Malaysia would be invalid or of limited effect if not filed or registered under the Bills of Sale Act;
- a charge on land wherever situated or any interest therein;
- a charge on book debts;
- a floating charge on the undertaking or property of the company;
- a charge on calls but not paid;
- a charge on ship or aircraft or any share in a ship or aircraft;
- a charge on goodwill, on a patent or licence under a patent, on a trademark or on a copyright or a licence under a copyright; and
- a charge on the credit balance of the Malaysian company in any deposit account.

If the charge is not registered with the Companies Commission of Malaysia, such charge shall be void against the liquidator and any creditor of the Malaysian company.

Any legal charge pursuant to the relevant land codes has to be registered with the relevant land registry/office. Such charges will be endorsed on the document of title to the land.

Any charge affecting the property of a Labuan company or affecting the property in Malaysia of a foreign Labuan company must be lodged with the Labuan Financial Services Authority within one month of the creation of the charge.

There is no need to register a guarantee with the Companies Commission of Malaysia or the Labuan Financial Services Authority.

A resident is allowed to give a financial guarantee in any amount in foreign currency or Malaysian Ringgit on behalf of or in favour of a non-resident provided that the prior approval of BNM is required if the financial guarantee:

- exceeds MYR50 million equivalent in aggregate:
  - to secure borrowing obtained by a non-resident which is not part of the resident's group of entities;
  - to secure borrowing obtained by a non-resident which obtains financing from a non-resident financial institution or any person which is not part of the resident entity's group of entities or not its direct shareholder; or
- in any amount where payment will be made in Malaysian Ringgit to or by a non-resident for an underlying foreign currency borrowing.

For financial guarantees which do not require approval, if the amount of the financial guarantee exceeds MYR50 million or its equivalent in aggregate, residents are required to register such financial guarantee with BNM not later than seven business days after giving the financial guarantee.

The term "financial guarantee" is defined under the foreign exchange control notices as a guarantee or any form of undertaking to secure the repayment of a debt or liability. If an underlying transaction involves a security to secure a credit facility, that transaction would be deemed a "financial guarantee" and be subject to such relevant provisions applicable to financial guarantees. A third party charge over lands or shares in Malaysia by a resident to secure the obligations of a non-resident borrower would fall within the expression of a "financial guarantee" and be

subject to the approval or registration requirements stated above vis-a-vis financial guarantees..

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Ad valorem stamp duty is payable on security documents and guarantees. Where there is more than one security document, one of the instruments (usually the facility agreement) can be selected as the principal instrument on which *ad valorem* stamp duty is payable while the rest would be deemed subsidiary instruments with nominal stamp duty. A principal instrument securing a foreign currency loan would be subject to stamp duty, currently at MYR5.00 for every MYR1,000 of the loan, but the total duty payable shall not exceed MYR500 whilst a Ringgit Malaysia loan would be subject to stamp duty at the rate, currently at MYR5.00 for every MYR1,000 of the loan.

Power of attorney clauses in security documents would be subject to nominal stamp duty of MYR10.00. Such clauses are required to be registered with the High Court of Malaya.

On enforcement of the security, however, *ad valorem* stamp duty would be payable on any conveyance of the subject matter of the security. Where the security is that of land or shares in a real property company (as defined under the Real Property Gains Tax Act 1976), dealings by the chargee by way of enforcement of the land charge or the share charge, as the case may be, shall be treated as dealings by the chargor and real property gains tax in respect of any gain from the disposal of the land or the shares, as the case may be, may be payable by the chargor.

Instruments executed by a Labuan entity in connection with a Labuan business activity and instruments of transfer of shares in a Labuan entity are exempted from stamp duty. Stamp duty in other words is exempted assuming that the security or guarantee is related to the Labuan entity's business activities.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. It is possible to grant a second ranking security over an asset which has already had security granted over it to another person. Where such security is required to be registered with the Companies Commission of Malaysia (see question 15), unless otherwise agreed amongst the lenders, the second security will rank in priority after the first security. Generally, the lenders will enter into a security sharing agreement or intercreditor agreement setting out their priority rights vis-a-vis each other. Where the security is a fixed charge over immovable property under the National Land Code 1965, the first lender (chargee) will need to file a prescribed form in the relevant land registry/office postponing his charge to the second charge.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

Any business of supplying products and/or provision of service, onshore or offshore including the supply and use of rigs, derricks, ocean tankers and barges requires a registration with or licence from Petroliam Nasional Berhad ("**PETRONAS**"). One of the requirements under the Licensing and Registration Guidelines of PETRONAS is that the applicant must fulfill its minimum *bumiputera* (local interest) participation requirement in respect of its equity, composition of board of directors, company management and staff composition. The minimum *bumiputera* participation requirement applicable varies depending on the categories of services provided or products supplied and ranges between 30% and 100%.

Depending on the nature of the service to be provided or products to be supplied by the applicant under the PETRONAS licence or registration, the Malaysian company may need to be registered with the Ministry of Finance ("**MOF**") and/or Board of Engineers ("**BOE**").

There are three categories of registration with MOF. There is no restriction on foreign equity in respect of a company applying for registration as "common status". Where the shareholding is held by foreign interest and Malaysians, the company can be registered as a "company with *bumiputera status*" if such company has at least 51% *bumiputera* (in terms of equity ratio, board of directors, company management and staff composition). Where the shareholding is held by Malaysians, such company can be registered under "*bumiputera status*" if the company has at least 51% *bumiputera* (in terms of equity ratio, board of directors, company management and staff composition).

Although there is no bumiputera equity requirement for the registration with BOE, in order to be registered under the Registration of Engineers Act 1967, there are conditions on the qualifications of the shareholders and directors.

18.2 Electricity

Save as otherwise exempted under the Electricity Supply Act 1990, no person other than a supply authority shall use, work or operate or permit to be used, worked or operated, any installation or supply to, or for the use of, any other person, electricity from any installation save in accordance with a licence expressly authorising the supply or use of the same. No licence shall be capable of being transferred unless with the prior written consent of the Minister of Energy, Green Technology and Water. The licence itself may contain provisions restricting the transfer of shares without prior approval of the Minister. The Energy Commission, as service regulator, may also impose equity conditions on companies so licensed.

18.3 Natural resources/mines

Acquisition of lands in West Malaysia by foreign interests would be subject to the prior approval of the relevant state authority. Certain lands which have restrictions in interest on its title against transfer or conveyance would require prior approval of the state authority before the registered owner of the land can deal with the land.

The prior approval of EPU is also required if there is a direct acquisition of property (except for residential units) valued at MYR20 million and above, resulting in the dilution in the ownership of property held by Bumiputera interest and/or government agency. Please also refer to the answer to question 12.2 with regard to the EPU approval in the case of an indirect acquisition of property.

18.4 Telecommunications

Subject to such exemptions as may be prescribed by the Minister of Communications and Multimedia, no person shall own or provide any network facilities, or provide any network services or provide any applications services, except under and in accordance with the terms and conditions of an individual licence or a class licence, as the case may be. Any individual licence issued pursuant to section 30 of the Communications and Multimedia Act 1998 will be subject to conditions. Such conditions would include compliance by the Malaysian company with the relevant Malaysian foreign investment restrictions and notification to the Minister of any changes in the substantial shareholdings or any restructuring or rationalisation of the individual licensee's corporate structure. The Malaysian Communications and Multimedia Commission, as service regulator, may also impose equity conditions on companies so licensed.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

Taking of security. Please refer to the answer to question 8 in respect of the taking of security interest.

Enforcement of security. If pursuant to an enforcement of security exercise, the immovable property is sold to a foreign interest, the foreign interest is required to obtain the prior approval of the state authority pursuant to section 433B of the National Land Code 1965 in respect of the acquisition of the immovable property. Please also refer to the answers to questions 12.2 and 18.3 *vis-a-vis* the EPU approval.

If the PETRONAS licence or any other licence governing the Malaysian company and/or its business states that prior approval of PETRONAS or such other licensing authority is required for the transfer of shares in the Malaysian company, such approval would need to be obtained.

Please refer to the answer to question 12 in respect of the enforcement of security.

19.2 Electricity

Taking of security. Please refer to the answers to question 8 in respect of the taking of security interest.

Enforcement of security. If pursuant to an enforcement of security exercise, the immovable property is sold to a foreign interest, the foreign interest is required to obtain the prior approval of the state authority pursuant to section 433B of the National Land Code 1965 in respect of the acquisition of the immovable property. Please also refer to the answers to questions 12.2 and 18.3 *vis-a-vis* the EPU approval.

If the enforcement of the security results in the transfer of a licence, prior approval of the Minister is required. Prior approval of the Minister is required if it is a condition in the licence that no shares shall be transferred without prior approval of the Minister.

Please refer to the answer to question 12 in respect of the enforcement of security.

19.3 Natural resources/mines

Taking of security. Please refer to the answers to question 8 in respect of the taking of security interest.

Enforcement of security. If pursuant to an enforcement of security exercise, the immovable property is sold to a foreign interest, the foreign interest is required to obtain the prior approval of the state authority pursuant to section 433B of the National Land Code 1965 in respect of the acquisition of the immovable property. Please also refer to the answers to questions 12.2 and 18.3 *vis-a-vis* the EPU approval.

Please refer to the answer to question 12 in respect of the enforcement of security.

19.4 Telecommunications

Taking of security. Please refer to the answer to question 8 in respect of the taking of security interest.

Enforcement of security. If pursuant to an enforcement of security exercise, the immovable property is sold to a foreign interest, the foreign interest is required to obtain the prior approval of the state authority pursuant to section 433B of the National Land Code 1965 in respect of the acquisition of the immovable property. Please also refer to the answers to questions 12.2 and 18.3 *vis-a-vis* the EPU approval.

The licence may have equity conditions and enforcement will be subject to such conditions.

Please refer to the answer to question 12 in respect of the enforcement of security.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Malaysia?

A judgment obtained against a borrower in an action based on, or in relation to, a loan agreement or guarantee will be enforced by the courts in Malaysia without re-examination or re-litigation of the matters thereby adjudicated.

In the event that a judgment of the English courts is obtained, after due service of process, the same would be enforced by the Malaysian courts pursuant to the Reciprocal Enforcement of Judgments Act 1958 (the "**Act**") without retrial or further review of the merits of the case subject to conditions set out in section 3 of the Act, namely that the judgment should be a judgment of the superior courts in England, the judgment should be final and conclusive as between the parties thereto and the judgment should be for a sum of money and not being a sum in respect of taxes, fine or other penalty. Further, pursuant to section 5 of the Act, the registration of a registered judgment shall be set aside if the Malaysian court is satisfied that:

- the judgment was registered in contravention of the Act;
- the English courts had no jurisdiction in the circumstances of the case;
- the judgment was obtained by fraud;
- the enforcement of the judgment would be contrary to public policy in Malaysia; or

- the rights under the judgment are not vested in the person by whom the application for registration was made.

The registered judgment may also be set aside if the Malaysian court is satisfied that the nature of the matter in dispute in the proceedings in the English court had previously to the date of the judgment in the English court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

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MAURITIUS

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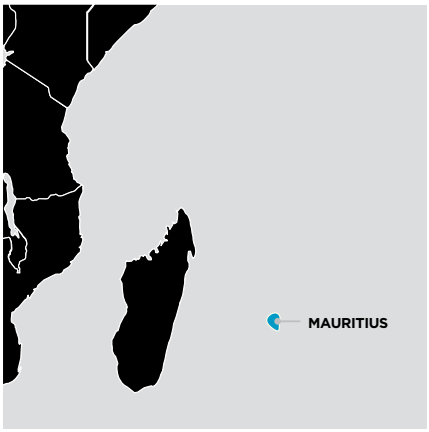

LENDING

1. Does a lender require a licence to lend money to a company based in Mauritius (the "borrower")? Are there any exemptions available?

A person operating a banking business in Mauritius must be licensed under the Banking Act 2004 ("**BA**") (2 and 5 BA). A person is considered to be operating a banking business in Mauritius if they accept deposits in Mauritius which they then use to make loans in Mauritius.

Up until December 2013, moneylending in Mauritius by entities not otherwise authorised under the BA was governed by the Moneylenders Act 1960 (the "**MLA**"). The MLA was repealed on 21 December 2013, and certain licensing requirements for moneylenders have been introduced into the BA. Under the MLA, foreign lenders were generally considered to be exempted from licensing requirements. The new requirements under the BA are similar, but not identical to those previously found in the MLA. The current drafting of the new requirements under the BA raises certain uncertainties as to the need for foreign lenders to be licensed as moneylenders by the Mauritian central bank. The central bank has the power to issue guidelines under the BA in matters relating to licensing requirements for moneylenders, but has not yet done so.

2. What are the consequences of making a loan to a borrower in Mauritius without a licence?

Lending without being licensed under the BA or exempted from its application is an offence liable to a fine not exceeding MUR 1 million and to imprisonment for a term not exceeding five years (14(5) and 97 (1) BA).

3. Will a borrower based in Mauritius have to deduct amounts for withholding tax on interest payments made to an overseas lender?

There is currently no withholding tax on interest payments made by a Mauritian borrower to a foreign lender.

4. Is there any limit to the level of interest that can be charged on loans made in Mauritius?

There is no general concept of criminal or usurious interest rate under Mauritian law. Further, lesion does not generally vitiate contracts. In Mauritius (as in several other civil law systems), lesion (or "lésion" in French) is an economic injury that a party suffers as a result of the execution of a contract. It conveys the idea of unfairness. It does not in itself void a contract save in specifically provided exceptional cases (contracts by minors, for example).

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Subordination of debt is possible in Mauritius. It may be achieved contractually or structurally.

Contractual subordination. Two lenders to the same borrower may agree that one should be paid before the other, irrespective of the timing and nature of the loans. The terms of the subordination will typically be set out in a subordination or intercreditor agreement. They will, by definition, include a covenant by the junior lender not to receive payments from the borrower until the senior lender has been paid. They will determine whether the subordination is complete or springing. The terms may also include accessory obligations on matters such as turnover of payments received in contravention of the subordination and exercise of rights in the event of the borrower's insolvency (proof of debt, voting and dividends, for example). Where the junior and senior debts are both secured, subordination of debts will typically be accompanied by priority arrangements in respect of security. The borrower will often be a party to the subordination agreement; this is particularly frequent where the terms of the subordination effectively vary the terms of the underlying loan agreements.

Structural subordination. A transaction may be structured in such a way that one lender will be closer to the revenue stream and assets than the other lender, thus increasing the former's chances of being paid before the latter. This is typically done by having the senior lender extending credit to the operating subsidiary and having the junior lender extending credit to the holding entity. In the event of insolvency, the senior lender will be paid before any

dividends are distributed to the holding entity. Prior to insolvency, this type of subordination may be strengthened by contractually prohibiting distributions from the subsidiary to the holding entity until the senior debt has been paid. Conversely, it will be weakened if the holding entity lends the proceeds of the junior loan to its subsidiary; indeed the holding entity (and its creditors) would then effectively rank equally with the senior lender against the subsidiary.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Mauritius or a guarantee from an entity incorporated in Mauritius?

As a general rule, a lender does not have to be licensed or registered in order to take security over property located in Mauritius or benefit from a guarantee given by a Mauritian entity.

There are two exceptions to this rule. Firstly, fixed or floating charges may only be granted to authorised bodies under the Institutions Agréées Regulations 1988. Banks licensed under the BA and insurance companies are authorised bodies. A foreign lender is most likely to be considered an authorised body and entitled to benefit from a fixed or floating charge, but the matter is not entirely free from doubt. Secondly, a "banker's special pledge" (see question 8.2(a) below) is only available to banks licensed under the BA.

7. Does the taking of security in Mauritius result in a lender being liable to tax in Mauritius?

No. The taking of security in Mauritius by a foreign lender will not by itself cause the lender to be liable to tax in Mauritius. However, some expenses in the form of registration fees, stamp duties or other similar taxes may be incurred in connection with registration and enforcement of some security interests.

8. Can a security interest be taken in Mauritius over the following assets?

Please also see our comments under question 15 in relation to registration with governmental authorities.

8.1. Land

Yes. Security over land may be taken by way of a charge (fixed or floating) (2202-3, 2202-17 and 2202-34 Code civil mauricien ("**CCM**")) or a hypothec (2163 CCM). In both forms of security, ownership (title) and possession remain with the grantor, and the secured party is afforded real rights in the land by way of the security. Although the Mauritian hypothec is a civil law form of security, it is commonly referred to as a mortgage in Mauritius.

8.2. Shares in a Mauritian company

(a) Shares (in certificated form) in a Mauritian company

Yes. Security over shares may be taken by way of a charge (fixed or floating) or a pledge (a "gage").

Where the security is by way of a general commercial pledge, it must be inscribed in the share register of the issuer (2073 and following CCM, and 91 (3) Code de commerce mauricien ("**Cdec**")). Where the issuer is governed by the Companies Act 2001 ("**CA**"), the requirement also constitutes an obligation of the issuer (86 CA).

Where the secured party is a bank licensed under the BA, it may be granted a "banker's special pledge" (2129-1 CCM). This is a simplified version of the general commercial pledge mentioned in the preceding paragraph. There is arguably no requirement that it be inscribed in the issuer's share register for it to be effective, but this inscription should nevertheless be effected, if only out of caution and to facilitate enforcement (and, in any event, this inscription remains an obligation of the issuer under the CA). The enforcement process is simplified and more expeditious than that for a general commercial pledge.

Where the issuer of the shares being pledged is a Mauritian offshore entity (that is, it holds a Global Business Licence issued by the Financial Services Commission of Mauritius), the shares may be pledged by way of another type of "special pledge" (92-6 and following C de c.). This is another simplified version of the general commercial pledge mentioned above. There is arguably no requirement that it be inscribed in the issuer's share register for it to be effective, but this inscription should nevertheless be effected, if only out of caution and to facilitate enforcement (and, in any event, this inscription remains an obligation of the issuer under the CA). The enforcement process is simplified and more expeditious than that for a general commercial pledge.

(b) Shares and securities listed by a Mauritian company in scripless form

Yes. The types of security interest mentioned in question 8.2 (a) above will generally be applicable to shares held in scripless form, with certain adjustments. Where the shares are held through the Central Depository & Settlement Co Ltd (Mauritius), certain additional rules will apply to the creation, perfection and enforcement of security interests.

Mauritius has ratified (and implemented in its internal law) the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the "**Hague Securities Convention**") prepared by the Hague Conference on Private International Law.

8.3. Bank accounts

Yes. Security over bank accounts may be taken by way of a charge (fixed or floating), a commercial pledge (a "gage") (2073 and following CCM, and 91 and 92-1 to 92-5 C de c) or, where the secured party is not the account bank, a commercial assignment by way of security (82 to 86 C de c).

Security over accounts must be notified to the account bank for it to be effective against that bank.

A bank licensed under the BA benefits from a legal lien (a "privilège") over accounts held with it by its debtor or its debtor's guarantor(s) (2150-1 CCM). This lien only secures debts resulting from a facility evidenced in writing (2150-2 CCM). This lien has priority over the rights of any other creditor of the bank's debtor or the guarantor(s) of the bank's debtor, including the holder of a security interest over the bank account(s) (2150-3 CCM).

8.4. Receivables (rights under contracts)

Yes, as a general rule, subject to any contractual restrictions relating to assignment or creation of security interests. Security over receivables may be taken by way of a charge (fixed or floating), a commercial pledge (a "gage") (2073 and following CCM, and 91 and 92-1 to 92-5 C de c) or a commercial assignment by way of security (82 C de c).

Security over receivables must be notified to the debtor of the receivables for it to be effective against that debtor.

8.5. Insurance

Yes, as a general rule, subject to any contractual restrictions relating to assignment or creation of security interests. Security over insurance rights may be taken by way of a charge (fixed or floating), a pledge (a "gage") (2073 CCM and 91 C de c) or a commercial assignment by way of security (82 C de c).

Security over insurance rights must be notified to the insurance company for it to be effective against the insurance company. In addition, a fixed charge on an asset extends to the insurance proceeds relating to that asset (2202-32 CCM).

8.6. Floating charge over all assets

Yes. A floating charge may be granted by both legal and natural persons. It may charge all property (present and future, corporeal (tangible) and incorporeal (intangible), movable (personal) and immovable (real)), or only certain classes of property (for example, only present property, or only accounts or equipment) (2202-34 CCM). A floating charge ranks from the day of its inscription, just like a fixed charge (2202-53 CCM). A fixed charge therefore does not automatically have priority over a floating charge. The Mauritian legal regime applicable to fixed and floating charges is, in many respects, different from the English regime applicable to security interests of the same name under English law.

9. Are trusts recognised in Mauritius? How are trusts used in the context of taking security?

9.1. Are trusts recognised in Mauritius?

Yes. Trusts can be established under Mauritian law in accordance with the Trusts Act 2001 ("**TA**"). Trusts typically used in a commercial context must be created by a written instrument, and trustees must be authorised to act as such by the Financial Services Commission. Under a Mauritian trust, a trustee holds property of which it is not the owner in its own right, with a fiduciary obligation to hold , use, deal or dispose of it for the benefit of beneficiaries whether or not yet ascertained or in existence (3 TA). The trustee has legal title to the trust property, and beneficiaries have an equitable or beneficial interest in the property.

Although Mauritius is not a party to the Convention on the Law Applicable to Trusts and their Recognition (the "**Hague Trusts Convention**"), the TA provides for the recognition of foreign trusts in terms similar to those of the Hague Trusts Convention (60 and 61 TA).

9.2. Taking security over securities held in a clearing system

The majority view in Mauritius is that a security interest can be granted to a security trustee that will hold it on trust for the benefit of the ultimately secured creditors (present and future). There is, however, no Mauritian case law on this specific issue.

10. Can a company incorporated in Mauritius (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Capacity generally. As for all contracts, parties to a guarantee must have the capacity to contract (1108 and 2018 CCM). All persons have the power to contract, unless the law declares them incapable (such as non-emancipated minors and protected majors) (1123 CCM). Legal persons are endowed with juridical personality, unless expressly provided otherwise by law (8 CCM). Companies and most partnerships are legal persons. As a general rule, therefore, natural persons, companies and most partnerships have the capacity to enter into contracts, including contracts of guarantee, unless specifically provided otherwise.

Company. A company organised under the CA has the capacity to carry or undertake any business or activity, do any act, or enter into any transaction, subject to the CA or any other enactment (27 (1) CA). The CA does not limit the capacity of a company to grant guarantees, except in connection with acquisition of the guarantor's shares as noted in question 14 below (81 CA). A constitution may restrict a company's capacity (27 (3) CA). However, no act of a company (including the execution of contracts) is invalid by reason only that it was done in contravention of a restriction in the constitution (28 (2) CA). A company may not assert against a person that the constitution has not been complied with (29 (1) (a) CA). Further, the fact that an act is not, or would not be, in the best interests of a company does not affect the capacity of the company to do the act (28 (4) CA). Therefore, an act in excess of capacity is not void by that reason only. Some recourses are available to shareholders, directors and other entitled persons for the contravention of the restrictions, but they do not affect the validity of the acts done in excess of capacity; these recourses are generally available against the directors that have authorised the contravention.

Partnership. The legal capacity of a partnership is often said to be limited to those transactions that further the objects of the partnership stated in the partnership agreement. This tempers the general rule set out above. Unless the partnership is a form of financial institution, the objects of a partnership will generally not include a general capacity to grant financial assistance. Although the question is not free from doubt, an indirect furtherance of the objects is most likely sufficient to validate assistance where there exists a commonality of interests between the grantor and the principal. Such a commonality may more readily exist where the grantor and the principal form part of the same corporate group. The obligations being guaranteed or secured must therefore promote the realisation of the objects of the partnership, directly or indirectly.

Jurisdiction of borrower. The jurisdiction of the organisation of the borrower is irrelevant in determining a Mauritian entity's capacity to give a guarantee (or grant security or extend any form of financial assistance).

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

Generally. Secured assets will generally be protected from the unsecured creditors of a security grantor. They do not generally form part of the pool of assets available to satisfy the claims of the unsecured creditors. The protection that is available will depend on the nature of the insolvency proceedings – the two most common forms for companies are winding-up and administration.

Winding-up. Where a winding-up order has been made or a provisional liquidator has been appointed, no action or proceedings may be proceeded with or commenced against a

company except by leave of the court and on such terms and conditions as the court thinks appropriate (105 Insolvency Act 2009 ("**IA 2009**")). However, the winding-up of a security grantor will generally not affect the right of a secured lender to enforce its security on property of the company (154 (2) IA 2009).

Administration. An administration is an arrangement regime. Its objective is to provide for a company to be administered in a way that (a) provides the opportunity for a company (or as much as possible of its business) to continue its existence; or (b) if (a) is not possible, results in a better return for stakeholders than that which would result from the immediate winding-up of the company (213 IA 2009). An administration generally culminates in the execution and performance of a deed of company arrangement, failing which the company is ultimately wound-up. Security may not be enforced during an administration (except in limited circumstances) but it may be enforced once the administration has ended (when a deed of company arrangement is executed, for example).

Preferential claims. Certain types of claims enjoy a statutory priority over unsecured creditors as well as over most secured creditors (Fourth Schedule IA 2009). Preferential claims include customary items such as employees' claims, taxes and costs of insolvency proceedings.

11. (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

Mauritius has ratified the Hague Securities Convention. Further, Mauritius has adopted in its internal law the substance of the Hague Securities Convention (irrespective of the date of coming into force of the Hague Securities Convention).

In accordance with the Hague Securities Convention, the law applicable to the legal nature and effects against an Intermediary (as defined below) and third parties of (i) rights resulting from a credit of securities to a securities account and (ii) security interests in securities held with an Intermediary (as defined below) will generally be the law in force in the state expressly agreed in the account agreement as the state whose law governs that agreement (or, if the agreement expressly provides that another law is applicable to these issues, that other law).

The effect of an Intermediary's (as defined below) insolvency on the claims of a secured lender will in large part depend on the legal nature of rights in intermediated securities, and that issue will be determined by the law identified in accordance with the Hague Securities Convention (right in rem, right in personam, other).

For these purposes, an intermediary is defined as a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account, and a person that maintains securities accounts in its capacity as a central securities depository will be regarded as an intermediary ("**Intermediary**").

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

Generally. As a general rule, a lender may enforce a security on movable property or claim under a guarantee freely after default by the borrower.

Security on immovable property. Enforcement of security on immovable property is governed by the Sale of Immovable Property Act and is ultimately done under court supervision.

Security on movable property. A lender may generally enforce a security on movable property freely after default by the borrower, subject to the requirements set out in the security agreement itself. However, a secured creditor will require a court order for enforcement in at least two circumstances: (i) where the secured creditor holds pledge ("gage") as security for a non-commercial debt, or (ii) where a secured creditor other than a bank licensed under the BA holds a pledge ("gage") of the shares of a domestic company (that is, a Mauritian onshore company).

Guarantee. As a general rule, the conditions for calling a guarantee will be set out in the guarantee agreement itself. If the guarantor has renounced to the benefit of discussion or if it is bound solidarily (that is, jointly and severally) with the borrower, the lender is entitled to demand payment upon default of the borrower; otherwise, the lender must exhaust its recourses against the borrower before claiming under the guarantee. If the guarantor fails to pay, the lender can serve a statutory demand on the guarantor giving it one month to pay (or to offer some other solutions acceptable to the lender) (181 IA 2009). If the amount demanded is not paid (or no other solution is accepted by the lender), the lender can apply to the court to have the guarantor wound up. Alternatively, the lender may issue court proceedings (an action in payment against the guarantor). The time involved in pursuing proceedings depends upon the circumstances of each case.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

Generally. No, unless the security or guarantee was invalid or voidable or the lender's enforcement action did not conform to the terms of the security or guarantee agreements or the provisions of applicable laws. A liquidator or a creditor can also pay off the beneficiary of the security or guarantee in order to prevent enforcement (and be subrogated to the rights of the initial beneficiary).

Administration. As mentioned in question 11, a creditor is generally prevented from enforcing a security or a guarantee during an administration (that is, before the execution of a deed of company arrangement or the winding-up of the company).

Voidable transactions. In the course of winding-up proceedings, the official receiver or the liquidator may apply to the court to have set aside a transaction that (a) is a voidable preference and (b) is made within two years before the commencement of the winding-up. A voidable preference is a transaction (including the granting of security or a guarantee) that is made at a time when the company is unable to pay its due debts and that enables another person to receive more towards satisfaction of a debt than it would be likely to receive in liquidation (313 IA 2009). Security may similarly be set aside if (a) it is given within two years of the commencement of the winding-up; and (b) immediately after the security is granted, the company was unable to pay its due debts (314 IA 2009). A security granted in support of new consideration (such as a fresh loan, for example) may not be set aside as a voidable security.

Paulian action. A security or a guarantee may also be attacked by a creditor through a Paulian action if the transaction is made in fraud of the creditor's rights (1167 CCM). Where a creditor suffers a prejudice as a result of a security or guarantee granted by its debtor, it may ask the court for a declaration that the transaction may not be set up against it. This action is particularly relevant where the transaction has rendered the debtor insolvent or where an insolvent debtor grants some forms of preference to another creditor.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security, or giving guarantee to secure the loan used by the borrower to acquire such company?

Where the grantor of financial assistance is a company governed by the CA, and the assistance is granted in connection with the acquisition of the grantor's shares, certain conditions must be met for the assistance to be valid (81 CA). The board of directors of the company must resolve that: (a) the granting of the assistance is in the interests of the company, (b) the terms and conditions of the assistance are fair and reasonable to the company and to any shareholders not receiving the assistance and (c) the company will satisfy a statutory solvency test immediately after granting the assistance. The solvency test is met if (a) the company is able to pay its debts as they become due in the normal course of business and (b) the value of the company's assets is greater than the sum of the value of its liabilities and its stated capital (6 CA).

Where the amount of assistance to meet these three conditions would cause the aggregate amount of all financial assistance granted by a company to exceed 10% of its stated capital, the company must also obtain from its auditor a certificate attesting that (a) the auditor has inquired into the state of affairs of the company and (b) there is nothing to indicate that the opinion of the board of directors that the solvency test is met is unreasonable in the circumstances (81 (3) CA).

The restrictions set out in the CA apply to all forms of financial assistance, including the granting of security, the giving of a guarantee and the extension of a loan (81 (5) CA).

The restrictions set out in section 81 CA do not apply to financial assistance granted by a private company (essentially an unlisted company with not more than 25 shareholders), if the financial assistance has been authorised by all shareholders (272 CA).

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Guarantee. There is no requirement that a guarantee by a Mauritian entity has to be registered, filed or inscribed in Mauritius for it to be effective against the guarantor.

Security. Certain types of security interests require a form of registration with Registrar General and inscription with the Conservator of Mortgages for them to be effective against third parties.

Hypothec/Mortgage. A hypothec/mortgage must be registered with the Registrar General and inscribed with the Conservator of Mortgages for it to be effective against third parties (2184 CCM).

Non-commercial pledge. A pledge granted as security for a non-commercial debt must generally be registered with the Conservator of Mortgages for it to be effective against third parties (2074 CCM).

Commercial pledges. There is no requirement that a pledge under the C de c has to be registered , inscribed or filed for it to be effective against third parties.

Fixed and floating charges. Fixed and floating charges must be registered with the Registrar General and inscribed with the Conservator of Mortgages for them to be effective against third parties (2202-9 CCM).

Time of registration. As a matter of security law, there is no time limit within which registration with the Registrar General or inscription with Conservator of Mortgages must be made, where such registration or inscription is required. Where inscription and registration are required, the security generally becomes effective against third parties from the time of inscription and registration. A secured party should therefore inscribe and register this type of security as soon as possible after the execution of the security agreement (pre-filing is not permitted in Mauritius). Late inscription and registration may, however, attract higher administrative fees (Sixth Schedule Registration Duty Act 1804).

Filing of particulars by grantor. A company governed by the CA must file with the Registrar of Companies a statement of the particulars of each security interest it grants, irrespective of the governing law of that interest or the location of the collateral (127 CA). The filing must be done within 28 days of the creation of the security. This is an obligation imposed on the grantor of the security and it has no bearing on the validity or effectiveness of the security.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Except in connection with the inscriptions and registrations referred to in question 15, no registration, stamp duty or other taxes are payable for the provision of a guarantee or the granting of security, as a matter of guarantee and security law.

Inscription fees. The inscription of security with the Conservator of Mortgages contemplated in question 15 attracts fees, the amount of which is made up of a fixed portion and a variable portion (generally proportional to the amount of the secured obligations).

Registration fees. Registration of a security interest with the Registrar General automatically gives rise to a fixed duty payable to the Registrar-General, generally not in excess of MUR1,000.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. A borrower is not legally prohibited from granting security over property already charged. Of course, where property has been pledged and physically delivered to a secured lender, it may not be validly pledged and physically delivered to another secured lender without the intervention of the first lender. As a general rule, security ranks on an asset according to the date on which it becomes effective against third parties (by way of inscription, registration, by operation of law or otherwise). Secured creditors (consensual or legal) may enter into priority agreements but their arrangements may not prejudice any intermediate creditors or other third parties (2202-53 and 2202-54 CCM). The grantor of a security interest may contractually agree with the secured party that it will not grant additional security on the charged property. This form of negative pledge is valid between the grantor and the secured party but it will generally be ineffective against third parties.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1. Oil/gas

There is no law in Mauritius preventing the acquisition of companies or assets in the oil and gas industry. However, a buyer of such companies or assets may need to apply to governmental authorities for the transfer of an existing licence or the issuance of a new licence. Any oil or gas discovered in Mauritius belongs to the State (3 Petroleum Act 1970). Prospecting licences and mining leases are required in order to operate in these fields (4 Petroleum Act 1970).

18.2. Electricity

There is no law in Mauritius preventing the acquisition of companies or assets in the electricity industry. However, a buyer of such companies or assets may need to apply to the Utility Regulatory Authority for the transfer of an existing licence or the issuance of a new licence (Electricity Act 2005).

18.3. Natural resources/mines

There is no law in Mauritius preventing the acquisition of companies or assets in the natural resources and mining industry. However, a buyer of such companies or assets may need to apply to governmental authorities for the transfer of an existing licence or the issuance of a new licence. The State has exclusive rights for prospecting for minerals (Minerals Act 1966).

18.4. Telecommunications

There is no law in Mauritius preventing the acquisition of companies or assets in the telecommunications industry. However, a buyer of such companies or assets may need to apply to the Information and Communication Technologies Authority for the transfer of an existing licence or the issuance of a new licence (Information and Communication Technologies Act 2001).

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1. Oil/gas

There is no law in Mauritius preventing the taking of (or enforcement of) security in relation to shares in or assets of companies in the oil and gas industry. However, the restrictions on dealings in this industry and the need for regulatory consent to the transfer of licences mean that the creation and enforcement of security over these interests generally require regulatory consent.

19.2. Electricity

There is no law in Mauritius preventing the taking of (or enforcement of) security in relation to shares in or assets of companies in the electricity industry. However, the restrictions on dealings in this industry and the need for regulatory consent to the transfer of licences mean that the creation and enforcement of security over these interests generally require regulatory consent.

19.3. Natural resources/mines

There is no law in Mauritius preventing the taking of (or enforcement of) security in relation to shares in or assets of companies in the natural resources and mining industry. However, the restrictions on dealings in this industry and the need for regulatory consent to the transfer of licences mean that the creation and enforcement of security over these interests generally require regulatory consent.

19.4. Telecommunications

There is no law in Mauritius preventing the taking of (or enforcement of) security in relation to shares in or assets of companies in the telecommunications industry. However, the restrictions on dealings in this industry and the need for regulatory consent to the transfer of licences mean that the creation and enforcement of security over these interests generally require regulatory consent.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Mauritius?

Personal foreign judgments for a fixed sum of money may be enforced in Mauritius by way of a common law procedure (that is, a non-statutory procedure) known as exequatur. If the judgment emanates from a superior court of the United Kingdom, it may also be enforced by way of registration under the Reciprocal Enforcement of Judgments Act 1923.

These two processes provide for enforcement without reconsideration of the merits of the foreign judgments if some criteria are met. Criteria are essentially the same in both cases and they include public policy considerations, absence of fraud, final nature of the foreign judgment and valid jurisdiction of the foreign court. The Reciprocal Enforcement of Judgments Act 1923 includes a distinctive, subjective criterion that may incite a judgment creditor to prefer the exequatur route: enforcement may be refused if the Supreme Court of Mauritius considers that registration and enforcement of the UK judgment would not be just and convenient in all the circumstances of the case.

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MONGOLIA

MAHONEYLIOTTA LLC

LENDING

1. Does a lender require a licence to lend money to a company based in Mongolia (the "borrower")? Are there any exemptions available?

As a general rule, a foreign lender that does not maintain a permanent establishment or carry on business in Mongolia is not required to be licensed or registered to lend money to a Mongolian borrower.

However, pursuant to Mongolia's Currency Settlement Law (the "**Currency Settlement Law**"), if the loan is borrowed offshore and received in Mongolia in a foreign currency, the borrower must report the loan to the Central Bank of Mongolia (the "**BOM**") within 15 business days of signing the loan agreement.

All domestic commercial banks in Mongolia must be licensed by the BOM. Additionally, under the Non-Bank Financial Activities Law of Mongolia (the "**NBFA Law**") and the Licensing Law of Mongolia (the "**Licensing Law**"), any entity engaged in non-bank financial activities in Mongolia, including lending, must be licensed by the Financial Regulatory Commission (the "**FRC**"), a government agency that reports directly to the Parliament of Mongolia.

2. What are the consequences of making a loan to a borrower in Mongolia without a licence?

Lenders operating in Mongolia without a proper licence face various penalties under several different Mongolian laws. Under the Licensing Law, carrying on banking or non-bank financial activities without the proper licence could result in the confiscation of the illegally earned income by the State and fines ranging from MNT20,000 to MNT50,000 for individuals, or MNT100,000 to MNT250,000 for business entities. Under the NBFA Law, establishing a non-bank financial institution or engaging in non-bank financial activities (including lending) without obtaining a licence from the FRC could result in the confiscation of the illegally earned income by the State, as well as fines equal to 20 to 40 times the current monthly minimum salary (ie MNT192,000).

Pursuant to the Banking Law of Mongolia (the "**Banking Law**"), establishing a bank or engaging in banking activities (including lending) without obtaining a licence from the BOM could result in the confiscation of all illegally earned income, as well as fines equal to 50 to 150 times the current monthly minimum salary (ie MNT192,000).

3. Will a borrower based in Mongolia have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Yes. Mongolian income tax is owed on interest paid to a non-resident party at a rate of 20%, to be withheld by the borrower from the interest payment.

If the recipient of the interest is resident in a country with whom Mongolia has entered into a bilateral convention on the avoidance of double taxation, the applicable tax rate may be reduced if so provided in the relevant convention.

4. Is there any limit to the level of interest that can be charged on loans made in Mongolia?

The determination of interest is a contractual matter between the relevant parties, and the Civil Code of Mongolia (the "**Civil Code**") provides that parties may negotiate and determine the amount of interest on a loan. However, the Law of Mongolia on Deposits, Loans and Transactions of Banks and Authorised Legal Persons provides that the rate of additional default interest cannot exceed 20% of the basic rate of interest. The Civil Code also provides that a Mongolian court may reduce the interest rate at the request of the borrower where the established interest rate is found to be "unreasonable". However, no guidance is provided on how a court might determine that an interest rate is unreasonable.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

In respect of unsecured loans, such loans would generally be treated on a *pari passu* basis. However, it is possible for multiple lenders to agree to a different basis for repayment. This could be accomplished through a subordination agreement, which involves subordinating certain loans to the priority of other loans. Additionally, a form of intercreditor agreement (with the borrower as a party) could similarly provide for the priority of treatment of various loans. An intercreditor or subordination agreement would consist of contractual undertakings by the parties, including the borrower, and would be enforceable as contractual obligations.

Generally, in respect of security, the Civil Code provides for priority on the basis of first in time. As noted below, certain security interests (eg, pledges of immovable property and minerals licences) can be registered and priority is established based on the date of registration. For pledges of other property and rights, priority is established based on the date of execution of the security instrument. The Civil Code further provides that parties registering interests with the State register may agree to re-order their respective priorities. However, an academic commentary on the Civil Code comments that this provision is applicable only to the pledge of rights in immovable property. While such commentary is not binding on a Mongolian court, it is an authority which a Mongolian court may find persuasive.

It is also possible for multiple lenders to agree contractually as to their respective priority rights. This would be enforceable among the parties to the contract, but would not affect the order of legal priorities of security as provided for in the Civil Code.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Mongolia or a guarantee from an entity incorporated in Mongolia?

There are no licensing or registration requirements in Mongolia for a lender, whether foreign or domestic, to take security over assets or a guarantee from an entity incorporated in Mongolia.

7. Does the taking of security in Mongolia result in a lender being liable to tax in Mongolia?

No. The taking of security in Mongolia does not result in tax liability for a lender. However, notarisation and/or registration fees are payable in connection with the registration and perfection of a security interest taken over immovable property or minerals licences.

8. Can a security interest be taken in Mongolia over the following assets?

8.1 Land

The Constitution of Mongolia (the "**Constitution**") provides that all land not owned by Mongolian citizens is the property of the State. The Constitution also provides that Mongolian citizens are prohibited from transferring land or land rights to foreign citizens or stateless persons without permission from a competent State authority.

The Land Law of Mongolia (the "**Land Law**") provides for three types of land rights: (i) ownership (only available to Mongolian citizens pursuant to the Land Ownership Law of Mongolia); (ii) possession rights; and (iii) use rights. Under the Land Law, ownership and possession rights are not available to foreign legal entities, business entities with foreign investment ("**BEFIs**") or foreign citizens (collectively, "**Foreign Persons**"). Where 25% or more of the paid in capital of a Mongolian company comes from foreign sources, such company is deemed to be a BEFI. Foreign Persons may only obtain land use rights.

"Land possession" is defined as holding land under one's control with the right to dispose of such land in accordance with the law and the relevant possession agreement. Although these rights may be pledged, they may not be pledged to a Foreign Person. Any pledge of possession rights must be "consented to" by the authority which has granted the relevant land possession rights and registered with the relevant registry. The Land Law does not provide how the authorities will determine whether or not to consent to a pledge. In addition, while the Land Law provides for the registration of certain land related matters, and such registry has been established, it has not yet become common practice for parties to register such matters in Mongolia. Only a very small number of land rights have been registered - most of them registered at the insistence of commercial banks that are taking a pledge of such rights.

"Land use" is defined as permission to use land for a particular purpose for a period of time pursuant to the law and the relevant land use agreement. These rights may not be pledged.

8.2 Shares in a Mongolian company

(a) Shares (in certificated form) in a Mongolian company

Yes. A security interest may be created over shares (in certificated form) in a Mongolian company by way of a pledge agreement.

(b) Shares and securities listed by a Mongolian company in scripless form

Yes. A security interest may be created over shares and securities listed by a Mongolian company in scripless form by way of a pledge agreement. In fact, most shares of Mongolian companies exist in scripless form and it is rare for a Mongolian company to issue a share certificate.

In the case of joint stock companies listed on the Mongolian Stock Exchange, the parties may register the security interest over such shares and securities in scripless form with the Mongolian Securities Clearing House and Central Depository ("**MSCH&CD**"). Such registration does not act to "perfect" the pledge, but rather acts to "freeze" the disposal of such shares and securities without the consent of the secured party. Such registration to freeze the shares and securities is not mandatory under the laws of Mongolia.

In respect of non-listed companies, at present, there is no ability to register the pledge thereof with any Mongolian public entity.

8.3 Bank accounts

Yes. A security interest may be created over bank accounts by way of a pledge agreement. Typically, this is done by way of an account pledge agreement between the pledgor, the pledgee and the bank at which the account is held.

8.4 Receivables (rights under contracts)

Yes. A security interest may be taken over receivables and other rights under contracts in Mongolia, subject to the terms of the contract in question, by way of a contractual assignment or a pledge agreement.

8.5 Insurance

Yes. A security interest may be created over insurance rights or claims in Mongolia, subject to the terms of the insurance policy in question, by way of a contractual assignment or a pledge agreement.

8.6 Floating charge over all assets

There is no specific provision of Mongolian law regarding a floating charge over all assets, and the mechanics of doing so under Mongolian law are problematic. The Civil Code, however, does expressly provide that future-acquired assets may be the subject of a pledge. It is therefore possible to structure a functional equivalent of a floating charge through the use of a set of

appropriately drafted documents covering the various classes of assets of the pledgor.

9. Are trusts recognised in Mongolia? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Mongolia?

Yes, trusts are recognised in Mongolia although the law is not very developed. In practice, when used in connection with the granting of security to a security trustee to hold such security for the benefit of the finance parties, the arrangement would typically be established pursuant to an English law governed document due to lack of developed law in this area.

9.2 Taking security over securities held in a clearing system

To date, there has been no experience with the use of a trust in the context of taking security over securities held in a clearing system.

10. Can a company incorporated in Mongolia (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Pursuant to the Civil Code, a Mongolian company may guarantee the debt of a borrower, regardless of where the borrower is incorporated.

It is important to note that engaging in a business of issuing guarantees is considered a banking or non-bank financial activity under the Banking Law and the NBFA Law. Therefore, a Mongolian company engaging in banking or non-bank financial activities, including making guarantees, must be properly licensed by the BOM or the FRC in order to enter into a valid guarantee agreement.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

As a general rule, the secured assets of an insolvent company should be protected from its general creditors under the Civil Code, which provides that a pledgee has the first right to recover funds from any pledged property, in priority over other creditors.

The Bankruptcy Law of Mongolia (the "**Bankruptcy Law**") is rudimentary and has not yet been applied to the bankruptcy of large commercial enterprises. The Bankruptcy Law does not distinguish between secured and unsecured creditors. The Bankruptcy Law provides, however, that if the proceeds from the sale of assets pledged as collateral by a secured claimant are insufficient for fulfilling the claims or obligation of a secured claimant, any unsatisfied claims shall be moved to the list of common claims. The Civil Code provides that, in connection with the liquidation of a legal person (the law does not apply to individuals), the assets of the debtor shall be distributed in the following order of priority: (1) payments necessary to eliminate any harm done to the life or health of others, or other court-ordered payments; (2) expenses incurred by the trustee or liquidation commission, or other similar persons, within their rights and obligations; (3) claims arising from contracts and transactions concluded during the process of recapitalisation of the debtor during its bankruptcy; (4) reimbursement of mandatory bank deposit insurance payments; (5) money assets of depositors; (6) wages of workers under labour contracts; and finally, (7) payments to other claimants in accordance with Mongolian law. Also, the Civil Code states that if a debtor fails to fulfil its legal or contractual obligations secured by a pledge, the creditor-pledgee shall be entitled to have their rights satisfied first from the value of the pledged property before other creditors. Therefore, if the borrower becomes insolvent, the creditor-pledgee has the first priority to claim the pledged property. However, if the proceeds from the sale of the pledged property are not sufficient to satisfy the creditor-pledgee's claims, the remaining unsatisfied portion of the claim will be distributed in the order pertaining to the common unsecured claims.

11. (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

The role of an intermediary in the Mongolian securities market is performed by legal entities holding a brokerage licence ("**Intermediary**"). Under the Securities Market Law, brokerage activities are defined as intermediary services of buying and selling securities carried out with the assets of the client, on behalf of the client and in accordance with the client's instructions pursuant to an agreement with the client.

The broker has a duty to hold the client's assets and securities in the client's named account, which is segregated and non-commingled (the purpose of this account is limited to securities settlement and clearing only) at an authorised clearing house or depositary. The broker is prohibited from managing and disbursing the assets and securities in the client's account without the client's authorization or order or for other purposes not expressly authorised by the client. The obligations of the broker to others may not be cleared by using the client's assets and securities.

The broker may not transfer funds between the client's account and its own account, unless the broker lent money to the client for purposes of buying securities and in accordance with the terms provided in the agreement with the client. Therefore, if the broker acting as an Intermediary becomes insolvent, this will not affect the claims of the secured lender in relation to securities held in a clearing system. The client may change its broker at any time because his or her assets and securities are held in a segregated account at the MSCH&CD. Similarly, as the securities are held in an account which is the property of the account holder, the bankruptcy of the MSCH&CD should likewise not affect the ownership of the securities or the security granted by the account or securities holder.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

The Civil Code provides that, unless otherwise permitted by law, all pledges of immovable property (ie, land and anything permanently affixed thereto) are to be enforced by public auction of the property through the Court Decision Enforcement Agency (the "**Bailiff**"). The Bailiff will only act on the basis of a writ of execution issued by a Mongolian judge. A Mongolian judge will issue a writ of execution on the basis of a Mongolian court

judgment. A Mongolian court judgment may be obtained through: (i) a Mongolian court proceeding on the merits of the claim; (ii) the certification of a validly obtained qualifying arbitration decision (both domestic and foreign); or (iii) the certification of a court decision from a country with which Mongolia has entered into a treaty concerning the reciprocal enforcement of civil court judgments (a very limited number of countries). A Mongolian court proceeding followed by the enforcement of the resulting judgment by the Bailiff will typically take one to two years.

In July 2009, the Mongolian Parliament adopted the Immovable Property Pledge Law of Mongolia (the "**Immovable Property Pledge Law**"). The Immovable Property Pledge Law provides, among other things, that creditors may enforce pledges of immovable property (but not land) through non-judicial foreclosure methods described in such law, provided the relevant pledge agreement provides such power to the creditors. The Immovable Property Pledge Law has not yet been widely implemented in Mongolia.

The Civil Code provides for the same judicial sale procedure described above in respect of movable property and rights. It also permits the parties to a pledge agreement covering movable property or rights to agree to an alternative enforcement process which can include private sale or auction arranged by the creditors. The creditors, or any purchaser at foreclosure, must in any event obtain possession of the relevant pledged asset and, failing voluntary delivery by the borrower, such party must seek assistance from the Mongolian courts and the Bailiff.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

Except where the borrower or guarantor is declared insolvent under the Bankruptcy Law, a liquidator or creditor would have no ability to block validly undertaken enforcement efforts of another creditor.

Under the Bankruptcy Law, an automatic stay would be in place which would prevent any enforcement efforts of secured and unsecured creditors. The Bankruptcy Law also provides for the setting aside of certain pre-bankruptcy transfers of assets by the borrower as follows: (i) if to debtor's management or family members for zero value during the two years prior to initiation of the bankruptcy case; (ii) if to any person other than management or family members of the debtor for zero value during the one year prior to initiation of the bankruptcy case; (iii) if to other parties for below market value during the one year prior to initiation of the bankruptcy case; and (iv) if resulting in preferential treatment of certain creditors over other creditors during the 120 days preceding the initiation of the bankruptcy case.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

No. Mongolian law does not specifically address this issue. However, the Company Law of Mongolia requires the directors of a company to act in the interests of that company. Accordingly, any financial assistance made by a company must be in the interests of that company.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

A security interest, or pledge, taken over immovable property must be registered with the Property Right Registration Office of the General Authority of the State Registration in order to be valid. The pledge of a minerals licence must be registered with the Cadastre Department of the Minerals Resources Authority of Mongolia in order to be valid. No security interest is created in any of these classes of assets until completion of registration.

Mongolia has acceded to the Cape Town Convention on International Interests in Mobile Equipment and therefore security interests (and other interests) in aircraft may be perfected as a matter of Mongolian law through registration with the international registry in conformance with the provisions of such convention.

The time period for the registration of an immovable property pledge is up to 3 business days. For minerals licences, the Minerals Law (as defined below) does not provide a time period for the registration of a pledge, but in practice it takes 7 to 14 days.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

The registration of immovable property pledges, and pledges of minerals licences, would give rise to notary and registration fees, and incur fees to translate the original document into the Mongolian language, if it is executed in another language.

The registration fee for immovable property pledges is equal to 0.1% of the amount of the secured obligation. The registration fee for pledges of minerals exploration licences is MNT1 million and for minerals mining licences, it is MNT2 million.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes, the Civil Code permits a party to grant security over an asset to multiple parties, subject to compliance with related provisions of the Civil Code, including the obtaining of the consent of the first security holder. Typically, the documentation of such an arrangement would include a second pledge agreement, and, if relevant, an intercreditor agreement.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

The Petroleum Law of Mongolia (the "**Petroleum Law**") requires exploration for, and production of, oil and gas within Mongolia to be conducted under a Production Sharing Agreement (a "**PSA**") between the oil/gas company and the Petroleum Authority of Mongolia on behalf of the Government of Mongolia ("**Mongolian Government**"). The standard form of PSA used by the Mongolian Government provides that when the cost of an asset used for the production of oil/gas under a PSA has been recovered by the

company (these costs are to be recovered prior to the production sharing split between the company and the Mongolian Government), ownership of the relevant asset is transferred to the Mongolian Government, and all data and reports resulting from the operations under the PSA shall be the property of the Mongolian Government.

The Law of Mongolia on Petroleum Products (the "**Petroleum Product Law**") regulates the following relations with respect to petroleum products: (i) importing; (ii) manufacturing; (iii) sales; (iv) transportation; (v) storage; and (vi) safety for the above-mentioned relations.

There is no statutory prohibition regarding the acquisition of oil/gas companies (in the exploration or production sector or in respect of the other activities covered by the Petroleum Product Law). However, specific prior approval may be required depending on the nature of the transaction.

18.2 Electricity

No. Mongolian law does not prevent the acquisition of companies or assets in the electricity industry. However, this is a highly regulated sector and specific prior approval may be required depending on the nature of the transaction. As this is an industry which is also constantly evolving, including the recent introduction of the concept of public/private partnerships under the Concessions Law, a party would be advised to confirm the then existing laws before acquiring a company or the assets of a company in the electricity industry.

18.3 Natural resources/mines

Under the Minerals Law of Mongolia (the "**Minerals Law**"), only Mongolian chartered legal entities may hold a minerals exploration or mining licence. The Minerals Law does not, however, prohibit a foreign legal entity from owning 100% of the shares of the Mongolian chartered legal entity that holds an exploration or mining licence.

In July 2009, the Mongolian Parliament adopted the Nuclear Energy Law of Mongolia (the "**Nuclear Energy Law**"). The Nuclear Energy Law regulates all the activities related to nuclear energy and radioactive substances, including construction, use, renewal and reparation of nuclear energy equipment and the exploration, extraction, transportation, sale, export and elimination of radioactive minerals (superseding the Minerals Law where relevant).

The Nuclear Energy Law requires the issuance of a licence for the performance of the above activities, which licence may be issued only to a Mongolian chartered legal entity. The Nuclear Energy Law does not prohibit a foreign person from holding shares of a Mongolian legal person holding a licence for the exploration and mining of radioactive minerals. However, it provides that the State shall hold, directly and free of any charge, no less than 51% of the shares of a company holding rights over a deposit of radioactive minerals, if such deposit has been identified through exploration activities performed using the State budget funds. The State shall hold, directly and free of charge, no less than 34% in respect of a deposit identified through exploration activities performed using private funds. The Nuclear Energy Law also requires the approval of the regulator for the issuance by any licence holder of shares to any shareholder, or the transfer of such shares by any existing shareholder.

On 3 October 2013, the Mongolian Parliament annulled the Foreign Investment Law (the "**FIL**") and Strategic Entity Foreign Investment Law[3] (the "**SEFIL**") and adopted the new Investment Law (the "**Investment Law**") which became effective on 1 November 2013. The Investment Law regulates investment by foreign and domestic investors, their affiliated entities and provides tax and non-tax incentives to investors. Most importantly, the Investment Law stabilises the tax environment by a way of issuing "stabilisation certificate(s)" for investors who meet the criteria stated in the Investment Law. Within the scope of tax stabilisation, the following four taxes will be stabilised: (i) legal entity income tax; (ii) customs duties; (iii) value added tax; and (iv) mineral royalties. Under the Investment Law, foreign investors are no longer required to be registered and obtain permission from the competent authority if they choose operate in Mongolia or invest in businesses, affiliated entities or third parties carrying on business operations in Mongolia. However, a Foreign State-Owned Legal Entity (as defined below) must obtain permission from the relevant authority in charge of investment matters before acquiring 33% or more of the total issued shares of a Mongolian legal entity operating in the sectors of mining, banking and finance, or media and communications. A foreign state-owned legal entity is defined as a legal entity in which at least 50% of the shareholding is directly or indirectly owned by a foreign state ("**Foreign State-Owned Legal Entity**").

The mining industry is Mongolia's most important industry and is closely monitored and heavily regulated, by the State. In addition, the laws regulating the mining industry are constantly changing. There are potentially several other considerations a party would want to take into account before acquiring a company, or the assets of a company, in the mining industry, which are more comprehensive than this advice can provide.

18.4 Telecommunications

No. Mongolian law does not prevent the acquisition of companies or assets in the telecommunications industry. However, as noted in the response to question 18.3 above, the Investment Law also applies to investment from Foreign State-Owned Legal Entities in the telecommunications sector and therefore prior approval may be required for an investment by a Foreign State-Owned Legal Entity in this sector. There will also be other regulatory approvals that need to be obtained from the telecommunications sector's regulators.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

There is no specific statutory prohibition regarding the taking of or enforcement of security in relation to shares in or assets of oil/gas companies. However, specific prior approval may be required, depending on the nature of the transaction.

19.2 Electricity

There is no specific statutory prohibition regarding the taking of or enforcement of security in relation to shares in or assets of electricity companies. However, specific prior approval may be required, depending on the nature of the transaction.

3 This law was adopted in 1993 and regulated foreign investments in Mongolia until the recent adoption of the Investment Law.

19.3 Natural resources/mines

Under the Minerals Law, in order to pledge a minerals exploration or mining licence, all of the related mining assets and technical reports and data generated by the licence holder must also be pledged to the creditor (a mineral licence alone may not be the subject of a pledge). Only banks or non-bank financial institutions are permitted pledgees of mineral licences. It is clear that Mongolian domestic banks and non-bank financial institutions are permitted pledgees, and the practice of the registration authorities over the years has been to accept registrations of foreign banks and non-bank financial institutions as well.

The Nuclear Energy Law provides that any decisions of the shareholders, or the board or the executive governing body of a company holding a radioactive minerals exploration or mining licence, made in respect of: (i) the sale, pledge or transfer in any other manner to the ownership, possession or use of others of more than 5% of the shares of such company; (ii) the issuance by the company of securities convertible into shares or the issuance of additional shares constituting more than 5% of the previously issued shares; and (iii) the re-organization of such company through consolidation, merger, division or separation, shall become effective only upon ratification by the state administrative body in charge of radioactive minerals matters.

19.4 Telecommunications

There is no specific statutory prohibition regarding the taking of or enforcement of security in relation to shares in or assets of telecommunications companies. However, specific prior approval may be required, depending on the nature of the transactions.

See also the response to question 18.4 in respect of the Investment Law issues.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Mongolia?

The choice of English law is permitted under Mongolian law and would be respected by local courts. Mongolian parties are permitted to submit to the jurisdiction of English courts or other foreign courts, but there is no assurance that a judgment from one of these courts would be enforced by a Mongolian court without re-trying the case. Mongolia is a party to some inter-governmental agreements (primarily with China and certain former Soviet-bloc countries; but not with the United Kingdom) regarding mutual enforcement of civil judgments. In the absence of such an agreement, a foreign judgment is not enforceable in Mongolia.

Mongolia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and any qualifying arbitration award (including those based on English law) would be enforceable in Mongolia.

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MahoneyLiotta was established in May 1997 as a limited liability company under the laws of Mongolia. The firm advises and assists companies in structuring business transactions and relationships, and in accessing the capital markets to obtain financing, for ventures and projects in Mongolia. Members of the firm have extensive experience in advising and assisting mining companies in structuring, implementing and financing mining ventures and in advising offshore lenders and investors in structuring and implementing their Mongolia-related transactions. The firm also advises and assists clients in connection with Mongolia-related tax matters, cross-border tax strategies, acquisitions of interests in Mongolian companies, and matters pertaining to the operations of banks, insurance companies, and other financial institutions.

MYANMAR

MYANMAR LEGAL SERVICES LIMITED (MLSL)

LENDING

1. Does a lender require a licence to lend money to a company based in Myanmar (the "borrower")? Are there any exemptions available?

The Moneylenders Act of 1945 requires those who carry on a money-lending business to register as a moneylender. As a matter of practice, the Moneylenders Act would not apply to foreign exchange denominated loans, although the text of the Moneylenders Act contains no such exemption. Therefore, an overseas lender does not require a licence to lend money to a company based in Myanmar. However, an overseas lender should take into consideration the provisions of the Foreign Exchange Management Law of 2012 (the "**FEML**"), which affects how money can be transferred out of Myanmar in order to repay any offshore loan. The FEML repealed the Foreign Exchange Regulations Act of 1947 (the "**FERA**"). However, as implementing regulations have yet to be issued under the FEML, the rules and regulations issued under the FERA remain valid to the extent that they do not conflict with the provisions of the FEML. The current lack of implementing rules or regulations under the FEML means there is current uncertainty around exactly what approvals would be required prior to entering into a loan arrangement with an offshore entity but in general all foreign exchange transactions will require the prior approval of the Central Bank of Myanmar (the "**CBM**") and may only be conducted through banks authorised by the CBM to deal in foreign exchange transactions.

Notwithstanding that approval of the CBM will still be required, the FEML has sought to liberalise foreign exchange transactions in Myanmar as it expressly provides that there shall be no restriction on foreign exchange payments into or out of Myanmar for "Current Transactions", which includes: payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities and payments due as interest on loans and payments of moderate amounts for amortization of loans.

In addition, any entity which is operating under the Foreign Investment Law of 2012 (the "**MFIL**") or the Myanmar Citizens Investment Law of 2013 (the "**MCIL**") will also require approval from the Myanmar Investment Commission (the "**MIC**") prior to entering into any loan agreement or repayment of any amounts in relation to the same. In practice, such approval can be set out as part of the investors licensing process which will make any subsequent approvals required from the CBM much more of an administrative task and should be relatively straightforward to obtain.

2. What are the consequences of making a loan to a borrower in Myanmar without a licence?

In practice, it will not be possible to electronically transfer money outside of Myanmar without the approval(s) noted above and therefore any overseas lender who makes a loan to a borrower in Myanmar without the relevant approval(s) may find it difficult to be repaid. In addition, it is not possible to enforce a loan made to a Myanmar entity without the approval of the CBM.

3. Will a borrower based in Myanmar have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Yes. Under notification number 41/2010 dated 10 March 2010 issued by the Ministry of Finance and Revenue, withholding tax of 15% is payable by the borrower on interest payments made to overseas lenders. This withholding tax of 15% is a final tax.

4. Is there any limit to the level of interest that can be charged on loans made in Myanmar?

Under the Regulations for Financial Institutions of 1992, the interest rate on loans by local banks in the local currency (the Kyat, "**MMK**") is limited. There is no limit to the interest rate that can be charged on foreign currency denominated loans. However, the interest rate on such loans may be reviewed by the CBM when seeking approval.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

There are no express provisions or Myanmar court decisions that could be used as guidance as to whether one lender can agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred. Because of the lack of express provisions in the Myanmar laws related to subordination, it is assumed that subordination may be done by contract.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Myanmar or a guarantee from an entity incorporated in Myanmar?

The registration requirement hinges on the phrase "doing business", for which there are no interpretative guidelines. However, as a matter of current practice, an overseas lender does not have to be licensed or registered in order to take security over assets in Myanmar or a guarantee from an entity incorporated in Myanmar. Nevertheless, it shall be noted that foreign persons are restricted from taking any security over land or immovable property in Myanmar.

7. Does the taking of security in Myanmar result in a lender being liable to tax in Myanmar?

No. Generally the mere taking of security over assets in Myanmar will not in itself result in an overseas lender being liable to tax in Myanmar.

However, if income is generated as a result of the taking of security in Myanmar, an overseas lender should consider section 26(a) of the Income Tax Law of 1974, which states that if a non-resident foreigner has received income (i) from any capital assets (defined as any land, building, vehicle and any capital assets of an enterprise which also includes shares, bonds and similar instruments) within Myanmar; or (ii) from any source of income within Myanmar, that income received shall be deemed to be income received within Myanmar and income tax shall be assessed accordingly.

8. Can a security interest be taken in Myanmar over the following assets?

As a general rule, any entity operating under the MFIL or MCIL will require approval from the MIC prior to entering into any security arrangements. In addition, CBM approval will be required as part of the approval of the overall loan arrangements.

8.1 Land

Section 3 of the Transfer of Immovable Property Restriction Law of 1987 prohibits an overseas lender from taking a security interest over land in Myanmar. The section states that "No person shall transfer any immovable property by way of sale, purchase, gift, acceptance of a gift, mortgage, acceptance of a transfer by any other means to a foreigner or a company owned by a foreigner". Therefore, an overseas lender cannot take security interest over land or immovable property by way of mortgage. An overseas lender may, however, be able to take a charge over immovable property in Myanmar as a charge does not create an interest in the property itself. A charge entitles a chargee to make a forced sale of the property (with the assistance of the Court) upon default by the chargor but does not transfer any right to the property or interest in it.

Directive 3/90 issued by the government in 1990 prohibited the mortgaging or sale of a right of occupancy of the whole or part of a building on leased land to foreign nationals and foreign economic organisations, except with the prior approval of the government.

8.2 Shares in a Myanmar company

(a) Shares (in certificated form) in a Myanmar company

Yes. In theory, a foreign or local entity or person may take security over the shares in a locally incorporated Myanmar company. However, there are uncertainties around the registration process and therefore any enforcement of such security may be difficult. Please see question 15 below for further details.

Approval of the MIC will also be required if the local entity is operating under the MFIL. The exercise of any security would accordingly be subject to any restrictions on change of ownership of the local company or any restrictions on foreign investment in such a company under the implementing regulations of the MFIC or the MIC Permit itself (see question 19 below for further information).

As a matter of practice, approval of the CBM is also likely to be required to take security over shares but this will need to be discussed with the CBM on a case by case basis.

Section 28 of the Myanmar Companies Act of 1913 (the "**MC Act**") defines shares as movable property. To be valid, a mortgage or charge on movable property of the company must be registered or filed with the Directorate of Investment and Company Administration ("**DICA**") under the Ministry of National Planning and Economic Development within 21 days after the date of its creation. Please see the response to question 15 below for further details.

(b) Shares and securities listed by a Myanmar company in scripless form

This question is not applicable. Shares are only issued in certificated form in Myanmar. A new securities law is expected to be passed in Myanmar later this year which should set out the foundations for a Yangon stock exchange.

8.3 Bank accounts

Myanmar law is unclear on the taking of security interest over bank accounts. However, the Rules relating to Financial Institutions of Myanmar Law of 1991 allow local banks to accept demand or time deposits with bank(s) as security for a loan. The Myanmar courts have ruled that money belonging to a debtor that is deposited in a bank or a debt due to him by the bank can be attached by means of a prohibitory order on the bank. Further, monies in local currency and foreign currency deposited with a bank can be subject to temporary injunction. In certain foreign exchange denominated loan transactions, bank accounts, monies on deposit and balances in bank accounts have been utilised as security for the loan.

8.4 Receivables (rights under contracts)

Yes, though there is considerable uncertainty in this area of Myanmar law. The Transfer of Property Act of 1882 (the "**TP Act**") in theory permits the assignment of receivables but there is considerable uncertainty regarding how assignment of receivables under the TP Act would work in practice, as to date there have been no reported case on this point.

8.5 Insurance

Yes. Section 135 of the TP Act states that every assignee, by endorsement or other writing, of a marine or fire insurance policy, in whom the property of the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself. In addition, illustration (ii) to section 130 of the TP Act makes reference to the assignment of life insurance to a bank for securing the payment of a debt.

As mentioned in question 8.2 above, approval of the CBM is also likely to be required and the security should be discussed with them as part of the process for seeking approval for the underlying loan arrangements.

8.6 Floating charge over all assets

Under section 109(1)(f) of the MC Act, as mentioned in question 15 below, a floating charge on the undertaking or property of the company may be taken as a security interest. However, if immovable property is included in the assets of the company, then this is subject to the provisions of the Transfer of Immovable Property Restriction Law and of any MIC Permit - see answer to questions 8.1 and 8.2 above.

9. Are trusts recognised in Myanmar? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Myanmar?

In theory, trusts are recognised in Myanmar and so, subject to underlying laws and regulations, security may be held on trust for a beneficiary in Myanmar. However, in practice, this is not something which is an established practice and there is little precedent of this in Myanmar.

9.2 Taking security over securities held in a clearing system

This question is not applicable. There is no established clearing system in Myanmar and so to date trusts have not been used in this context in Myanmar.

10. Can a company incorporated in Myanmar (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

As a general rule, a private company may give a guarantee for the debt of the borrower (regardless of whether the borrower is incorporated in Myanmar or in a different country) pursuant to the MC Act. It is important to note that a continuing guarantee as to future transactions may be revoked by the guarantor at any time by notice to the creditor, unless such guarantee is expressed to be irrevocable.

Under Myanmar law, the guarantor is entitled to the benefit of every security which the lender has against the principal debtor at the time when the guarantee is entered into, whether the guarantor knows about the existence of such security or not. If the lender loses, or, without the consent of the guarantor, parts with such security, the guarantor may apply to the court to be discharged to the extent of the value of the security. The following illustrations are given in the Contract Act of 1872 (the "**Contract Act**") as examples of how the above rule would operate:

Illustration (a): C advances to B, his tenant, MMK2,000 on the guarantee of A. C has also a further security for the MMK2,000 by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

Illustration (b): C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

Illustration (c): A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

The courts have discretion in determining whether any guarantee should be set aside on the basis of the above. There are no reported Myanmar cases relating to this provision. It is unclear what the courts may take into consideration in applying the provision and whether the above may be excluded as a matter of contract.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

As a general rule, the secured assets of an insolvent borrower will be protected from the general creditors of the borrower and, subject to the payment of certain preferential claims (such as debts to the government, employee and labour and pension claims), may be enforced outside of any insolvency proceedings. The applicable Myanmar laws that would apply if the borrower becomes insolvent are the MC Act, the Myanmar Insolvency Act of 1920, the Yangon Insolvency Act of 1909, the Central Bank of Myanmar Law of 1990, the Rules relating to Financial Institutions of Myanmar Law of 1990 and the Code of Civil Procedure of 1908 (the "**CPC**"). These laws include a number of sections dealing with priority of debts.

11. (b) If an intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

This question is not applicable. There is no established clearing system or shares held in scripless form in Myanmar.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

As a general rule, a court order is required for the enforcement of security or a claim under a guarantee and a lender cannot enforce its security or claim under the guarantee freely after default by the borrower. According to precedents, the conditions for the lender to make a demand under a guarantee without a court order can be expressed in guarantees. Myanmar law contains two notable exceptions to this general rule. Section 69 of the TP Act states that:

- a mortgagee has the power to sell the mortgaged property for which the related loan is in default without the intervention of a court in the following cases:
  - where the mortgage is an "**English Mortgage**". Section 58 (e) of the TP Act defines an English mortgage as "where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed", and neither the mortgagor nor

the mortgagee is a Hindu, Muslim or Buddhist or a member of any other race, sect, tribe or class specified in the Government Gazette;

- where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the government;
- where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property is situated within the towns of Yangon, Mawlamyaing, Pathein, Sittwe or in other towns or areas which the government may specify in the Government Gazette; and

- the power to sell mortgaged property may not be exercised until written notice requiring payment of the principal money has been served on the mortgagor and default has been made in payment of the principal money or of part thereof, for three months after service.

There is also recognition of pledges of movable property under the Contract Act. Section 176 of the Contract Act states that if the pawnor (pledgor) is in default in payment of the debt or performance, the pawnee (pledgee) may bring a suit against the pawnor and retain the goods pledged as collateral security or may sell them upon giving the pawnor reasonable notice of the sale. Upon enforcement, the pawnee's right of sale is secured by law and the pawnee may either sue for debt retaining the pledge as collateral security or sell the goods.

Therefore, a lender needs a court order and decree to enforce its security or a guarantee claim other than those mentioned above.

If a court order is required, the enforcement of security or a guarantee claim would take a minimum of two years.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

Yes, the liquidator or creditor of the borrower can prevent the enforcement of security. A creditor of the company (the borrower) may apply to the court for winding up under section 166 of the MC Act and the court has the power to restrain further proceedings in any suit against the company.

Where a winding up has been made by a court or a provisional liquidator appointed, no suit or other legal proceeding may be commenced or continued against the company except by leave of the court under section 171 of the MC Act. In addition, the MC Act gives the liquidator the power to take the property and assets of the company into his custody and sell them, as noted above.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

Subject to the approval of the MIC and pursuant to the MFIL and MCIL (where applicable), there are no laws in Myanmar preventing a company which has been acquired by the borrower from providing financial assistance, granting security or giving a guarantee in connection with foreign exchange denominated loans that are subject to the provisions of the FEML.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Pursuant to section 109 of the MC Act, every mortgage or charge or floating charge on the undertaking or property of a company created by a company must be registered with the DICA within 21 days of its creation to be valid. If it is not registered, the security interest will be void and unenforceable against the liquidator and other creditors of the company. However, in practice, the process of how to actually register such security interest in Myanmar is uncertain (and as far as we are aware it has not been done at the DICA to date). There is no searchable public registry in which to search security interests and therefore it is difficult for parties to independently check whether or not any security has been taken and/or registered over the property or shares of a Myanmar company. In addition, as mentioned above, we understand that the DICA is generally not in the practice of checking for any registration of security against the shares or assets of a company before processing any request for the transfer or issuance of such shares. Therefore, there is a risk that any registered security interest may not in fact act as an effective protection for the relevant assets.

The Registration Act also requires that all security interests relating to immovable property be registered with the Office of the Registration of Deeds under the Ministry of Agriculture and Irrigation. Under section 49 of the Registration Act, non-registration will affect immovable property comprised in the document and the document cannot be received as evidence of any transaction affecting such property. Hence, the security interest may be unenforceable. As noted above, foreign persons are not permitted to take security over immovable property in Myanmar.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Security gives rise to the stamp duty and registration fees as set out below.

Under Article 40 of Schedule 1 of the Myanmar Stamp Act of 1899, the stamp duty for a mortgage deed is:

- 5% for a consideration equal to the amount secured by mortgage deed, when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given. Where instruments affect immovable property in the city of Yangon, an additional 2% stamp duty is due under section 68 of the Yangon Development Trust Act of 1920; and
- 1.5% for the amount secured by mortgage deed when possession is not given or agreed to be given as aforesaid. The stamp duty for a guarantee is MMK40.

Section 29(a) of the Myanmar Stamp Act requires that stamp duty is borne by the person drawing, making or executing the instrument in the absence of an agreement to the contrary.

Registration fees for mortgage deeds are calculated by the value of the right, title or interest affected:

VALUE OF RIGHT, TITLE OR INTEREST AFFECTED	FEE
WHEN THE VALUE EXCEEDS MMK700 BUT DOES NOT EXCEED MMK1,000	MMK10
FOR EACH ADDITIONAL MMK1,000 OR PART THEREOF UP TO THE TOTAL VALUE OF MMK50,000	MMK4
WHEN THE VALUE EXCEEDS MMK50,000, FOR EACH ADDITIONAL MMK1,000 OR PART THEREOF	MMK2

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. Generally, it is possible to grant a lender security over an asset which has already had security granted over it to another person. However, such an arrangement would be subject to compliance with any applicable Myanmar laws related to perfection requirements, notice and registration. See answers to questions 8 and 15 above.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

The oil/gas industry is included in the list of restricted business activities that can only be undertaken by the government under section 3(c) of the State-owned Economic Enterprises Law of 1989 (the "**SEE Law**"). Under section 4 of the SEE Law, oil/gas activities may be carried out by a joint venture with the government or by any economic organisation or a person approved by the government under conditions prescribed by the government. The government may also prohibit or prescribe conditions regarding the purchase, procurement, improvement, storage, possession, transport, sale and transfer of products derived from or produced by the oil/gas industry or property used by the oil/gas industry under section 5 of the SEE Law. Therefore, if government approval is not obtained, the acquisition of companies or assets in the oil/gas industry would be prevented by the government under the SEE Law.

18.2 Electricity

Electricity generating services can only be undertaken by the government under section 3(k) of the SEE Law. If government approval is not obtained, the acquisition of companies or assets in the electricity industry would be prevented by the government under the SEE Law.

18.3 Natural resources/mines

Natural resources/mines are included in the list of restricted business activities that can only be undertaken by the government under section 3(c) and section 3(j) of the SEE Law. If government approval is not obtained, the acquisition of companies or assets in the natural resources/mining industry would be prevented by the government under the SEE Law.

18.4 Telecommunications

The telecommunications industry is included in the list of restricted business activities that can only be undertaken by the government under section 3(f) of the SEE Law. If government approval is not obtained, the acquisition of companies or assets in the telecommunications industry would be prevented by the government under the SEE Law.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

As noted in paragraph 18.1 above, the taking of, or enforcement of, security in relation to shares in or assets of companies in the oil/gas industry is subject to prior approval(s) of the government. In addition, any company which is operating under an MIC Permit will need to apply to the MIC for any change to its shareholders or shareholding pursuant to the provisions of the MFIL.

19.2 Electricity

As noted in paragraph 18.2 above, the taking of, or enforcement of, security in relation to shares in or assets of companies in the electricity industry is subject to prior approval of the government. In addition, any company which is operating under an MIC Permit will need to apply to the MIC for any change to its shareholders or shareholding pursuant to the provisions of the MFIL.

19.3 Natural resources/mines

As noted in paragraphs 18.3 above, the taking of, or enforcement of, security in relation to shares in or assets of companies in the natural resources/mining industry is subject to prior approval of the government. In addition, any company which is operating under an MIC Permit will need to apply to the MIC for any change to its shareholders or shareholding pursuant to the provisions of the MFIL.

19.4 Telecommunications

As noted in paragraphs 18.4 above, the taking of or enforcement of security in relation to shares in or assets of companies in the telecommunications industry is subject to prior approval the government. In addition, any company which is operating under an MIC Permit will need to apply to the MIC for any change to its shareholders or shareholding pursuant to the provisions of the MFIL.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Myanmar?

Myanmar is not a party to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the Hague Convention 1971), but in theory the Myanmar Code of Civil Procedure does suggest the recognition and enforcement of certain foreign law judgments. However, there is almost universal expectation that this would not happen in practice.

Myanmar has recently acceded to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958). However, it has not yet implemented any domestic legislation giving force to this and therefore there is still no framework setting out how such enforcement would work in practice. As far as we are aware, there are currently no reported cases of the Myanmar courts recognising any foreign arbitral awards.

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MLSL offers a broad range of legal advice and assistance in relation to local and international commercial transactions and aspects of doing business in Myanmar. MLSL was established to fill the gap in the Myanmar legal market for international standards legal services at reasonable rates. MLSL is committed to providing high quality, cost-effective legal services in a timely manner.

NEPAL

KUSUM LAW FIRM

LENDING

1. Does a lender require a licence to lend money to a company based in Nepal (the "borrower")? Are there any exemptions available?

No. A local lender is not required to hold any licence to lend money to a company based in Nepal. However, if the lender is a foreigner or a foreign entity, prior approvals from the Department of Industries and the Nepal Rastra Bank (the "**Central Bank**") are required under the Foreign Investment and Technology Transfer Act, 1992 and Foreign Exchange (Regulation) Act, 1962 respectively, in the case where the borrower in Nepal is an industrial company as categorised by the Industrial Enterprises Act, 1992. However, the Central Bank's approval is sufficient in the case where the borrower is an individual or a non-industrial company.

The Foreign Investment and Technology Transfer Act, 1992 deals with the provisions relating to foreign equity participation, loan and technology transfers such as technical assistance, licensing of technical know how, trademarks etc. The Foreign Exchange (Regulation) Act, 1962 sets out the conditions with respect to dealing in foreign currency, precious metals, foreign loans and transfer of shares to a foreigner.

2. What are the consequences of making a loan to a borrower in Nepal without a licence?

A licence is not necessary for a local lender to lend money to a Nepalese company. However, a foreign loan given or taken without the prior approval of Department of Industries or the Central Bank may result in a lender not being able to recover the loan as the Central Bank's approval is required for any foreign remittance of foreign exchange from Nepal. The Central Bank will not give approval for such remittance if the requisite prior approval has not been obtained. Remittance without its approval also constitutes a criminal offence under the Foreign Exchange (Regulation) Act, 1962.

3. Will a borrower based in Nepal have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Yes. The interest rate for withholding tax is currently 15%.

4. Is there any limit to the level of interest that can be charged on loans made in Nepal?

Under the general law, the maximum allowed interest rate is 10% per annum for loans between natural persons. This cap is not applicable to loans involving a company. However, in practice, the Department of Industries tries to limit the interest payable on loans provided by a foreign lender to a Nepalese company to 5-6% per annum. The Central Bank also considers whether the local borrower has income in the form of foreign currency earnings in order to pay back the loan. It will also consider whether the interest rate is less than the local market interest rate. It is to be noted that the Department of Industries only considers cases where the borrower is an industrial company as stated in question 1 above.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes, one lender can agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred.

This is done by way of contractual agreement between all the parties involved. This may be in the form of an inter-creditors agreement or a subordination agreement.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Nepal or a guarantee from an entity incorporated in Nepal?

No, a lender is not required to be licensed or registered in order to take security over assets in Nepal or a guarantee from an entity incorporated in Nepal.

7. Does the taking of security in Nepal result in a lender being liable to tax in Nepal?

No, the mere taking of security by a lender would not by itself result in the lender being liable to tax in Nepal. However, a registration fee may be charged for registering the security document.

8. Can a security interest be taken in Nepal over the following assets?

8.1 Land

Immovable property such as land and buildings are considered as the prime security by the lenders, including local banks and financial institutions.

However, under Nepalese law, immovable property cannot be transferred by way of sale or gift, or in any other way relinquished or mortgaged to a foreigner, foreign corporate body or foreign nation, without the prior approval of the Government of Nepal. Any attempt to do so will result in the loss of the title of property and title of the property will pass to the Government of Nepal. Special approval must be obtained from the Government by a foreign lender to take immovable assets as security. This takes the form of a general application indicating the intention to acquire and details of the proposed property. There is no formal fee for application and approval. We are unaware of any approval for projects where only foreign individuals are involved.

From practical experience of acquisitions of property by foreign entities, it takes about three months to gain this approval. There have also been instances of approval given for private projects funded by the IFC.

8.2 Shares in a Nepalese company

(a) Shares (in certificated form) in a Nepalese company

Shares can be given and taken as security. However, the Central Bank's prior approval is required to pledge the shares to any foreign individual or entity. Failure to obtain such approval is considered an offence on the part of both the borrower and the lender under the Foreign Exchange (Regulation) Act, 1962.

(b) Shares and securities listed by a Nepalese company in scripless form

This question is not applicable since there is no provision for shares and securities in scripless form in Nepal as of now.

8.3 Bank accounts

Yes, security can be given and taken over bank accounts under Nepalese law for both local and foreign loans. There are no registration requirements in relation to this.

8.4 Receivables (rights under contracts)

Yes, security can be given and taken over receivables for both local and foreign loans. There are no registration requirements in relation to this.

8.5 Insurance

Yes, security can be given and taken over insurance policies and proceeds for both local and foreign loans. There are no registration requirements in relation to this.

8.6 Floating charge over all assets

Yes, a floating charge can be given and taken as security over some or all assets (except that a floating charge cannot be given over real estate to a foreigner, foreign corporate body, or foreign nation without prior approval of the government as stated in question 8.1 above). To grant such security, the board of the company must pass the appropriate resolutions and a deed of charge of directors must be executed. The security created can extend to future assets.

9. Are trusts recognised in Nepal? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Nepal?

In Nepal, there is no concept of trust as understood in many jurisdictions where the trustee holds the trust assets for the benefit of the beneficiary. Trusts are created in Nepal for religious and charitable purposes where the endower relinquishes the ownership of the property for the object(s) described in the trust deed.

9.2 Taking security over securities held in a clearing system

This question is not applicable since there is no provision relating to holding securities in a clearing system as of now.

10. Can a company incorporated in Nepal (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

A company incorporated in Nepal can give a guarantee for the debt of another local company subject to its Memorandum and Articles of Association and the Companies Act, 2006.

Under the Companies Act, no company shall, directly or indirectly, lend money to another company in excess of 60% of its paid-up capital and free reserves, or an amount equal to 100% of its free reserves (whichever is the higher), or guarantee a loan for another company or make an investment in the securities of another company in excess of these amounts. This rule does not apply to companies carrying on banking or financial transactions as part of its business, insurance companies, companies whose main objectives are to buy and sell securities, private companies which have not borrowed from a bank or financial institutions, companies which provide infrastructure facilities, investments made by a holding company in its fully owned subsidiary company, money lent by such a holding company to such a subsidiary, a guarantee given by such a holding company for a loan borrowed by such a subsidiary, and an investment made in rights shares issued under the Companies Act. Rights shares are shares issued by a company to increase capital which can be subscribed for by the existing shareholders as of right in proportion to the shares held by them in the company at the time of issuance of those shares.

In addition to the above, a local company may guarantee the debt of a foreign borrower as long as the approval of the Central Bank is obtained.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

Yes, under the Insolvency Act, 2006, the secured assets are protected from the general creditors of the borrower. No claim ranks higher than this security.

11. (b) If an intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

This question is not applicable since there is no provision relating to holding securities in a clearing system.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

The concept of a "self-help" remedy is recognised in Nepal only in the case of the recovery of loans extended by banks and financial institutions incorporated in Nepal. They can enforce the security in this situation themselves. In all other cases, a court decision is needed to enforce security or a claim under a guarantee if the security is not willingly handed over to the lender, or the guarantee is not honoured.

Obtaining judicial decisions in Nepal can take a considerable amount of time. It can take several (6-7) years before a dispute reaches conclusion.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

A liquidator or creditor cannot prevent the enforcement of security or guarantee. However, the borrower or guarantor may try to delay the enforcement by filing a claim in the courts. Since no compensation will be paid in the case of failure of the claim, the defaulters have been known to make attempts to delay enforcement.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security, or giving guarantee to secure the loan used by the borrower to acquire such company?

There are no laws other than those mentioned in question 10 above.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court. What is the time period for such filing or registration to be made and what is the consequence if it is not made?

In the case of immovable property (ie land), the mortgage has to be registered with the Landcess (Land Revenue) Office within six months of the creation of the security.

Under the Secured Transaction Act, 2006, there is a requirement to register security on moveable assets with the Security Registry. However, such Registry has not yet been established. Therefore, as the law stands at the moment, it is not necessary to register security on movable assets.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

A fee of a maximum of NPR30,000 (USD428) is levied for the registration of security over land. The charge is determined by reference to an established scale in accordance with the value of the property. This scale is revised annually. Likewise, stamp duty fees also apply in the case of movable property.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Under the Companies Act, 2006, it is permitted to grant or obtain security over assets which already have security granted over them in favour of another lender to the extent that the amount of the security granted is covered by the value of the property. This is normally done through a loan agreement referring to the existing security. In Nepal, there is a concept of "seniority" of documentation under which an older document gets priority over a newer document in the case of a commercial transaction. Therefore, the new lender will receive the proceeds left over after satisfaction in favour of the old lender if there is no *pari passu* agreement to the contrary.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

No, there are no laws preventing the acquisition of companies or assets in the oil/gas industry. This applies in the case of foreign individuals and companies.

18.2 Electricity

No, there are no laws preventing the acquisition of companies or assets in the electricity industry. This applies in the case of foreign individuals and companies.

18.3 Natural resources/mines

No, there are no laws preventing the acquisition of companies or assets in the natural resources/mining industry. This applies in the case of foreign individuals and companies.

18.4 Telecommunications

No, there are no laws preventing the acquisition of companies or assets in the telecommunications industry. This applies in the case of foreign individuals and companies.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

No, there are no laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the oil/gas industry. This applies in the case of foreign individuals and companies.

19.2 Electricity

No, there are no laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the electricity industry. This applies in the case of foreign individuals and companies.

19.3 Natural resources/mines

No, there are no laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the natural resources/mining industry. This applies in the case of foreign individuals and companies.

19.4 Telecommunications

No, there are no laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the telecommunications industry. This applies in the case of foreign individuals and companies.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Nepal?

The jurisdiction under the contract can generally be chosen to suit the preferences of the parties.

However, choosing to submit to the jurisdiction of a court outside of Nepal (including the English courts) will create a problem of enforcing the judgment. The foreign court judgment will not be enforceable in Nepal as Nepal has not yet enacted a law for the enforcement of the judgments of foreign courts. However, the Arbitration Act, 1999 provides for the enforcement of foreign arbitral awards on the basis of reciprocity. Nepal has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Therefore, it is advisable to put an arbitration clause into an agreement for dispute resolution.

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The contributor of this Chapter, Sudheer Shrestha is a Reader in Law delivering lectures in banking law. He has been advising several local and foreign banks and companies over the last 20 years and has worked as legal adviser in the establishment of several banks and companies in Nepal.

The Kusum Law Firm is a proprietorship Firm registered in the name of Senior Advocate Mr. Kusum Shrestha who is one of the most prominent figures in the Nepalese legal field and considered as father of commercial law in Nepal. The Firm was first established in 1966 under the name "Nepal Law Firm" in the joint partnership with one other lawyer, The Firm is a full service law firm specialising in corporate law.

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NEW ZEALAND

RUSSELL MCVEAGH

LENDING

1. Does a lender require a licence to lend money to a company based in New Zealand (the "borrower")? Are there any exemptions available?

There are two regimes that may be relevant.

First, if a lender wishes to carry on any activity directly or indirectly in New Zealand using the restricted words "bank", "banker" or "banking" (or any derivatives of those words) in its name, title or (in some situations) advertisements, the lender must be authorised by the Reserve Bank of New Zealand ("**Reserve Bank**") under the Reserve Bank of New Zealand Act 1989 ("**RBNZ Act**"), or be a registered bank under the RBNZ Act.

Secondly, the Financial Service Providers (Registration and Dispute Resolution) Act 2008 ("**FSP Act**") applies to persons with a place of business in New Zealand that are in the business of providing "financial services" (this includes, for example, brokers, building societies, credit providers, fund managers, insurers and banks). Such persons are required to enrol on the online searchable Financial Services Providers Register and join an approved dispute resolution scheme.

2. What are the consequences of making a loan to a borrower in New Zealand without a licence?

Under the RBNZ Act, any person who carries on any relevant activity using a name or title that includes a restricted word without authorisation may be liable to the following maximum penalties:

- in the case of an individual, imprisonment for a term of up to 12 months or a fine of up to NZD100,000; and
- in the case of a body corporate, a fine of up to NZD 1 million.
- Any person who does not register under the FSP Act when required to do so is liable to the following maximum penalties:
- in the case of an individual, imprisonment for a term of up to 12 months or a fine of up to NZD100,000, or both; and
- in the case of a person who is not an individual, a fine of up to NZD300,000.

3. Will a borrower based in New Zealand have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Yes. New Zealand tax residents and New Zealand branches of non-New Zealand residents must deduct withholding tax at the current rate of 15% on interest payments to an overseas lender, subject to relief under any applicable double tax agreement. The vast majority of New Zealand's major trading partners, including those within the Asia Pacific region, have entered into double tax agreements with New Zealand.

However, where the borrower and the overseas lender are not "associated" for tax purposes (broadly, a 50% common ownership test in relation to companies and a 25% or greater voting interest in the case of individuals), withholding tax can be reduced to 0% through the "approved issuer levy" regime. To benefit under this regime, the borrower must register with the Inland Revenue as an approved issuer, register details of the security/class of security in respect of which the relevant interest is being paid, and pay a levy of 2% (similar in nature to a stamp duty) on the amount of interest.

4. Is there any limit to the level of interest that can be charged on loans made in New Zealand?

There is no express limit on the level of interest that may be charged on loans made to a company in New Zealand.

However, under the Credit Contracts and Consumer Finance Act 2003, a Court may reopen a credit contract if it considers that the contract is oppressive, or that a party has exercised its rights conferred by the contract in an oppressive manner. In this context, "oppressive" includes being in breach of reasonable standards of commercial practice, and could extend to the level of interest charged on a loan.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. This is normally achieved by way of contractual subordination, ie the junior lender agrees to accept a lower priority ranking than the senior lender, or not to be paid by the borrower until the senior lender has been paid.

The terms of subordination are usually documented by way of a subordination deed. Depending on the nature of the subordination, the junior lender typically undertakes to the senior lender that so long as the senior debt is outstanding, the junior lender will (subject to any specific permitted exceptions in each case):

- not demand or receive any payment in respect of the junior debt;
- not exercise any right of set-off in respect of the junior debt;
- not accelerate or attempt to enforce the junior debt;
- not prove for the junior debt on the insolvency of the borrower in competition with the senior lender; and
- turn over any distribution received to the senior lender.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in New Zealand or a guarantee from an entity incorporated in New Zealand?

No. However, as noted in our comments in question 18 below, the Overseas Investment Act 2005 (the "**OIA**") stipulates that ministerial consent is required for the acquisition of any interest in sensitive land or significant business assets in New Zealand. This includes taking security over those assets, or acquiring those assets following an enforcement of such security. There are general exemptions available under the Overseas Investment Regulations 2005 to lenders who, in the ordinary course of business and in good faith, take security in those assets under a security arrangement or acquire those assets as a result of enforcing such security arrangement in good faith.

7. Does the taking of security in New Zealand result in a lender being liable to tax in New Zealand?

The mere taking of security in New Zealand does not give rise to permanent establishment in New Zealand for income tax purposes. However, income derived from a mortgage over land in New Zealand has a New Zealand source and so may result in a lender being liable to New Zealand income or withholding tax, subject to relief under any applicable double tax agreement.

8. Can a security interest be taken in New Zealand over the following assets?

Please see our comments below at question 15 for further details on the applicable registration regimes for each of the following asset categories.

8.1 Land

Yes. Security over land subject to the Land Transfer Act 1952 ("**LTA**") is taken by way of a registered mortgage. Security over land not subject to the LTA (eg certain Maori land or land which was overlooked when the prior deeds system was replaced by the LTA regime) generally is taken by way of a charge, assignment by way of security or equitable mortgage.

8.2 Shares in a New Zealand company

(a) Shares (in certificated form) in a New Zealand company

Yes, unless prohibited by the constitution of the company. Security over shares in certificated form in a New Zealand company is usually taken by way of the grant of a security interest.

In order to perfect such a security interest for the purposes of the New Zealand Personal Property Securities Act 1999 ("**PPSA**"), physical possession is usually taken by the lender/secured party of the share certificates and a financing statement is registered on the Personal Property Securities Register ("**PPSR**") against the grantor. In addition, a signed transfer for the shares and a notation on the share register (noting the security interest) is obtained.

(b) Shares and securities listed by a New Zealand company in scripless form

Yes, unless prohibited by the constitution of the company. Security over listed shares and securities in a New Zealand company in scripless form is usually taken by way of the grant of a security interest.

In order to perfect a security interest over uncertificated (scripless) shares or securities under the PPSA, a PPSR registration will be undertaken and the lender/secured party will (if the shares are traded or settled through a clearing house or securities depository) need to have its interest noted in the records of the clearing house or securities depository. If not settled or cleared through a clearing house or securities depository, the security interest must be noted in the records maintained by or on behalf of the issuer or (if held by a nominee) in the records of the nominee.

In practice, currently, lenders in New Zealand looking to take security over listed shares may provide the registrar of the shares with a reservation request noting the interest of the lender and having the registrar undertake not to transfer the secured shares without its consent. Another method used in the past is to have the security holder request that the registrar of those securities remove the security from the securities that are covered by that security holder's confidential personal identification number. As a result a settlement system participant will not be able to register itself as the holder of the security on the issuer's register (a prerequisite to lodging the security on the depository) as the electronic legal title transfer system operated by the depository and connected to the issuer's register requires the settlement system participant to enter its client's confidential personal identification number before it can effect the registration.

8.3 Bank accounts

A bank account is an account receivable in New Zealand (see below).

8.4 Receivables (rights under contracts)

Yes, unless prohibited by the terms of the contract. Security over accounts receivable is usually taken by way of the grant of a security interest or an assignment by way of security. A debtor may take a security interest in the account receivable under which the debtor is obligated. For example, a bank may take a security interest in an account held at the bank itself.

If the borrower becomes insolvent, certain preferential claims (such as unpaid wages, redundancy compensation and certain amounts payable to the Inland Revenue) have priority over the claims of secured creditors to the extent that their security is over the borrower's accounts receivable.

8.5 Insurance

Yes, unless prohibited by its terms. Security over insurances is usually taken by way of an absolute assignment or the grant of a security interest. The form of security taken may depend on whether the secured party seeks to avoid the application of the priority rules in the PPSA to its interest in the insurances.

8.6 Floating charge over all assets

In New Zealand, since the introduction of the PPSA, lenders no longer take a fixed and floating charge over all assets of a company. The common practice is instead to take a security interest over all present and after-acquired personal property of the borrower to which the PPSA applies, and a fixed and floating charge over the balance of the borrower's assets. Please also see our comments in question 11 below in relation to the priority of preferential claims in respect of security interests in accounts receivable and inventory.

9. Are trusts recognised in New Zealand? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in New Zealand?

Yes, trusts are recognised in New Zealand. A trust is a legal relationship in respect of trust assets between a trustee and a beneficiary. The trustee holds the trust assets for the benefit of the beneficiary. While the trustee has legal ownership of trust assets, the beneficiary has economic or beneficial ownership. Assets held under a trust can be tangible or intangible. Trust structures are commonly used in New Zealand to hold security for a pool of creditors.

9.2 Taking security over securities held in a clearing system

The two principal clearing systems in New Zealand are NZ Clear (operated by the Reserve Bank) and the NZX clearing system operated by New Zealand Clearing and Depository Corporation Limited (a wholly owned subsidiary of NZX).

Under both systems the legal title to the securities held in the system are held by a nominee entity controlled by the operator, with clearing system participants holding an equitable interest derived from credit to their securities account maintained by the depository. Participants' clients hold their interest as a second-tier intermediary, their rights derived through credit to their securities account held with the clearing participant. This structure involves trusts and sub-trusts, with interests being derived from the issuer's records through all vertical intermediaries.

The clearing system rules recognise certain security interests granted by clearing participants in favour of other clearing participants. In respect of investors holding their interest through a participant, measures are usually taken to prevent securities over which security is taken from entering a clearing system. Please refer to our answer to question 8.2(b).

10. Can a company incorporated in New Zealand (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Provided its constitution does not prohibit or restrict it from doing so, a company incorporated in New Zealand may give a guarantee for the debt of the borrower whether the borrower is incorporated in New Zealand or in another jurisdiction. However, the enforceability of the guarantee may be affected by laws such as the Companies Act 1993 ("**Companies Act**") which require the giving of the guarantee to have approval of the shareholders, of the guarantor or be in the best interests of the guarantor or its holding company.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

Generally, yes. To the extent that the terms of the security permit, a secured creditor of a company is generally free to take possession of and realise or otherwise deal with property of the borrower over which that creditor has a security. However:

- certain preferential claims (such as the unpaid wages, redundancy compensation and certain amounts payable to the Inland Revenue) have priority over the claims of secured creditors to the extent that their security is over the borrower's accounts receivable or inventory (which are similar to debtors and stock, respectively); and
- where a voluntary administrator is appointed over the borrower:
  - if the secured creditor does not enforce their security, the costs, expenses and remuneration of the voluntary administration will have priority over the secured creditor in respect of accounts receivable and inventory; and
  - voluntary administration triggers a moratorium period during which a secured creditor cannot generally enforce their security without the consent of the administrator. One exception is where the secured creditor is a fully secured creditor, in which case that creditor has 10 working days from receiving written notice of the appointment from the administrator to enforce their security. The moratorium operates generally for five weeks although it can be extended.

11. (b) If a clearing system participant becomes insolvent, how does this affect the claims of the secured lender in relation to securities held by the clearing system participant on behalf of clients?

Under the NZX Participant Rules, each market participant that accepts client assets must hold them on trust for clients at all times. So in the insolvency of the market participant, the client (and the client's secured lender) would look to recover its securities on the basis that the assets on trust do not form part of the insolvent market participant's assets available for distribution on liquidation. The ability of the client to obtain its securities will depend on its ability to trace its assets into the assets held by the insolvent market participant.

Where the market participant is insolvent, the secured lender may have various means of claiming or recovering the securities or the value of the securities secured in its favour.

If the securities held by the market participant are kept in a segregated account, this may confer on the chargor, and therefore the secured lender, a right to trace into that account in the event of the market participant's insolvency.

However, market participants often hold securities in a clearing system on a commingled and non-segregated basis. Where the market participant does not keep these securities in a segregated account, the secured lender may suffer losses if there is a shortfall in the overall pool of securities held by the market participant.

In particular, if the market participant account was active, it is likely that the loss resulting from the shortfall of securities would be borne pro rata among all the affected clients of the market participant. However, if the market participant account was

inactive, so that it was easier to identify the transactions that had caused the shortfall, the court may apply tracing rules to attribute the 'missing' shares to particular client(s), and the secured lender may not be required to share the losses with other clients of the market participant on a pro-rata basis.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

A lender can generally enforce its security or claim under the guarantee freely after default by the borrower, subject to:

- compliance with the terms of the security and/or any relevant subordination arrangement;
- in respect of security interests over personal property of the borrower, compliance with the notice requirements and other duties (such as obtaining the best price reasonably obtainable where the lender exercises a power of sale of collateral) under the PPSA;
- in respect of mortgages, compliance with notice and procedural requirements under the Property Law Act 2007; and
- our comments in question 11 above regarding the moratorium on enforcement action during an administration. During administration, a guarantee provided to the lender by a third party, such as a director, cannot be enforced for the period of the administration.

If the borrower is in voluntary administration, guarantees given by the director or the director's spouse cannot be enforced without court order for the duration of the moratorium. See our comments in question 11 above regarding the moratorium. If the borrower is not in voluntary administration, and subject to compliance with the terms of a guarantee and any relevant subordination arrangements, a lender can make a demand against a guarantor for payment under a guarantee without the need for a court order. If the guarantor fails to pay under the guarantee then the lender may serve a statutory demand requiring payment within 15 working days and if such demand is not satisfied, the lender may apply to the court to liquidate the guarantor.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

No. Subject to our comments below, and our comments in question 11 above relating to a creditors' moratorium during an administration, the liquidator or other creditors of the borrower or guarantor cannot generally prevent a creditor from taking enforcement action in respect of a valid security or guarantee which complies with the terms of that security or guarantee. However:

- voluntary administration can result in a deed of company arrangement ("**DOCA**"). The court has powers to restrict enforcement of security where a DOCA is operating. Orders will be made generally only when the secured creditor's position is adequately protected.
- a junior creditor may be prohibited by the terms of their subordination arrangements from taking enforcement action against the borrower (please see our comments above in relation to subordination at question 5 above).
- an otherwise valid transaction entered into by a borrower or guarantor may be challenged if that company is in liquidation and:
  - *voidable transaction* – the transaction was entered into at a time when the company could not pay its due debts and enabled another person to receive more towards satisfaction of a debt owed by the company than the person would receive in a liquidation;
  - *voidable charge* – in respect of charges granted by the company, the company was unable to pay its due debts immediately after the charge was given and the charge does not either secure fresh advances or replace a valid charge; and
  - *undervalue transactions* – the value received by a company under the transaction is lower than the value provided by the company and the transaction was entered into at a time when the company is unable to pay its due debts.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

Yes. A New Zealand company is prohibited from giving financial assistance (including the granting of security or giving guarantee to secure the loan used by the borrower to acquire shares in that company or its holding company) unless it complies with one of certain procedures set out under the Companies Act. The simplest and most commonly used procedure requires:

- all "entitled persons" of the company (ie the company's shareholders and any other persons upon whom the constitution of the company confers the rights and powers of a shareholder) agreeing in writing to the financial assistance being given; and
- before financial assistance is provided, the board of the company to be satisfied, on reasonable grounds, that the company will remain solvent immediately after providing the financial assistance.

Where the company is listed on the New Zealand Stock Exchange, there are additional procedural requirements pursuant to the NZX Listing Rules that need to be satisfied.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

A guarantee granted by the guarantor does not have to be registered or filed with a governmental body/court.

Security given by the borrower or guarantor should be registered.

In relation to real property, a legal mortgage over land registered under the LTA should be registered with Land Information New Zealand. Pursuant to the LTA, instruments registered on real property titles take effect according to the date and time of registration. Generally, registered mortgages have priority over subsequently registered mortgages and unregistered mortgages. Hence, failure to register may lead to postponement of priority.

There are also separate registration requirements which are applicable to some land which is not subject to the LTA.

In relation to personal property, in New Zealand, the PPSA governs the creation, perfection and priority of security interests in personal property (subject to certain exceptions contained in the PPSA). There are also various transactions that are specifically deemed to be security interests under the PPSA, including transfers of accounts receivable and chattel paper, leases for a term of more than one year and commercial consignments. Security interests may be perfected by possession or registration of a financing statement on the PPSR. Although registration is not mandatory, a security interest perfected by registration will generally have priority over unperfected security interests or subsequently registered security interests. Accordingly, failure to register or otherwise perfect a security interest in personal property leaves the secured party's priority vulnerable to subsequent security interests granted in the same personal property.

In addition to (or, in some cases, instead of) registration on the PPSR, a number of other registration regimes may also be applicable, depending on the asset concerned. For example:

- ships: an interest created or provided by a transfer, assignment, mortgage or assignment of a mortgage of a ship exceeding 24m in registered length is outside the scope of the PPSA. The Ship Registration Act 1992 provides for the registration of a mortgage over such ships;
- fishing quota: the Fisheries Act 1996 provides for the registration of mortgages over quota shares;
- insurances: the Life Insurance Act 1908 provides for the registration of mortgages of life insurance policies; and
- radio frequencies: the Radiocommunications Act 1989 provides for the registration of mortgages over licences to operate under a specific frequency.

Although registration of security in relation to the above asset classes is not mandatory, failure to register can lead to a loss of priority under the relevant regime.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

There is no stamp duty in New Zealand. Payment under a guarantee may constitute an interest payment for withholding tax purposes, with implications as discussed at question 3 above. There are also costs associated with registration of securities as outlined in our comments to question 15 above.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. It is possible to grant second ranking security over an asset as a matter of New Zealand law. Generally, where there are a number of competing creditors with security interests over the same asset, they will, subject to compliance with any applicable registration or perfection requirements (see our comments above in relation to registration of security under question 15), rank in the order in which their interests were created, registered or perfected. It is also generally possible for competing secured lenders to enter into contractual arrangements that modify their priority position (see our comments to question 5 above). Such priority arrangements may also be registered under the applicable regime.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

There are no industry specific laws which prevent the acquisition of companies or assets in the oil or gas industry in New Zealand. However:

- operating permits and other licences may be required in order to operate mining and exploration businesses. The Crown owns the in ground petroleum and any company wanting to prospect, explore or mine petroleum in New Zealand must obtain a permit from New Zealand Petroleum and Minerals under the Crown Minerals Act 1991. Amendments to the permit regime under the Crown Minerals Act 1991 took effect from 24 May 2013;
- before a company can undertake certain activities (for example, exploration drilling) they must comply with the appropriate environmental regulation; in particular the Resource Management Act 1991 and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012;
- operators carrying out petroleum exploration and extraction activities will be subject to health and safety regulation, in particular the Health and Safety in Employment Act 1992. New regulations under this Act came into effect in June 2013;
- companies providing gas services will be subject to various regulations including the Gas Act 1992, Hazardous Substances and New Organisms Act 1996, Gas Regulations 1993 and the Gas (Information Disclosure) Regulations 1997; and
- providers of certain gas line services will be subject to regulations under the Commerce Act 1986 such as information disclosure and price quality regulation.

18.2 Electricity

There are no industry specific laws which prevent the acquisition of companies or assets in the electricity industry in New Zealand. However:

- the electricity industry is governed by the Electricity Industry Act 2010, which establishes the Electricity Authority;
- participants in the electricity industry must register and supply information to the Electricity Authority and comply with the Electricity Industry Participation Code which specifies the functions of the system operator, how their functions are to be performed and sets requirements relating to transparency and performance; and
- providers of electricity lines services will be subject to regulations under the Commerce Act 1986, such as information disclosure and price quality regulation.

18.3 Natural resources/mines

There are no industry specific laws which prevent the acquisition of companies or assets in the mining industry in New Zealand. However:

- operating permits and other licences may be required in order to operate mining and exploration businesses. The Crown owns the in ground minerals and any company wanting to mine minerals must obtain a permit from New Zealand Petroleum and Minerals under the Crown Minerals Act 1991;
- before a company can undertake certain activities they must comply with environmental legislation, in particular the Resource Management Act 1991;
- operators carrying out mining will be subject to health and safety regulation, in particular the Health and Safety Employment Act 1992, the Health and Safety in Employment (Mining Underground) Regulations 1996 and the Health and Safety in Employment (Mining Underground) Regulations 1999; and
- New Zealand fisheries are managed by a quota management system which limits the total catch of each quota species from each defined quota management area. Overseas companies intending to own or control fishing quota in New Zealand must obtain consent by meeting certain criteria under the statutory provisions relating to overseas fishing.

18.4 Telecommunications

There are no industry specific laws which prevent the acquisition of companies or assets in the telecommunications industry in New Zealand. However:

- the Telecommunications Act 2001 promotes competition within the industry by regulating and providing for the regulation of the supply of certain services between service providers; and
- as the telecommunications market in New Zealand is highly concentrated, competition law restrictions should be noted.

COMPETITION LAW

New Zealand's competition legislation prohibits persons (which includes any association of persons, whether incorporated or not) from entering into contracts, arrangements or understandings or acquiring assets or shares of a business if that acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

Due to the highly concentrated nature of many of the key industries in New Zealand, competition law should always be considered before proceeding with acquisitions in these industries.

OVERSEAS INVESTMENT REGIME

The OIA regulates the acquisition by an "overseas person" of "sensitive land" or business assets in New Zealand with a value in excess of NZD100 million. An "overseas person" is any person who is not a New Zealand citizen and is not ordinarily resident in New Zealand. The definition of "overseas person" also includes any non-New Zealand entity and any entity that is 25% or more owned or controlled by overseas persons.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

No. Other than the general restrictions set out above, and our comments relating to the overseas investment regime in question 6, there are no laws preventing the taking or enforcement of security in relation to shares in or assets of a company in the oil/gas industry.

19.2 Electricity

No. Other than the general restrictions set out above, and our comments relating to the overseas investment regime in question 6, there are no laws preventing the taking or enforcement of security in relation to shares in or assets of a company in the electricity industry.

19.3 Natural resources/mines

No. Other than the general restrictions set out above, and our comments relating to the overseas investment regime in question 6, there are no laws preventing the taking or enforcement of security in relation to shares in or assets of a company in the natural resources/mining industries.

19.4 Telecommunications

No. Other than the general restrictions set out above, and our comments relating to the overseas investment regime in question 6, there are no laws preventing the taking or enforcement of security in relation to shares in or assets of a company in the telecommunications industry.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in New Zealand?

Yes, subject to our comments below.

Judgments obtained from a superior court (meaning a court of unlimited jurisdiction) in the United Kingdom are registrable under the Reciprocal Enforcement of Judgments Act 1934 ("**REJ**"). A judgment may be registered provided that:

- it is a money judgment (not, for example, an injunction);
- it is final and conclusive (this is not a requirement that all appeals have been exhausted); and
- it is not in respect of taxes, fines or penalties.

Registered judgments will be enforceable in the same manner as judgments obtained in the High Court of New Zealand.

Furthermore, if the judgment in question is not registrable under the REJ because of the identity of the court, it may nonetheless be enforced by way of common law action in New Zealand courts, subject to certain conditions that are similar to those under the REJ.

The applicable limitation period for bringing an action on a foreign judgment is 12 years.

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PAKISTAN

ORR, DIGNAM & CO.

LENDING

1. Does a lender require a licence to lend money to a company based in Pakistan (the "borrower")? Are there any exemptions available?

The financial services sector is highly regulated in Pakistan. As a general rule, loans and finance can be provided, as a business, only by banks or non-banking financial companies ("**NBFCs**"). Banks are regulated by the central bank, the State Bank of Pakistan (the "**SBP**") under the Banking Companies Ordinance 1962 (the "**Banking Ordinance**") and the regulations and circulars issued under the Banking Ordinance. NBFCs are regulated by the Securities and Exchange Commission of Pakistan (the "**SECP**") under the Companies Ordinance 1984 (the "**Companies Ordinance**") and the rules and regulations issued under that Ordinance. An entity (which is not a bank or an NBFC) wishing to engage in lending within Pakistan may be subject to the Moneylenders Ordinance 1960 (the "**MLO**"). The MLO requires persons carrying on the business of money-lending to have an effective licence under the MLO. The MLO does not apply to loans advanced by banks, co-operative societies or companies registered under the Pakistan company laws and whose accounts are subject to audit. Therefore, if any entity wishes to enter and/or operate as a lender in the Pakistani market, it should consider creating either a bank or an NBFC.

As mentioned above, SBP approval is required for establishing a bank or the branch of a foreign bank. A licence to undertake banking business is also required. Under the Banking Ordinance, "banking" is defined as the acceptance of, for the purpose of lending or investment, deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise. A banking company (ie a bank) is defined as a company which conducts the business of banking in Pakistan.

A lender, who has been refused a licence, may in certain circumstances continue to lend money. Case law under the Banking Ordinance suggests that a lender would still be able to carry on business as a money-lender, albeit the depositor could not draw cheques on him.

Foreign lenders that have no presence in Pakistan do not require a licence to lend to a Pakistani borrower. A Pakistani borrower would be subject to the applicable foreign exchange regulations of the SBP and these must be complied with to ensure the ability of the Pakistani borrower to make repayments to a foreign lender.

2. What are the consequences of making a loan to a borrower in Pakistan without a licence?

As mentioned above, a banking/NBFC licence regulates the banking/NBFC business. It is not a permit for a lender to operate. As such, there is no consequence of making a loan without a licence per se, provided the entity is not undertaking the business of banking or an NBFC. Under the Banking Ordinance, SBP has the power to call for certain information, where it appears that a company is acting as a banking company without a licence. The SBP may seize books, accounts and relevant documents in respect of any business that may be operating in contravention of the Banking Ordinance. After giving the company an opportunity of showing cause against the proposed action for contravention of the Banking Ordinance, the SBP may make a declaration to that effect. The chief executive and officers of the company are liable to imprisonment and a fine.

A lending company without a banking licence (or a NBFC) may not have recourse to the banking recovery laws which provide a more efficient means of enforcing recovery of loans and securities. Similarly, where the moneylender is not a bank or an NBFC, then certain special concessions and/or incentives available to financings provided by banks/NBFCs would not be available to such moneylenders. Furthermore, where the lender is not a bank/NBFC, and is not exempted under the MLO, and makes a loan to a borrower without the required licence, the lender will not be entitled to recover any money or enforce any security in respect of that loan in any court. If a foreign lender wishes to enforce its loan or security in respect of such a loan in Pakistan, then it would have to seek recourse to the normal civil courts of Pakistan as the special banking courts cannot deal with financings based on interest.

3. Will a borrower based in Pakistan have to deduct amounts for withholding tax on interest payments made to an overseas lender?

A borrower based in Pakistan must deduct withholding tax on interest payments made to an overseas lender at the rate prescribed in the Income Tax Ordinance 2001, unless a tax exemption or concession is available. The exemptions under the Income Tax Ordinance 2001 include any profit on debt payable to a non-resident person in respect of a private loan to be utilised projects in Pakistan approved by the government, and any income of a non-resident from profit on monies borrowed under a loan agreement approved by the Federal Government.

4. Is there any limit to the level of interest that can be charged on loans made in Pakistan?

There is no set limit to the level of profit that can be charged on loans made in Pakistan in domestic financings provided by banks/NBFCs. Domestic financing by banks/NBFCs in Pakistan should be under the permitted modes of Islamic financings. Foreign currency loans from overseas lenders are in the conventional form, ie based on interest. The foreign exchange regulations specify, in certain cases, the permissible levels of interest and other terms for foreign currency borrowings by foreign controlled companies as well as other companies in Pakistan. If the rate of interest exceeds the prescribed limit, then permission of the SBP is required for repatriating the interest payments.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. This would be contractually documented and, where necessary, the preference of the senior lender over the junior lender would be required to be registered with the appropriate authority (eg the Registrar of Companies pursuant to section 121 of the Companies Ordinance. See our response to question 15 below).

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Pakistan or a guarantee from an entity incorporated in Pakistan?

No. Subject to our comments above, there is no requirement per se for a foreign lender to be registered or licensed to take security over assets in Pakistan or benefit from a guarantee by an entity incorporated in Pakistan. However, under the foreign exchange regulations, any security to be created by a Pakistani entity in favour of a non-resident, and the underlying borrowing, would require general or special permission of the SBP. The general permissions granted by the SBP are set out in the Foreign Exchange Manual of the SBP.

7. Does the taking of security in Pakistan result in a lender being liable to tax in Pakistan?

No. The mere taking of security in Pakistan per se does not result in the foreign lender being liable to pay tax. However, as part of the financing transaction, there may be various fees payable for registering and perfecting the security interests. Please refer to our answer to question 16 for further details.

8. Can a security interest be taken in Pakistan over the following assets?

8.1 Land

Security over land in Pakistan is taken by way of a legal charge or a mortgage. The most common form of a mortgage over land is the mortgage by deposit of title deeds, which does not require registration with the Land Registry.

A registered mortgage (mortgage deed) may also be created as security. However, such a mortgage would, in addition to the applicable stamp duty, also attract *ad valorem* land registration costs and is therefore generally not used. Where a charge or mortgage is created by a company, the same (if it is a charge covered by the scope of section 121 of the Companies Ordinance) must be registered with the Companies Registry within 21 days of its creation. Please refer to our response to question 15.

8.2 Shares in a Pakistani company

Security over shares of a company in Pakistan can be taken by way of a pledge. Please refer to our answer to question 15 for further details.

8.3 Bank accounts

Security over a bank account may be created by way of a lien, a fixed or a floating charge in favour of a lender.

8.4 Receivables (rights under contracts)

An assignment by way of security of receivables and/or rights under a contract may be made in favour of a lender, subject to any restrictions contained in the contract.

8.5 Insurance

Please refer to our answer to question 8.4.

8.6 Floating charge over all assets

A borrower may create a floating charge over all its assets in favour of a lender.

From a foreign exchange regulations standpoint, any security to be created by a Pakistani entity in favour of a non-resident, and the underlying borrowing, would require general or special permission of the SBP. The general permissions granted by the SBP are set out in the Foreign Exchange Manual of the SBP.

9. Are trusts recognised in Pakistan? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Pakistan?

Yes, trusts are recognised in Pakistan. A trust is a legal relationship in respect of trust assets between a trustee and a beneficiary. The trustee holds the trust assets for the benefit of the beneficiary. While the trustee has legal ownership of trust assets, the beneficiary has the economic or beneficial ownership.

9.2 Taking security over securities held in a clearing system

Where a pledge is to be created on securities or shares of a corporate entity, the methodology differs depending on whether or not the concerned security is listed on the stock exchanges. Unlisted shares are held in certificated form.

In the case of securities of listed companies, all securities traded therein are required to be held in dematerialized form in terms of the Central Depositories Act, 1997 ("**CDC Act**") and the Central Depositories Company of Pakistan Limited Regulations ("**CDC Regulations**") made under the CDC Act. Such dematerialized securities are called book-entry securities ("**Book-entry Securities**") in the CDC Act and under the regulations of the stock exchanges in Pakistan, all trades and transactions on stock exchanges can be effected only in respect of Book-entry Securities, which are entered in the account of any account holder or sub-account holder with the Central Depository Company of Pakistan ("**CDC**"). The CDC Act and the CDC Regulations provide a detailed mechanism enabling the creation of security interest on securities held in electronic form with the CDC. Section 12 of the CDC Act regulates the creation of pledge of the Book-entry

Securities and the following is a summary of the procedure required for pledging securities:

- Book-entry Securities can be pledged only in favour of an Eligible Pledgee (as defined below) to secure the payment of a debt or liability or the performance of any obligation by an account holder or sub-account holders;
- the term "eligible pledgee" ("**Eligible Pledgee**") is defined in the CDC Act to mean any person who, in accordance with the CDC Regulations, is recognised by CDC as eligible for the purpose of receiving any pledge of Book-entry Securities. In other words, a pledge of Book-entry Securities can only be made in favour of an Eligible Pledgee;
- under the CDC Regulations, any person, company, corporation or institution may be permitted to become an Eligible Pledgee so far as they comply with the applicable requirements prescribed under the CDC Regulations. It should be noted that due to the exchange control requirements of the State Bank, prior permission of the State Bank is required for the creation of a pledge over Pakistani securities in favour of non-residents;
- a pledge of Book-entry Securities is created when securities are blocked in an account or sub-account and the holder of an account or sub-account gives instructions to the CDC, in accordance with the CDC Regulations, for this purpose. The effect of blocking is that the account holder etc., ceases to handle the pledged Book-entry Securities and notice of the creation of the pledge is made available to the Eligible Pledgee through the Central Depository System ("**CDS**") operated by the CDC; and
- in case of default by a pledgor account holder etc., the Eligible Pledgee concerned is authorised to make a pledge call in terms of the CDC Regulations and move the pledged Book-entry Security from the account of an account holder to the account in the CDC of a stock broker for the purposes of sale on the stock exchange.

Accordingly, where the security over electronic shares is to be created in favour of a trustee, such trustee would have to be an Eligible Pledgee as described above.

10. Can a company incorporated in Pakistan (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Prior approval of the SBP is required to give a guarantee, an undertaking or open a letter of credit on behalf of a resident of Pakistan in favour of a non-resident company, the implementation of which may involve payment to a non-resident either in foreign currency or rupees. Similarly, prior approval of the SBP is required for giving guarantees in favour of residents in Pakistan either on behalf of non-residents, or against overseas guarantees or collaterals lodged outside Pakistan.

An "authorised dealer" (ie a bank licensed to deal in foreign exchange) may, however, issue guarantees in favour of foreign suppliers/lenders to cover repayment of loans and payment of interest under foreign private loan/supplier credit, in accordance with the terms and conditions of the agreement registered with the SBP.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

Where the borrower becomes insolvent, a secured creditor has an independent right to enforce his security outside of the normal course of insolvency proceedings. If a lender has perfected the security over an asset in Pakistan, it may join the insolvency proceedings or enforce its security independently against the borrower. Priorities are regulated by the order in which the security interests are registered under the Companies Ordinance. However, lenders may also agree amongst themselves that the securities created in their favour at different times will rank *pari passu* inter se in point of security.

In a winding up, the secured creditors may independently enforce and realise their security over the assets that are secured in their favour. If the amount realised is less than the amount due to the secured creditor, he may prove the shortfall amount as part of the insolvency proceedings. A secured creditor may, however, also decide not to enforce his security and surrender it to the liquidator for the benefit of all creditors, including himself, in which case he will share in the distributable funds as an unsecured creditor on a pari passu basis with other unsecured creditors.

A secured creditor may neither realise nor surrender his security, but, in his affidavit for proof of debt, give a value which he assesses of his security. If the liquidator accepts the valuation, he may redeem it on payment to the creditor of the assessed value. If the liquidator does not accept the valuation, he may require the security to be sold on terms agreed between the liquidator and the creditor. If no such agreement is reached, then the sale may be arranged as the court directs. In that case, the sale amount, if realised, after the amount of the value of the security assessed by the creditor, (if this is less than the amount due to the creditor) will be paid to the creditors.

Under the Companies Ordinance, the order of priorities of payments to creditors upon winding up is as follows:

- preferential payments including taxes, wages and remuneration of employees and workmen, contributions towards the employee funds, insurance and Workmen's Compensation Act 1923;
- winding up expenses;
- secured creditors;
- other creditors including unsecured creditors; and
- contributories (shareholders etc).

11. (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

If the securities are held through a custodian ("**Intermediary**"), this will mean that the securities are entered in a sub-account with CDC maintained under the accounts family of the custodian with CDC. Securities entered in a sub-account of the secured lender with CDC will be presumed to be owned by the secured lender from a legal standpoint. Therefore, on balance, there is no apparent risk for the secured lender to hold any Book-entry Securities in a sub-account with CDC through a custodian. Nonetheless, it should be ensured that the securities are entered

in a sub-account of the secured lender and the title of sub-account is that of the secured lender. Of course, under the CDC Act, a custodian (Participant) is not permitted to deal with any Book-entry Securities entered in a sub-account under his control without the permission of the sub-account holder. If a custodian deals with such securities without the permission of the sub-account holder, the custodian will be deemed to have committed an offence under the CDC Act. Nonetheless, if the custodian does deal with the securities entered in a sub-account, CDC will not stop that as the CDS of CDC is an end-user driven system. Therefore, the secured lender should select such custodian with whom it has an ongoing relationship at international level and with whose creditability and bona fide it is fully satisfied.

As discussed above, the title to the Book-entry Securities entered in any sub-account under the accounts family of the custodian will be that of the sub-account holders. Therefore, an insolvency of the custodian will not affect the title of the secured lender to the securities entered in any sub-account under the accounts family of the custodian with CDC. The secured lender will be entitled and able to recover the securities entered in its sub-accounts with CDC.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

Lenders generally have the power to take possession of the property, appoint a receiver, foreclose on a mortgage, sell the secured property and wind-up the corporate borrower. In the case of pledged property (where the pledged property is in the possession of the lender), the lender would generally have the contractual right to sell the pledged property directly after giving notice to the pledgor. A company may be wound up by the court on account of its inability to pay its debts. Therefore, the lender may exercise the option to enforce security through a court.

A secured creditor may "self-enforce" the security without the need for a court order. The financing documents would generally vest such power in the creditor and this is also supported by the law. However, from a practical standpoint, self-enforcement is usually not feasible as in most cases, the mortgaged/charged property is not in the possession of the lender, thereby making the transfer of possession to a third party purchaser problematic. Therefore, it would generally not be possible for a lender to handover possession to a third party purchaser. Accordingly, it is advisable to enforce the sale of mortgaged/charged property through the court.

Enforcement through the banking recovery system is slow as the defendant borrower has a number of ways to delay enforcement. Where the loan does not fall within the scope of the banking recovery laws, recourse to the civil courts has to be made. In the case of civil suits filed under the Civil Procedure Code 1908, enforcement of the security may take several years.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

In a winding up, the liquidator may, in certain circumstances, prevent the enforcement of any guarantees or unsecured claims of the company. In certain circumstances, the liquidator may set aside security given by the borrower.

Section 406 of the Companies Ordinance provides that the transfer of property (including actionable claims), or delivery of goods which is not in the ordinary course of its business, or in favour of a purchaser, or encumbrances in good faith and for valuable consideration, made one year before the presentation of a petition or the passing of a resolution for winding up, is void against the liquidator, except with a court order.

Section 408 of the Companies Ordinance provides that any conveyance, mortgage, delivery of goods, payment, execution or other actions relating to property made six months before the commencement of a winding up or the presentation of an insolvency petition on which an individual is adjudged insolvent, will be deemed fraudulent and invalid. The section further provides that any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

Under section 411 of the Companies Ordinance where a company is being wound up, a floating charge on the undertaking or property of the company created within 12 months of the commencement of the winding up shall, unless it is proved that the company was solvent immediately after the creation of the charge, be invalid except to the amount of any cash paid to the company at the time of or subsequent to the creation of, and in consideration for, the charge together with surcharge on the amount at the rate of 1% per month or part thereof as notified by the SECP in the Official Gazette.

Under section 121 of the Companies Ordinance, all security interests on the company's property or undertakings will be void against a liquidator and any creditor of the company, unless a copy of the instrument creating the security interest is filed with the Registrar of Companies. Please see our answer to question 15 for further details.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

Yes. Section 95 of the Companies Ordinance provides that a company or any of its subsidiaries is prohibited from providing financial assistance for the purpose of an acquisition of shares in the company.

However, a private company (which is not a subsidiary of a public company) may provide financial assistance by means of a loan or guarantee or provision of security for the purpose of or in connection with the acquisition of its shares or the shares of its holding company.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Under section 121 of the Companies Ordinance, a company must file and register all instruments creating mortgages or charges with the Registrar of Companies to transfer rights in property. Section 121 requires all mortgages, charges or other interests created in relation to property, whether in or outside Pakistan, to be registered with the Registrar of Companies within 21 days from the date of creation. Failure to register renders the mortgage, charge or other instruments void against a liquidator or other creditors of the company.

Once the instrument is registered, the Registrar of Companies issues a certificate of registration which is proof of perfection of the security interest. A security by way of pledge is not covered by section 121 and need not be registered.

Where a pledge is to be created on securities or shares of a corporate entity, the methodology differs depending on whether the security is listed on the stock exchange. Unlisted shares are held in certificated form. To create a valid pledge over physical shares, the original share certificate must be handed over along with executed transfer deeds signed by the borrower/transferor.

In the case of securities of listed companies, all securities are required to be held in scripless form (defined as Book-entry Securities above) under the CDC Act and CDC Regulations. The CDC Act and the CDC Regulations provide a detailed mechanism enabling the creation of a security interest on securities held in electronic form with the CDC. A pledge of Book-entry Securities is created when securities are blocked in an account or sub-account held with the CDC based on the instructions to the CDC by the concerned account or sub-account holder.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Loan agreements and security documents are subject to stamp duty. As a general rule, any dutiable document which is not stamped may not be admissible as evidence in a court in Pakistan. However, under the banking recovery laws, an unstamped or under-stamped document may also be admissible as evidence. In the Province of Sindh, stamp duty on loan and security documentation would depend on the characterisation of the facility. Financing and security documents relating to a single transaction in favour of a banking company under a mode of finance not based on interest would attract stamp duty in the range of PKR1,000 (approximately USD12) to PKR100,000 (approximately USD1,200) depending on the amount involved. Where the financing is based on interest, and the lender is a bank or a financial institution, stamp duty at the rate of 1% of the loan amount is payable. An instrument of assignment is characterised as a conveyance for the purposes of stamp duty and attracts high *ad valorem* stamp duty. If a registered mortgage is to be perfected, in addition to the stamp duty, a registration fee of 1% under the Registration Act 1908 would be payable. Stamp duty is payable on or before the execution of an instrument. If the instrument is executed outside Pakistan, then stamp duty is payable within three months of the instrument being first brought into Pakistan.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. As a general principle, it is possible to create inferior or *pari passu* security over an asset, provided there are no contractual restrictions in relation to the existing charge-holders. This would be contractually documented and, where necessary, the second security would be required to be registered with the appropriate authority (eg the Registrar of Companies pursuant to section 121 of the Companies Ordinance, discussed in question 15 below).

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

Generally, an acquisition by a foreign investor of a company or assets of a company in Pakistan is prohibited under the Foreign Exchange Regulations Act 1947, which states that no resident of Pakistan shall take any action where a company ceases to be owned by a Pakistani resident without the approval of the SBP. The SBP has made certain exemptions in this regard where a foreign investor can acquire shares in a Pakistani company.

To encourage foreign investment, a wide range of activities are now under general exemptions according to the exchange control laws. No prior approval is required if the foreign investment falls within the permitted categories and relevant exemptions. For instance, the manufacturing sector is open to foreign investment without any restriction except for arms and ammunitions, high explosives, radioactive substances, security printing, currency and mint. Up to 100% foreign equity investment is allowed in composites in agriculture, social and infrastructure and services (including IT and telecommunications services), subject to a minimum foreign equity investment of USD360,000 in the agriculture and infrastructure sectors and USD150,000 in the services sector.

The Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance 2002 (the "**Takeovers Ordinance**") prohibits any person from directly or indirectly (i) acquiring voting shares which (taken together with the voting shares, if any, already held by such person) would entitle such person to more than 25% of the voting shares in a listed company, or (ii) obtaining control of a listed company, unless such person makes a public announcement of intention and, subsequently, a public announcement of offer to acquire the voting shares or control of the company (ie a tender offer). The Takeovers Ordinance further prohibits an acquirer, who has acquired more than 25% but less than 51% of the voting shares or control in a listed company, from acquiring additional voting shares or control without making a public announcement of the offer to acquire voting shares or control in accordance with the Takeovers Ordinance.

The provisions of the Competition Commission Ordinance 2007, (the "**Competition Ordinance**") may also be applicable, depending on whether the proposed acquisition would trigger any prescribed thresholds. The Competition Ordinance, amongst others, regulates the acquisition of shares of one undertaking by another undertaking where any of the thresholds prescribed for this purpose by the Competition Commission of Pakistan (the "**CCP**") constituted under the Competition Ordinance are met. Unless an exemption applies, where these thresholds are met, it is necessary

to obtain CCP clearance. The pre-merger notification thresholds are prescribed by the CCP in the Competition (Merger Control) Regulations 2007 (the "**Merger Control Regulations**").

The thresholds are where the:

- value of gross assets (excluding goodwill) of the acquirer is PKR300 million (approximately USD3.61 million) or more;
- combined value of gross assets of the acquirer and the target is PKR1 billion (approximately USD12.05 million) or more;
- turnover of the acquirer is PKR500 million (approximately USD6.02 million) or more;
- combined turnover of the acquirer and the target is PKR1 billion (approximately USD12.05 million) or more;
- value of shares or assets to be acquired is PKR100 million (approximately USD602,410) or more; or
- total percentage of voting shares in the target held by the acquirer exceeds 10% as a result of the acquisition of voting shares.

Under the Merger Control Regulations, the following transactions are exempted from filing a premerger notification:

- a transaction in which a holding company (whether incorporated in or outside Pakistan) acquires or increases its stake in its subsidiary or the subsidiaries thereof (whether incorporated in or outside Pakistan) increase their equity investment in each other;
- a transaction in which a holding company (whether incorporated in or outside Pakistan) merges, amalgamates, combines or ventures jointly with its subsidiary or the subsidiaries thereof (whether incorporated in or outside Pakistan) merge, amalgamate, combine or venture jointly with each other;
- shares acquired by succession or inheritance;
- allotment of voting shares pursuant to a rights issue (provided that the voting securities acquired do not increase, directly or indirectly the acquiring person's per centum share of outstanding voting securities of the issue); and
- where an undertaking, the normal market activities of which include the carrying out of transactions and dealings in securities for its own account or for the account of others, acquires securities of another undertaking and sells back the acquired securities on a pre-determined price within a period of six months from the date of such acquisition.

While the above transactions may be exempted from pre-merger notification, they may still be subject to substantive review under the Ordinance, if deemed appropriate by the CCP.

18.1 Oil/gas

The prior consent of the Government of Pakistan is required in relation to an acquisition resulting in a change of control of a company or assets of a company holding a petroleum right. If there is a disposition of the share capital of the holder of a petroleum right, or its parent company, in consequence of which any person who, prior to such disposition, had effective control of the holder or its parent company ceases to have such effective control, then the Government of Pakistan would be entitled to revoke such petroleum right unless its prior consent is obtained.

18.2 Electricity

Prior approval of the National Electric Power Regulatory Authority (the "**NEPRA**"), the regulator of the power and electric sector in Pakistan is required for any change in the ownership of a licensee, ie a company that holds licences for power generation, transmission and/or distribution of electricity. Any transfer of shares or other voting securities held by a licensee equal to, or exceeding, 10% of the total number of votes would require prior authorisation from NEPRA.

18.3 Natural resources/mines

There is specific restriction on the acquisition of companies or assets in the mining industry/natural resources (excluding oil and gas) in Pakistan, subject to the general laws and regulations relating to acquisition and foreign investment. As a matter of practice, the general conditions of mining concessions will typically require that, where the mineral title holder is a company, such company must notify the relevant licensing authority of any change in its beneficial ownership of more than 5% of the issued share capital.

18.4 Telecommunications

Any transfer of more than 10% of the shares in a telecommunications company must be reported to the Pakistan Telecommunication Authority (the "**PTA**"). Prior approval of the PTA is required for any changes or proposed changes in the substantial ownership interest in or control (either direct or indirect) of a telecommunications company. The PTA may impose conditions on the telecommunications company with regard to the proposed change. Further, where the Government of Pakistan is of the opinion that the transfer of control threatens or potentially threatens the national security of Pakistan, it may terminate the licence of the telecommunications company.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

Please refer to paragraph 18.1 above.

19.2 Electricity

Please refer to paragraph 18.2 above. NEPRA has wide powers to regulate the affairs of a licensee. This includes the right to suspend or revoke the licence or to appoint an administrator where the lenders of the licensee exercise their remedies which would incapacitate the licensee from performing its obligations under its licence. As a result, prior authorisaton from NEPRA may be required where an encumbrance is proposed to be created on all or a substantial part of the licensee's assets under the licence.

19.3 Natural resources/mines

Please refer to paragraph 18.3 above.

19.4 Telecommunications

Please refer to paragraph 18.4 above. Prior written permission of the PTA is required for the sale or creation of any charge or encumbrance over any telecommunications system licensed by the PTA to the extent such charge would render the licensee incapable of performing its obligations under its licence. PTA permission is not required by a licensee for the creation of a charge over its assets to secure a financing facility obtained in the normal course of the business.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Pakistan?

Section 44-A of the Civil Procedure Code 1908 (the "**CPC**") provides that (subject to section 13 of the CPC discussed below), where a foreign judgment has been rendered by a court in a reciprocating territory (as recognised by the Government of Pakistan) outside Pakistan, it is enforceable in Pakistan as if the judgment has been rendered by the relevant court of Pakistan.

Under section 44-A of the CPC, *inter alia*, the High Court of Justice in England has been notified as a court in a reciprocating territory and, accordingly, a money judgment of that Court would, subject to the exceptions contained in section 13 of the CPC, be enforceable as if the judgment was a judgment of a District Court in Pakistan.

Enforcement of any foreign judgment for a sum of money pursuant to a loan/facility agreement will be subject to the following exceptions contained in section 13 of the CPC, which provides that a judgment shall be conclusive as to any matter thereby directly adjudicated upon except:

- where it has not been pronounced by a court of competent jurisdiction;
- where it has not been given on the merits of the case;
- where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Pakistan in cases where such law is applicable;
- where the proceedings in which the judgment was obtained were opposed to natural justice;
- where it has been obtained by fraud; or
- where it sustains a claim founded on a breach of any law in force in Pakistan.

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The firm's principal office is in Karachi – the commercial centre of Pakistan. The firm also has a well-established office in Islamabad, the capital of Pakistan. This enables it to effectively represent its clients in negotiation with the Government of Pakistan and with regulatory agencies and to serve a large client base in the Province of Punjab and the North West Frontier Province.

The firm was established in 1952 and acts for multinational corporations operating within and outside Pakistan, foreign and local banks, multilateral agencies, financial institutions and consultants, leading Pakistani industrial and business houses and public sector corporations involved in a wide range of activities.

PHILIPPINES

SYCIP SALAZAR HERNANDEZ & GATMAITAN

LENDING

1. Does a lender require a licence to lend money to a company based in the Philippines (the "borrower")? Are there any exemptions available?

As a general rule, a lender, which does not maintain a permanent establishment or carry on business in the Philippines, does not need a licence to lend money to the borrower. However, if the loan is in a foreign currency, it must be approved and registered by the *Bangko Sentral ng Pilipinas* (the "**BSP**") so that the servicing of the loan and interest thereon can be made through the Philippine banking system.

2. What are the consequences of making a loan to a borrower in the Philippines without a licence?

If the loan is not approved and registered by the BSP, the borrower cannot purchase foreign exchange with Philippine pesos from a Philippine bank for debt servicing. The borrower, in that case, will have to source its foreign exchange requirements outside the banking system by purchasing the relevant foreign currency from money changers and forex dealers not affiliated with local banks.

3. Will a borrower based in the Philippines have to deduct amounts for withholding tax on interest payments made to an overseas lender?

The applicable withholding tax on interest must be deducted by the borrower from the amount payable to the overseas lender. However, a contractual "tax gross-up" obligation on the part of the borrower is valid in the Philippines.

4. Is there any limit to the level of interest that can be charged on loans made in the Philippines?

There is no limit to the level of interest, as the Usury Law is no longer effective. However, the BSP, when approving a loan facility, ensures that the interest rates are reflective of those prevailing in the international capital markets.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes, it is possible for two lenders to agree that one of them would be preferred over the other for the repayment of debt irrespective of when that debt was incurred. This arrangement is usually contained in a subordination or an inter-creditor agreement between the lenders concerned.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in the Philippines for a guarantee from an entity incorporated in the Philippines?

There is no such licensing or registration requirement. A lender (whether foreign or domestic) is not required to be licensed or registered in order to take security over assets or a guarantee from an entity incorporated in the Philippines.

7. Does the taking of security in the Philippines result in a lender being liable to tax in the Philippines?

The taking of security by a foreign lender does not result in it being liable to tax in the Philippines. However, the security may be subject to documentary stamp tax which is usually borne contractually by the borrower.

8. Can a security interest be taken in the Philippines over the following assets?

8.1 Land

Yes, security may be taken over land by way of mortgage. However, a foreign mortgagee cannot bid or purchase land at a foreclosure sale (ie sale of property as a result of enforcement by a secured lender). Its right is limited to receiving the net proceeds from such sale.

8.2 Shares in a Philippine company

(a) Shares (in certificated form) in a Philippine company

Yes, security may be taken in respect of shares in certificated form in a Philippine company by way of a share pledge. A foreign pledgee can bid and purchase the shares at a foreclosure sale.

However, if the business of the Philippine company is nationalised, the ownership of the foreign pledgee will not be recorded in the company books to the extent that it exceeds the allowable foreign share ownership level.

(b) Shares and securities listed by a Philippine company in scripless form

Yes, security may be taken in respect of listed shares and securities in scripless form in a Philippine company by way of a pledge. A foreign pledgee can bid and purchase the shares and securities at a foreclosure sale. However, if the business of the Philippine company is nationalised, the ownership of the foreign pledgee will not be recorded in the company books to the extent that it exceeds the allowable foreign share ownership level. There is no such restriction, if the securities in question are debt (rather than equity) instruments.

8.3 Bank accounts

Yes, security may be taken in respect of bank accounts in the Philippines by way of an assignment or a pledge.

8.4 Receivables (rights under contracts)

Yes, subject to the terms of the contracts in question, security may be taken over rights under contracts by way of an assignment or a pledge.

8.5 Insurance

Yes, subject to the terms of the insurance policy in question, security may be taken over insurances by way of an assignment or a pledge.

8.6 Floating charge over all assets

No, a floating charge over all assets is not recognised in the Philippines.

9. Are trusts recognised in the Philippines? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Philippines?

Yes, trusts are recognised in the Philippines.

9.2 Taking security over securities held in a clearing system

The clearing agency keeps a record of the securities held by it and their respective beneficiaries. To the extent that the securities are held in the name of the clearing agency, it is deemed as a trustee thereof.

10. Can a company incorporated in the Philippines (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

A Philippine company can guarantee a debt of the borrower, whether incorporated in the Philippines or elsewhere, provided that the guarantor is authorised to give such guarantee under its articles of incorporation and has obtained the requisite corporate approvals.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

As a general rule, the secured assets of an insolvent company are protected from its general creditors. However, there are certain claims that have preference or priority, including taxes and claims of employees.

If a petition for borrower corporate rehabilitation is filed in court by or against the borrower, the security of the lender may be subject to the terms of the rehabilitation plan approved by the court. The court has the power to approve a borrower rehabilitation plan even over the opposition of creditors, if, in its judgment, the rehabilitation of the borrower is feasible and the opposition of the creditors is manifestly unreasonable.

11 (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

If the clearing agency ("**Intermediary**") becomes insolvent, the securities held in the clearing system will not form part of its general assets for distribution in its insolvency proceedings. Under the Civil Code of the Philippines, property held by an insolvent trustee as a trustee of an express or an implied trust will be excluded from the insolvency proceedings. Thus, the claims of the secured lender, as a beneficiary of the trust, will not be affected by the insolvency proceedings.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

As a general rule, the security of the lender (such as a pledge or a mortgage) may be enforced by the lender by way of foreclosure sale after a default by the borrower without the intervention of the courts. Enforcement with court intervention can be accomplished expeditiously in the Philippines.

A guarantee can be enforced by court action against the guarantor. However, a guarantor cannot be compelled to pay the lender unless the latter has exhausted all the property of the borrower and has resorted to all legal remedies against the borrower. A surety, on the other hand, is not entitled to this benefit.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

It is possible for a liquidator or creditor of the borrower or guarantor to prevent the enforcement of a security or guarantee through a court injunction. However, the issuance of an injunction order is discretionary especially if there is an adequate compensatory remedy. If the suretyship is in the form of a standby letter of credit, a court injunction against payment to the beneficiary is possible if there is clear proof of fraud that constitutes an abuse of the independence principle in a letter of credit and irreparable injury might follow if the injunction is not granted or the recovery of damages will be seriously prejudiced.

In a corporate rehabilitation proceeding, the court can issue a stay order prohibiting the enforcement of a security or a guarantee (but not a suretyship), if the court finds the petition sufficient in form and substance.

Under the Financial Rehabilitation and Insolvency Act, if the borrower, within 90 days before the filing of a petition for insolvency by or against it, makes any pledge, mortgage, assignment or conveyance of its property, then it will be deemed to have made a fraudulent preference or transfer which is generally void.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

No.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Pledges and guarantees are not required to be registered or filed with a government body or court. Mortgages must be registered with the Register of Deeds in order to be valid against third parties. There is no prescribed period for such registration.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Pledges and mortgages (whether over chattels or real property) are subject to a documentary stamp tax of 0.2% of the secured loan. A mortgage is also subject to a registration fee when it is registered. There is a schedule of fees based on the amount of the mortgage.

A guarantee is not subject to any documentary stamp tax or registration fee.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes, it is possible to grant a lender security over an asset that is already encumbered in favour of another person. The subsequent security will be junior to the first one, subject to compliance with any registration requirements. Where there is such requirement, priority is established by the date of registration of the security in the relevant public registry, such as the Register of Deeds. For instance, a real estate or chattel mortgage that is registered first in the relevant Register of Deeds will be preferred over one that is subsequently registered therein, unless the second security to be registered was duly executed ahead of the first security which is already registered and the first registered mortgagee had actual knowledge of the existence of the earlier executed mortgage. However, it is possible for a lender entitled to the first security to agree to be ranked *pari passu* with a subsequent lender, in an inter-creditor agreement between them.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

There are no laws preventing the acquisition of assets in the oil and gas industry. However, the shareholdings of non-Philippine nationals in companies in the oil and gas industry are limited to not more than 40% of the outstanding voting capital stock.

18.2 Electricity

There are no laws preventing the acquisition of assets in the electricity industry. However, the shareholdings of non-Philippine nationals in companies engaged in the distribution of electricity are limited to not more than 40% of the outstanding voting capital stock.

18.3 Natural resources/mines

There are no laws preventing the acquisition of assets in the natural resource/mining industry. However, the shareholdings of non-Philippine nationals in companies in that industry are limited to not more than 40% of the outstanding voting capital stock.

18.4 Telecommunications

There are no laws preventing the acquisition of assets in the telecommunications industry. However, the shareholdings of non-Philippine nationals in telecommunications companies are limited to not more than 40% of the outstanding voting capital stock.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

No, however, a non-Philippine national cannot purchase more than 40% of the outstanding voting capital stock of an oil or gas company.

19.2 Electricity

No, however, a non-Philippine national cannot purchase more than 40% of the outstanding voting capital stock of a company engaged in the distribution of electricity.

19.3 Natural resources/mines

No, however, a non-Philippine national cannot purchase more than 40% of the outstanding voting capital stock of a natural resource/mining company.

19.4 Telecommunications

No, however, a non-Philippine national cannot purchase more than 40% of the outstanding voting capital stock of a telecommunications company.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in the Philippines?

As a general rule, the final judgment of an English court is enforceable in the Philippines, except where there is evidence that: (i) such English court did not have jurisdiction in accordance with its rules; (ii) the borrower had no notice of the proceedings; (iii) the judgment was obtained through collusion or fraud; or (iv) the judgment was based on a clear mistake of law or fact.

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SINGAPORE

HERBERT SMITH FREEHILLS LLP

LENDING

1. Does a lender require a licence to lend money to a company based in Singapore (the "borrower")? Are there any exemptions available?

Yes. A lender is required to hold a licence under the Moneylenders Act (Cap 188) (the "**Moneylenders Act**") in Singapore to carry on the business of lending money in Singapore unless one of the exemptions set out in the Moneylenders Act applies. Exempt categories of lenders include those regulated by other statutes eg, the Banking Act (Cap 19) (the "**Banking Act**") and the Finance Companies Act (Cap 108) (the "**Finance Companies Act**") with respect to their lending business. In addition, the Moneylenders Act exempts "any person carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money".

2. What are the consequences of making a loan to a borrower in Singapore without a licence?

Money-lending without being duly licensed, or exempted under the Moneylenders Act, is an offence and also renders the borrower's obligation to repay unenforceable. Section 14 of the Moneylenders Act expressly provides that no contract for the repayment of money lent by an unlicensed moneylender is enforceable.

3. Will a borrower based in Singapore have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Yes. The current legislation requires tax to be withheld on interest and related expenses in connection with any indebtedness paid to a non-resident lender under section 45 of the Income Tax Act (Cap 134) (the "**Income Tax Act**"). The current withholding tax rate on interest payments in connection with any loan or indebtedness is 15%.

In the case of a payment deemed to be income under the Income Tax Act made to a Singapore branch of a non-resident bank, the payer needs not withhold tax if the Singapore branch has been granted a waiver from compliance with section 45 of the Income Tax Act.

4. Is there any limit to the level of interest that can be charged on loans made in Singapore?

Under the Moneylenders Rules 2009, the maximum rate of interest a moneylender can charge is set out below.

	MAXIMUM INTEREST RATE
LOAN GRANTED TO AN INDIVIDUAL WHOSE ANNUAL INCOME ON THE DATE OF THE GRANT OF THE LOAN IS LESS THAN SGD30,000:	
(i) SECURED LOAN	13%
(ii) UNSECURED LOAN	20%
SECURED OR UNSECURED LOAN GRANTED TO AN INDIVIDUAL WHOSE ANNUAL INCOME ON THE DATE OF THE GRANT OF THE LOAN IS SGD30,000 OR MORE	TO BE AGREED UPON BETWEEN THE MONEYLENDER AND THE BORROWER

The Moneylenders Act provides the court with a broad discretion to grant the borrower relief if the interest charged in respect of the loan is excessive and a loan transaction is unconscionable or substantially unfair.

A contractual provision providing for the payment of additional amounts upon a default may not be enforceable if construed by the court as a penalty. In addition, clauses relating to default interest may not be enforceable in court if they are construed as a penalty and not a genuine and reasonable pre-estimate of the damage likely to be suffered as a result of the default in payment of the amount in question.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. It is possible and valid to subordinate debt in Singapore. There are two types of subordination commonly used in Singapore:

5.1 Contractual subordination

By contractual subordination, we refer to an arrangement whereby the senior creditors, junior creditors and the debtor agree to a set of pre-arranged rules in a contract (typically by way of an

intercreditor deed or a subordination deed) governing payment and priority, which is common in Singapore. They may also agree to restrictions in relation to the priority and enforcement of any security held by a junior creditor. Typically, in a total subordination, the junior creditor undertakes not to collect or accelerate the junior debt until the senior debt has been paid in full. It is also common for the junior creditors to undertake to turnover any monies received from the borrower if such payment is not made in accordance with the terms of the contractual arrangement, and to hold such moneys on trust for the senior creditors. The junior creditor usually agrees to be subordinated in relation to their rights on enforcement and on insolvency (whereby the senior creditor will generally direct the junior creditor as to the application of proceeds).

In the case of a breach of the contractual subordination, the senior creditor may, depending on the contractual arrangement, either claim title to the moneys held on trust for it by the junior creditor or merely have a contractual right against the junior creditor.

5.2 Structural subordination

Structural subordination describes the subordinating effect of lending to a company which is a holding company of another asset owning company. Singapore law treats the assets and liabilities of companies in a group individually and not on a group basis. Therefore, a creditor of the holding company will only be able to look to the assets of the holding company itself and not directly to the assets of the subsidiary. For that reason, a creditor of the asset owning subsidiary will effectively rank ahead of the holding company as the asset owning company will need to be liquidated (and therefore its own creditors satisfied) before its assets may be distributed to its parent for the satisfaction of the holding company's creditors. This concept is commonly used in acquisition finance transactions - the more junior debt being lent further up the chain of holding companies and therefore further away from the assets.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Singapore or a guarantee from an entity incorporated in Singapore?

Subject to our comments above on the licences required to make a loan in Singapore, there is no requirement for a lender to be licensed or registered for taking security over assets in Singapore or taking a guarantee from an entity incorporated in Singapore.

7. Does the taking of security in Singapore result in a lender being liable to tax in Singapore?

The mere taking of security in Singapore by a foreign lender does not cause the lender to be liable to Singapore tax.

However, some fees in the form of stamp duty may be incurred in connection with the entry, enforcement and performance of some securities (such as a charge over shares of a Singapore company or a mortgage over real property or land). In addition, there are some fees payable in relation to registering the security interests created by a company registered under the Companies Act (Cap 50) (the "**Companies Act**").

8. Can a security interest be taken in Singapore over the following assets?

8.1 Land

Yes. Security over land is commonly taken by way of mortgage in Singapore.

For registration requirements of security in Singapore, please refer to question 15 below.

8.2 Shares in a Singapore company

(a) Scrip shares of a Singapore company

Yes. Security over scrip shares of a Singapore company is taken by way of either mortgage (legal or equitable) or charge. For a legal mortgage, the mortgagee or its nominee becomes the registered holder of the shares whereas for an equitable mortgage, the mortgagee does not become the registered holder of the shares and the legal title remains with the mortgagor. A charge over such scrip shares is effected pursuant to the execution of the relevant security document. The chargee would typically require delivery of the original share certificates and blank share transfer forms and where the constitutional documents of the Singapore company contain any pre-emption rights, the chargor should amend its constitutional documents to ensure that these pre-emption rights do not apply to the shares subject to the charge.

(b) Scripless shares of a Singapore company

Security over scripless shares listed and traded on the Singapore Exchange (Securities Trading) Limited ("**SGX**") is governed by the Companies Act and laws and regulations made pursuant thereto. Security cannot be created over shares listed on the SGX unless permitted under section 130N of the Companies Act, or laws or regulations made pursuant to section 130P of the Companies Act.

Lenders could choose to take statutory security over scripless shares under section 130N of the Companies Act which permits security to be created in favour of a depositor:

- by way of assignment, by an instrument of assignment in the prescribed form; or
- by way of charge, by an instrument of charge in the prescribed form.

The requirement for the lender to be a "depositor" (eg, an account holder with the central depository or, itself, a depository agent) and limitations of the prescribed forms of instrument mean that lenders often take common law security as permitted under Regulation 23A of the Companies (Central Depositary System) Regulations made under section 130P of the Companies Act.

Such common law security would typically take the form of a charge and assignment whereby the security provider charges in favour of, and assigns to, the bank its interests in the sub-account maintained with the depository agent (as defined in section 130A of the Companies Act). The bank must maintain a sub-account with the same depository agent. Notice of the charge and assignment should be given to, and be acknowledged by, the depository agent.

For registration requirements of security in Singapore, please refer to question 15 below.

8.3 Bank accounts

Yes. Legal or equitable mortgages and charges may be created over bank accounts located in Singapore as specifically authorised by section 13 of the Civil Law Act (Cap 43) (the "**Civil Law Act**"). Security can be taken over bank accounts by way of a fixed or floating charge. Upon insolvency, secured creditors with a fixed charge rank in priority to the other creditors, including floating charge holders, in respect of the assets covered by such fixed charge. Further, secured creditors benefitting from a floating charge may be subject to certain preferential claims. Please refer to our response to question 11 for further details.

To effect a fixed charge over a bank account, the chargee must exercise sufficient control over that bank account. If there is insufficient control by the chargee over the bank account, Singapore courts may deem the charge to be a floating charge instead of a fixed charge.

For registration requirements of security in Singapore, please refer to question 15 below.

8.4 Receivables (rights under contracts)

Yes. Subject to any contractual restrictions (relating to assignment or creation of security interests), security interests can be created over receivables or trade debts by way of assignment of contract to an assignee. The procedure for the perfection of the receivables security depends on the nature of the assignment, ie, whether the assignment is a statutory or equitable assignment.

A legal or statutory assignment of trade debts must comply with the form and procedure prescribed by section 4(8) of the Civil Law Act. If this is not done, eg, if notice of the assignment is not provided to the debtor, the assignment may only be effective as an equitable assignment. Failing to notify the debtor of the assignment may result in the assignee losing priority to competing assignees or to those persons with a security interest in the same trade debts who give notice first.

For registration requirements of security in Singapore, please refer to question 15 below.

8.5 Insurance

Yes. Rights under an insurance policy may be assigned by way of security, subject to any contractual restrictions regarding assignment or the creation of security interests. Such rights generally include the right to payment of the insurance proceeds. A legal mortgage over a life insurance policy effected by legal assignment of the benefit of the policy must meet the requirements of section 4(8) of the Civil Law Act or comply with the provisions of the Policies of Assurance Act (Cap 392).

For registration requirements of security in Singapore, please refer to question 15 below.

8.6 Floating charge over all assets

A floating charge may be created on all the undertakings and assets (both present and future) of the company giving the charge.

A fixed charge is one that fastens to assets that are identifiable and ascertainable such as land, machinery, shares, ships and aircraft. A fixed charge attaches to such assets from the date of the charge's creation. From this point onwards, the chargor cannot deal with the assets unless a prior consent of the chargee is obtained. In comparison, although a floating charge creates an immediate security interest, it does not attach onto specific assets until "crystallisation" occurs. Whether a charge is a fixed or floating charge is not merely determined by the terms and conditions of the charge but rather is a factual determination as to the level of control exercised by the chargee over the charged assets.

For registration requirements of security in Singapore, please refer to question 15 below.

9. Are trusts recognised in Singapore? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Singapore?

Yes, trusts are recognised in Singapore. A trust is a legal relationship in respect of trust assets between a trustee and a beneficiary. The trustee holds the trust assets for the benefit of the beneficiary. While the trustee has legal ownership of trust assets, the beneficiary has beneficial ownership. Assets held under a trust can be tangible or intangible. Trust structures are commonly used in Singapore to hold security for a pool of creditors.

9.2 Taking security over securities held in a clearing system

Shares that are listed and traded on the SGX are held by a beneficiary (the "**Beneficiary**") in (i) a direct account maintained with the Central Depository (Pte) Limited (the "**CDP**") or (ii) a sub-account maintained with a depository agent.

Section 130CA(1) and Section 130CA(3) of the Companies Act provide that the CDP and the depository agent (each an "**Intermediary**") hold the shares as bare trustee for the benefit of the Beneficiary.

10. Can a company incorporated in Singapore (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

A Singapore incorporated company can guarantee the debt of the borrower, even if the borrower is incorporated outside Singapore, provided that there are no restrictions against the provision of guarantees in the Singapore incorporated company's constitutional documents. However:

- a Singapore incorporated company cannot make a loan or guarantee a loan to its own directors or directors of its related companies, unless it is an "exempt private company"; and
- a Singapore incorporated company cannot make a loan to a borrower or guarantee a loan made to a borrower if a director or the directors of the Singapore incorporated company is or together are interested in 20 per cent. or more of the total number of equity shares in the borrower unless:
  - the Singapore incorporated company is an "exempt private company"; or
  - where the borrower is the subsidiary or holding company of the Singapore incorporated company or where they are both subsidiaries of the same holding company.

This prohibition applies even when the borrower is incorporated outside Singapore.

Exempt private companies are either (i) those private companies with no more than 20 members and with no beneficial interest

being held in their shares, directly or indirectly, by any corporation, or (ii) those private companies that are wholly owned by the Singapore government, which the government has declared to be exempt private companies.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

If the borrower becomes insolvent, the liquidator will ascertain the debts of the borrower and satisfy them in order of their priority. Secured creditors possessing a valid fixed charge will rank first in priority to all other creditors in respect of the fixed charge assets. After these debts have been satisfied, certain preferential debts are next in priority for payment. These include:

- the costs and expenses of winding up;
- salaries, central provident fund contributions and other payments due to employees; and
- taxes.

Claims secured by a floating charge will rank behind certain preferential debts if the unsecured assets are insufficient to meet the preferential debts. All unsecured claims will rank *pari passu*.

11. (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

As stated in paragraph 8.2(b) above, a lender can take a statutory assignment or statutory charge or a common law security over scripless shares traded and listed on SGX.

Statutory assignment. A statutory assignment will only take effect upon the CDP transferring the book-entry securities from the Beneficiary's direct account to the lender's direct account. Once the shares have been transferred from the Beneficiary's direct account to the lender's direct account, the CDP would hold the shares as bare trustee for the benefit of the lender.

Statutory charge. A statutory charge will involve the registration by the CDP of the charge instrument on the register of charges. Unlike a statutory assignment, there is no actual transfer of the book-entry securities from one direct account to another. The book-entry securities charges are merely transferred from the free balance to the available balance of the Beneficiary's direct account to freeze such charged book-entry securities from any further dealings. In this case, the CDP would not hold the shares on trust for the lender but the lender is recognised as having a security interest in the shares.

Common law security. Where the lender is obtaining common law security, the depository agent would not hold the shares on trust for the lender but the lender is recognised as having a security interest in the shares.

Insolvency. In either situation where the Beneficiary holds the shares in a direct account with the CDP and the CDP becomes insolvent or where the Beneficiary holds the shares in a sub-account maintained with a depository agent and the depository agent becomes insolvent, the shares will not form part of the pool of assets available to creditors of the CDP or the creditors of the depository agent. The CDP or the depository agent (or the insolvency officer acting on their behalf) may, however, be able to deduct fees or other amounts owing or payable to them and any costs or amounts incurred in the preservation, recovery and handing over of the securities to the lender or the purchaser from the lender.

However, where the shares are held on a commingled and non-segregated basis by the Intermediary, and there are insufficient shares held by the CDP or the depository agent, the lender may have to trace and identify the traceable proceeds of the lender's security.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

Subject to compliance with the terms of the guarantee and/or security, a lender can generally claim under a guarantee after the borrower's default and enforce its security freely after the borrower's default without the need to obtain a court order or involve a court official. However, the lender may wish to enforce its security by way of a court order instead for, *inter alia*, the following practical reasons:

- if the lender wrongfully enforces the security, the damages could potentially be very high, particularly if third parties are affected;
- enforcement by the lender could potentially involve the tort of trespass; and
- if the lender attempts to sell the asset privately, the sale may be challenged on a number of grounds, including the authority of the lender to pass good title, the right to sell, the lack of a sale at best price and the infringement of the rights of third parties having a security interest in the asset in question.

The amount of time involved in pursuing an action in court will depend on the circumstances and whether it is contested.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

A liquidator or creditor of the borrower or guarantor cannot prevent an enforcement of a security or guarantee unless the security or guarantee is liable to being set aside or is invalid or the enforcement itself does not comply with the terms of the security or guarantee agreement. A liquidator or a creditor of the borrower may, *inter alia*, prevent an enforcement of security if they are successful in setting aside the security based on the following grounds:

Undue or unfair preferences. Section 329 of the Companies Act provides that any transfer, mortgage or other act relating to property that would be void or voidable against an individual in bankruptcy under sections 98, 99 or 103 of the Bankruptcy Act (Cap 20) (the "**Bankruptcy Act**") (read with sections 100, 101 and 102 thereof) may be void or voidable in the same manner as the liquidation of a company.

The transfer of property or any other act relating to property within the meaning of section 329 of the Companies Act amounts

to an unfair preference under section 99 of the **Bankruptcy Act** if:

- the person to whom the property is transferred is a creditor of the company or a surety or guarantor of the company's debts;
- the transaction puts the person in a better position than he would otherwise have been in the event of the company's winding up;
- the company had acted with the desire to put the person in a better position than he would otherwise have been in the event of the company's winding up; and
- the transfer occurs at the relevant time.

Under section 100(1) of the Bankruptcy Act (read with section 329 of the Companies Act), a preference is given at the relevant time if:

- the transaction is with an associate, within two years of the presentation of the petition or the commencement of winding-up; and
- in any other case, within six months of the same date.

Transactions at an undervalue. Section 98 of the Bankruptcy Act (read in conjunction with section 329 of the Companies Act) renders vulnerable any transaction entered into by a company with a counterparty if:

- the transaction is at an undervalue, ie, where the company:
  - makes a gift to the counterparty or otherwise enters into a transaction with that counterparty on terms that provide for it to receive no consideration; or
  - enters into a transaction with that counterparty for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company; and
- the transaction occurs within five years ending with the day of the presentation of the petition or the commencement of winding-up; and
- the company was insolvent at the time or becomes insolvent as a consequence of the transaction.

Floating charges. Where a company has gone into liquidation within six months of the creation of a floating charge, unless it is proved that the company was solvent immediately after the creation of the charge, that charge is void except to cover the amount of cash advanced to the company at the time of creation or subsequently, together with interest at 5% per annum.

Extortionate credit transactions. Section 103 of the Bankruptcy Act (read in conjunction with section 329 of the Companies Act) renders vulnerable any transaction entered into by a company with a counterparty if, having regard to the risk accepted by the creditor, either the terms require grossly exorbitant payments to be made in respect of the provision of the credit or it is harsh and unconscionable or substantially unfair. Such transactions are affected if they are entered into within a period of three years before the commencement of bankruptcy.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

Yes. Section 76(1) of the Companies Act states that a company, *inter alia*, must not lend money on the security of its own shares.

Also, a company must not provide financial assistance to purchasers of its shares or the shares of its parent company. Financial assistance includes granting a loan, providing security or a guarantee or releasing a company from an obligation, such as a debt. Section 76A states that if section 76(1) is not complied with, the contravening transaction or contract will be void.

However, there are exempted transactions in the Companies Act. They include:

- the payment of a dividend by a company in good faith and in the ordinary course of commercial dealing;
- a payment made by a company pursuant to a reduction of capital in accordance with the Companies Act;
- the discharge by a company of a liability of the company that was incurred in good faith as a result of a transaction entered into on ordinary commercial terms;
- where a corporation is a borrowing corporation by reason that it is or will be under a liability to repay monies received or to be received by it:
  - the giving, in good faith and in the ordinary course of commercial dealing, by a company that is a subsidiary of the borrowing corporation, of a guarantee in relation to the repayment of those monies, whether or not the guarantee is secured by any charge over the property of that company; or
  - the provision, in good faith and in the ordinary course of commercial dealing, by a company that is a subsidiary of the borrowing corporation, of security in relation to the repayment of those monies;
- the giving by a company in good faith and in the ordinary course of commercial dealing of any representation, warranty or indemnity in relation to an offer to the public of, or an invitation to the public to subscribe for or purchase, shares or units of shares in that company;
- the purchase by a company of shares in the company pursuant to an order of a court;
- the creation or acquisition, in good faith and in the ordinary course of commercial dealing, by a company of a lien on shares in the company (other than fully-paid shares) for any amount payable to the company in respect of the shares;
- the entering into, in good faith and in the ordinary course of commercial dealing, of an agreement by a company with a subscriber for shares in the company permitting the subscriber to make payments for the shares by instalments; or
- the acquisition of its shares or shares in its holding company if it complies with the "whitewash" processes in sections 76(9A), 76(9B) and 76(10) of the Companies Act.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

A guarantee given by a company incorporated in Singapore is not required to be registered or filed with any governmental body/court in Singapore.

Section 131(1) of the Companies Act provides that security in the form of a charge which is created by a company incorporated in Singapore (or the branch of a foreign corporation registered in

Singapore under Division 2 of Part XI of the Companies Act) and to which section 131 of the Company Act applies, must be lodged for registration with the Accounting and Corporate Regulatory Authority in Singapore (the "**ACRA**"). Such security must be registered within 30 days of its creation (with an additional period of 7 days if the document is executed outside of Singapore) or it will be void against the liquidator and other creditors of the company.

Charges that are subject to registration requirements under section 131 of the Companies Act are:

- a charge to secure any issue of debentures;
- a charge on uncalled share capital of a company;
- a charge on shares of a subsidiary of a company which are owned by the company;
- a charge or an assignment created or evidenced by an instrument which if executed by an individual, would require registration as a bill of sale;
- a charge on land wherever situated or any interest therein;
- a charge on book debts of the company;
- a floating charge on the undertaking or property of a company;
- a charge on calls made but not paid;
- a charge on a ship or aircraft or any share in a ship or aircraft; and
- a charge on goodwill, on a patent or licence under a patent, on a trademark or on a copyright or a licence under a copyright.

While section 131 of the Companies Act refers specifically to charges, the Companies Act defines a charge to include a mortgage and, as such, a mortgage is subject to the registration requirements provided in section 131 of the Companies Act.

Specific registration requirements for certain assets:

There are additional registration requirements for certain classes of assets such as security given over a ship, which must be in the prescribed form and registered with the Singapore Registry of Ships. For aircraft, there is no specific register of aircraft mortgages in Singapore. However, it is advisable that all security interests in aircraft are noted with the Civil Aviation Authority of Singapore. Charges provided by an individual over his property should be registered in accordance with the requirements of the Bills of Sale Act (Cap 24) if the charge constitutes a bill of sale.

There are two systems in place in Singapore to record dealings in land, whether outright transfers of ownership or transfers by way of mortgage. The first is the Deeds System which requires ownership of "unregistered" land to be transferred by deed. While it is not compulsory, it is advisable to file such deeds at the Registry of Deeds to ensure priority if there are conflicting and competing interests in the same property and to enable the deed to be introduced as evidence in court proceedings.

The second system is the Land Titles System, which requires all dealings in land registered under the Land Titles Act (Cap 157) (the "**Land Titles Act**") to be recorded in the Land Titles Register. Mortgages over real property governed by the Land Titles Act must be in the prescribed form and registered under the Land Titles Act. Transfers will only be effective if they are registered and registration is required to create a mortgage over real property.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

No stamp duty or other taxes are payable for the provision of a guarantee or the granting of security over any assets other than for dealings in land, stocks and shares. Security created over land, stocks and shares are subject to stamp duty of up to a maximum of SGD500.00. Such stamp duty must be paid within 14 days of the execution of the security agreement. However, if the security agreement is executed outside Singapore, stamp duty must be paid within 30 days of it being first received in Singapore.

A registration fee of SGD60 is payable in respect of the registration of a charge with ACRA (see question 15) in Singapore.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. It is possible to grant a second ranking security over an asset under Singapore law. However, security agreements may contain a negative pledge provision which prohibits the security provider from creating a subsequent security without the express written consent of the first security holder. Such consent, if given, will generally be subject to conditions prescribed by the first security holder and generally include contractual subordination agreements with the second security holder (see question 5). Where there are several competing creditors with security interests over the same asset, they will, subject to compliance with any applicable perfection requirements and/or notice and/or any contractual subordination agreements, rank in the order in which their interest was created and/or registered and/or crystallised.

The way of documenting a second ranking security would be the same as documenting any other security interest over the type of asset (see question 8). Both secured and unsecured creditors may enter into contractual arrangements to modify the priority position that the law confers on them in the event of the borrower's insolvency (see question 5). However, this will be subject to the priorities of the creditors preferred at law.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

Generally, there is no law in Singapore preventing the acquisition of companies or assets in the oil or gas industry.

However, no person shall, regardless of whether or not he has obtained an approval from the Energy Market Authority of Singapore (the "**EMA**") or is exempted under section 63D of the Gas Act (Cap 116A) (the "**Gas Act**"), acquire as a going concern:

- the business (or any part thereof) of a designated gas licensee conducted pursuant to its licence;
- the business (or any part thereof) of a designated entity relating to a gas pipeline network or any part thereof owned by the entity; or
- the business (or any part thereof) of a designated business trust relating to a gas pipeline network or any part thereof in respect of which, wholly or in part, the business trust is established,

unless that person, and the licensee or entity, obtains the prior written approval of the EMA.

Additionally, the EMA must be informed in writing, within 5 days of such acquisition, if any person acquires an equity interest in a designated gas licensee which results in that party holding 5% or more of the total equity interest of the designated gas licensee.

Furthermore, it is prohibited for any person to become a "12% controller", a "30% controller" or an indirect controller of a designated gas company without the prior written approval of the EMA.

"12% controller" in relation to a designated gas licensee, designated entity or designated business trust, means a person, not being a 30% controller, who, alone or together with his associates:

- holds 12% or more of the total equity interest in; or
- is in a position to control 12% or more of the voting power in, the licensee, the entity or the business trust.

"30% controller" in relation to a designated gas licensee, designated entity or designated business trust, means a person who, alone or together with his associates:

- holds 30% or more of the total equity interest in; or
- is in a position to control 30% or more of the voting power in, the licensee, the entity or the business trust.

Before acquiring the business or shares of any gas licensee, it is advisable to review the terms of the relevant gas licence as the licence may include conditions which give EMA the power to control, limit or restrict the following:

- ownership or control, directly or indirectly of the gas licensee;
- creation, holding or disposal of any interest in the gas licensee's shares or in any person holding the gas licensee's shares; or
- any other interest in the licensed gas business or undertaking of the gas licence or any part thereof.

Further, it is worth noting that under section 69 of the Gas Act, agreements (including those which provide for the direct/indirect acquisition of shares in or assets of a gas licensee) which may prevent, restrict or distort competition in any gas market in Singapore are prohibited. EMA may require the disposal of shares/assets if a transaction is found to violate section 69 therefore parties contemplating an acquisition should consider whether any competition law requirements will apply to their proposed transaction (see paragraph 18.5 below).

18.2 Electricity

Generally, there is no law in Singapore prohibiting the acquisition of electricity companies in Singapore. However, no person is permitted to acquire as a going concern:

- the business of a designated electricity licensee conducted pursuant to its licence; or
- the business of a designated entity which relates to its transmission system or any part thereof,

unless that person, and the licensee or entity, obtains the prior written approval of the EMA.

Additionally, the EMA must be informed, in writing, if any person acquires an equity interest in the designated electricity licensee which results in that party holding 5% or more but less than 12% of the total equity interest in the licensee. This requirement applies whether the interest arises through a series of transactions or otherwise.

Furthermore, it is prohibited for any person, whether through a series of transactions or otherwise, to become a "12% controller", a "30% controller" or an indirect controller of a designated electricity licensee without the prior written approval of the EMA. Any approval by the EMA may be granted subject to such conditions as the EMA considers appropriate.

"12% controller" means a person who, alone or together with his associates:

- holds 12% or more of the total equity interest in; or
- is in a position to control 12% or more of the voting power in, the licensee, the entity or the business trust.

"30% controller" means a person who, alone or together with his associates:

- holds 30% or more of the total equity interest in; or
- is in a position to control 30% or more of the voting power in, the licensee, the entity or the business trust.

Before acquiring the business or shares of any transmission, market support services or electricity licensee authorised to operate any wholesale electricity market, it is advisable to review the terms of the relevant licence as the licence may include conditions which control and restrict, directly or indirectly, on the creation, holding or disposal of shares in the licensee or its shareholders or of interests in the undertaking of the licensee or any part thereof.

Further, it is worth noting that under section 50 of the Electricity Act (Cap 89A) (the "**Electricity Act**"), agreements (including those which provide for the direct/indirect acquisition of shares in or assets of an electricity licensee) which may prevent, restrict or distort competition in any gas market in Singapore are prohibited. EMA may require the disposal of shares/assets if a transaction is found to violate section 50 therefore parties contemplating an acquisition should consider whether any competition law requirements will apply to their proposed transaction (see paragraph 18.5 below).

18.3 Natural resources/mines

Generally, there is no law in Singapore preventing the acquisition of companies or assets in the natural resources or mining industries.

18.4 Telecommunications

Generally, there is no law in Singapore preventing the acquisition of companies or assets in telecommunications companies.

However, under the Telecommunications Act (Cap 323) (the "**Telecommunications Act**"), no party may acquire any business of a designated telecommunications licensee conducted pursuant to a telecommunications licence as a going concern, unless that party and the designated telecommunications licensee obtain the written approval of the Info-communications Development Authority of Singapore (the "**IDA**"). This approval must be in the prescribed manner and obtained within the prescribed period.

Additionally, the IDA must be informed, in the prescribed form and within the prescribed period, if any person acquires an equity interest in the voting shares of the designated telecommunications licensee which results in that party (i) holding 5% or more but less than 12% of the voting shares of the licensee or (ii) being in a position to control 5% or more but less than 12% of the voting power in the licensee. This requirement applies whether the interest arises through a series of transactions or otherwise.

Furthermore, it is prohibited for any person, whether through a series of transactions or otherwise, to become a "12% controller" or a "30% controller" of a designated telecommunications licensee without the prior written approval of the IDA.

"12% controller", in relation to a designated telecommunications licensee, means a person, who, alone or together with his associates, holds 12% or more but less than 30% of the total number of voting shares in the designated telecommunication licensee or is in a position to control 12% or more but less than 30% of the voting power in the designated telecommunication licensee.

"30% controller", in relation to a designated telecommunications licensee, means a person who, alone or together with his associates, holds 30% or more of the total number of voting shares in the designated telecommunication licensee or is in a position to control 30% or more of the voting power in the designated telecommunication licensee.

18.5 Competition law

The Singapore Competition Act (Cap 50B) (the "**Competition Act**") regulates competition and dominant position abuses in the Singapore market. Section 34 of the Competition Act prohibits (unless exempted in accordance with the provisions of the Competition Act) any agreements between undertakings, decisions by associations of undertakings or concerted practices, which have, as their object or effect, the prevention, restriction or distortion of competition within Singapore.

Agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

Generally, there is no law in Singapore preventing the taking of or enforcement of security in relation to shares in or assets of an oil or gas company. Section 63(A)(3) of the Gas Act expressly states, among others, that there shall be disregarded an interest in a share of a person whose ordinary business includes the lending of money if he holds the interest only by way of security for the purposes of a transaction entered into in the ordinary course of business in connection with the lending of money. However, when it comes to enforcement of the share security which results in the acquisition as a going concern of the business of a designated gas licensee, prior approval of the EMA must be sought.

It is advisable to obtain confirmation from the EMA that the security does not constitute a breach of the law or any conditions set out in the relevant gas licence, notwithstanding that the form of security required does not involve any transfer of shares or assets.

19.2 Electricity

Generally, there is no law in Singapore preventing the taking of or enforcement of security in relation to shares in or assets of an electricity company. Pursuant to the Electricity Act and the Electricity (Control of Designated Electricity Licensees and Entities) Regulations, there shall be disregarded an interest in a share of a person whose ordinary business includes the lending of money if he holds the interest only by way of security for the purposes of a transaction entered into in the ordinary course of business in connection with the lending of money. However, when it comes to enforcement of the share security which results in the acquisition as a going concern of the business of a designated electricity licensee, prior approval of the EMA must be sought.

It is advisable to obtain confirmation from the EMA that the security does not constitute a breach of the law or any conditions set out in the relevant electricity licence, notwithstanding that the form of security required does not involve any transfer of shares or assets.

19.3 Natural resources/mines

Generally, there is no law in Singapore preventing the taking of or enforcement of security in relation to shares in or assets of a natural resources or mining company.

19.4 Telecommunications

Generally, there is no law in Singapore preventing the taking of or enforcement of security over the shares or assets of a telecommunications company.

Pursuant to the Telecommunications Act, there shall be disregarded an interest in a share of a person whose ordinary business includes the lending of money if he holds the interest only by way of security for the purposes of a transaction entered into in the ordinary course of business in connection with the lending of money. However, when it comes to enforcement of the share security which results in the acquisition as a going concern of the business of a designated telecommunication licensee, prior approval of the IDA must be sought.

It is advisable to obtain confirmation from the IDA that the security does not constitute a breach of the law or any conditions set out in the relevant telecommunications licence, notwithstanding that the form of security required does not involve any transfer of shares or assets.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Singapore?

With respect to an English law judgment, the applicable statute is the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) (the "**Judgments Act**").

Section 3 of the Judgments Act states that where a judgment has been obtained in a superior court of the United Kingdom of Great Britain and Northern Ireland, the judgment creditor may apply to the High Court in Singapore at any time within 12 months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court in Singapore.

Upon such application, the High Court of Singapore may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in Singapore, order the judgment to be registered in Singapore. Following registration of the judgment, it will be treated as though it were the judgment of the High Court in Singapore.

Notwithstanding the above, the Judgments Act provides certain restrictions on registration. No judgment will be ordered to be registered if:

- the original court acted without jurisdiction;
- the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court;
- the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;
- the judgment was obtained by fraud;
- the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or
- the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

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Our truly international finance practice offers full service capability across our Asia Pacific network. We provide a comprehensive service to lenders, borrowers, issuers, advisers and other intermediaries. Our clients are leading global banks and businesses, who come to us for the perspective we bring to deals, our strong transaction management and our ability to handle demanding structuring issues and driven timetables.

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Our team have received the following accolades:

- *Clients note the team's 'very solid understanding of structured financing' and ability to 'structure complex cross-border transactions effectively'.* (Singapore) – *Asia Pacific Legal 500 2014*
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- *'A quality practice...the team is approachable and always available, and its turnaround times are always quick but never at the cost of quality'.* (Singapore) – *Chambers Asia Pacific 2012*

SRI LANKA

NITHYA PARTNERS

LENDING

1. Does a lender require a licence to lend money to a company based in Sri Lanka (the "borrower")? Are there any exemptions available?

A lender may lend money without a licence in Sri Lanka subject to the Money Lending Ordinance No 2 of 1918 (as amended) (the "**MLO**"). The MLO applies where a person is habitually lending money to persons in Sri Lanka so as to be deemed to be in the "business of money-lending" in Sri Lanka. It is unlikely to apply to one-off or intermittent lending. The MLO provides that no person shall carry on the business of money-lending if such person:

- is an individual who is not a citizen of Sri Lanka;
- is a foreign company; or
- is a foreign firm.

The preceding provision shall not apply to a foreign firm or company which is approved by the Minister of Finance by Order published in the Gazette. The MLO does not apply to banks which are regulated under the Banking Act No 30 of 1988, as amended (the "**Banking Act**") and finance companies which are regulated under the Finance Business Act No 42 of 2011 (the "**Finance Business Act**").

The provisions of the MLO are rarely resorted to at present, as a majority of lending is done by banks or licensed financial institutions, which are governed by their own Acts of Parliament.

However, in terms of the Exchange Control Act No. 24 of 1953, as amended (the "**Exchange Control Act**"), a foreign lender would require the permission of the Controller of Exchange to lend to a borrower in Sri Lanka. These are special approvals that will be reviewed on a case by case basis and are usually obtained by the borrower as part of the approvals required at the borrower's instance. There are, however, general exemptions that have been introduced recently, as more fully set out below.

2. What are the consequences of making a loan to a borrower in Sri Lanka without a licence?

As set out above, if the lender is a foreign entity, approvals must be obtained from the Controller of Exchange prior to lending to a borrower in Sri Lanka. Violations of the Exchange Control Act will attract penalties and criminal sanctions. Further, the loan will become unenforceable and the borrower would be precluded from making payments on the loan.

Any entity which carries on a banking business without a licence under the Banking Act shall be guilty of an offence under the Banking Act. Similarly, any entity which carries on a finance business without a licence under the Finance Business Act shall be guilty of an offence under the Finance Business Act. If a finance company fails to register with the Central Bank, under the Finance Business Act, the Monetary Board of the Central Bank (the "**Monetary Board**"), which governs and regulates the banking and financial industry in Sri Lanka, may direct such a company to wind up, divest its finance business and settle its deposit liabilities within one month of such a direction.

3. Will a borrower based in Sri Lanka have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Following the recent amendment to the Inland Revenue Act No. 10 of 2006, interest accruing to any company, partnership or other body of persons outside Sri Lanka from any loan granted by such person to the Government of Sri Lanka, any public corporation or government institution, any commercial bank for the time being operating in Sri Lanka or to any other undertaking will be exempted from income tax, provided that such loan was granted on or after 1 April 2012. As such, overseas lenders are exempted from income tax on the interest on loans made to borrowers based in Sri Lanka, and accordingly withholding tax would be inapplicable.

4. Is there any limit to the level of interest that can be charged on loans made in Sri Lanka?

Yes. Insofar as banks are concerned, the Monetary Law Act No 37 of 1974 (as amended) (the "**Monetary Law Act**") provides that the Monetary Board may from time to time impose maximum rates of interest which may be charged on the amount of loans and investments. However, the Monetary Law Act goes on to state that nothing in any such order shall be deemed to require any bank to reduce the amount of its loans and investments.

In relation to finance companies, the Monetary Board is empowered under the Finance Business Act to impose maximum rates of interest on loans granted. It should be noted that in each case, the powers of the Monetary Board would only cover entities which come within its supervision and as such, regulations made by the Monetary Board in relation to levels of interest would not be applicable to foreign lenders.

It should be noted however that, as mentioned above, if the lender is a foreign entity, approval is required from the Controller of Exchange. The Controller of Exchange usually regulates or mandates the interest rates that will be applicable in such instances on a case by case basis.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. One lender can contractually agree with another lender to subordinate debt. This is done through a written contractual agreement, whereby the junior lender(s) consents not to be paid until the senior lender(s) are paid. Such an arrangement would comprise pre-arranged rules governing the priority of payment by the borrower.

If the junior lender receives any monies in breach of the contractual arrangement, it is usually agreed that the junior lender would turn over such monies to the senior lender. In the event of such breach, the senior lender merely has a contractual right against the junior lender. The junior lender may also undertake to be subordinated in relation to their rights on enforcement and on insolvency (whereby the senior lender will direct the junior lender as to the application of proceeds).

Such an arrangement would be subject to a determination of any statutory creditor's rights or any mortgage bonds.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Sri Lanka or a guarantee from an entity incorporated in Sri Lanka?

There is no requirement for a lender to be licensed or registered in order to take security over assets in Sri Lanka or a guarantee from an entity incorporated in Sri Lanka.

It should be noted however that the prior approval of the Controller of Exchange is required to take security over assets in Sri Lanka or a guarantee from an entity incorporated in Sri Lanka and in relation to the payment of any amounts that may be recovered from the enforcement of security over assets in Sri Lanka as well as on the payments made on a guarantee from an entity incorporated in Sri Lanka.

7. Does the taking of security in Sri Lanka result in a lender being liable to tax in Sri Lanka?

No. The mere taking of security in Sri Lanka by a foreign lender will not by itself cause the secured foreign lender to be liable to Sri Lankan tax.

Stamp duty may be payable according to the Stamp Duty Act No 12 of 2006 (as amended) on the execution of certain security documents and in respect of shares and property upon enforcement. In addition, there are various fees payable for the registration of security interests in Sri Lanka.

8. Can a security interest be taken in Sri Lanka over the following assets?

8.1 Land

Yes. Security over land is taken by way of a mortgage in Sri Lanka. The mortgage should be registered with the Land Registry as soon as possible from the date of creation so as to avoid conflict with another who may claim priority over the mortgage.

Where a charge or a mortgage is granted by a company, the procedure relating to such a charge is set out in the Companies Act No 7 of 2007 (the "**Companies Act**"). Such an instrument should also be registered as a charge under the Companies Act within 21 working days of the date of execution of the instrument provided the instrument is executed in Sri Lanka. In the case of an instrument executed outside Sri Lanka, it must be registered within three months of the date of execution of the instrument. These charges have to be registered at the Registrar of Companies.

8.2 Shares in a Sri Lankan company

Yes. Security over shares is taken by way of mortgage. The Mortgage Act No 6 of 1949 (as amended) (the "**Mortgage Act**") permits the agency (such as a bank) to sell, or cause the nominee to sell, the shares at the current market value.

Shares held in scripless form with the Central Depository System (the "**CDS**"), operated in Sri Lanka by the Colombo Stock Exchange, are generally secured by a mortgage over the rights of the mortgagor in respect of such shares, including the mortgagor's rights against the CDS, rights to delivery of any securities relating to the charged shares and any rights and remedies against any Intermediary (as defined below) or any other third party arising from the charged shares. Subsequent to the creation of such security over scripless shares, they will be placed in a "slash" securities account, in the names of "mortgagee/mortgagor" for purposes of identification that the securities are subject to a mortgage.

8.3 Bank accounts

Yes. Security may be taken over a bank account by way of mortgage under the Mortgage Act. Under the Mortgage Act, a bank account can be secured by way of a fixed or a floating charge. In order to effect a fixed charge over a bank account, it must be noted that the chargee must exercise sufficient control over the bank account and any proceeds in such account.

8.4 Receivables (rights under contracts)

Yes. Under the Mortgage Act, a receivable is deemed as a "book debt". A "book debt" is a debt which is due or may become due to any person on account of any loan made in the ordinary course of any business carried on by that person as a moneylender; on account of goods sold in the ordinary course of any business carried on by that person as a seller of such goods; or on account of work or services performed or rendered in the ordinary course of any business carried on for profit by that person, and is shown in the books kept by such person in the ordinary course of the business.

Under the Companies Act, a company may create a charge over its book debts.

8.5 Insurance

Yes. Under the Mortgage Act, a holder of the policy of a life insurance may create a mortgage of the policy as security.

The Mortgage Act provides for the notice to be sent by registered post to the address of the mortgagor.

8.6 Floating charge over all assets

Yes, other than over assets which are subject to separate statutory regimes (eg, real property, intellectual property, aircraft and ships).

The Companies Act provides that a company may create a floating charge over all or certain assets in a company. The difference here is that unlike an individual, a company may create a floating charge in relation to intellectual property, aircraft or ships etc. This is expressly provided for in the Companies Act.

A charge created by the company must be registered within 21 working days of its execution.

9. Are trusts recognised in Sri Lanka? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Sri Lanka?

Yes, trusts are recognised in Sri Lanka. Trusts are governed by the Trust Ordinance (Cap. 96) (the "**Trust Ordinance**"), which is based on English trust law principles, and there is provision for matters relating to trusts which are not specifically set out in the Trust Ordinance to be "determined by the principles of equity for the time being in force in the High Court of Justice in England".

9.2 Taking security over securities held in a clearing system

Trusts are not generally used in the taking of security over securities held in a clearing system. The usual method by which security is taken over scripless securities is by way of taking a formal mortgage over such securities, with such securities thereafter being deposited into a "slash" securities account, in the names of the "mortgagee/mortgagor".

10. Can a company incorporated in Sri Lanka (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

The present Companies Act has removed the objects clause. The board is given wider powers to decide on or resolve any such matters provided that they can justify such decision as being in the best interests of the company. Therefore, a company incorporated in Sri Lanka is not prohibited from giving a guarantee. If the borrower or lender is an overseas company, the Sri Lankan company is required to obtain permission from the Controller of Exchange for providing the intended guarantee.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

The Companies Act provides that if the borrower is insolvent, a secured creditor is entitled to seize, attach and realise, issue execution against or appoint a receiver in respect of property that is subject to the charge (section 358(1)(a)).

The creditor may also value the charged property and claim the value of the security as a secured creditor as well as the deficiency or the balance due as an unsecured creditor in the liquidation (section 358(1)(b)).

The secured creditor may also surrender his claim to the liquidator for the general benefit of the creditors and then claim the whole debt as an unsecured creditor in the liquidation. The preferential claims (expenses, fees, taxes, government dues, wages etc.), which are specified in Schedule 9 of the Companies Act, shall be paid in the order of priority and the other claims, which are set out in Schedule 10 (creditors who made a claim in the liquidation), shall be met with secondarily.

However, rights of the secured creditors have priority over other claims (preferential claims and claims of unsecured creditors).

See sections 358, 365 and 366 of the Companies Act.

11. (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

The CDS (as an "**Intermediary**") would be holding the securities in its system in trust and accordingly, in the event of it becoming insolvent, such securities would not be considered the assets of the CDS subject to insolvency proceedings and available for distribution to the CDS' contributories. As such, the insolvency of the CDS will not affect the claims of the secured lender of shares lodged in the CDS.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

In the case of a guarantee, there is no requirement for the lender to obtain a court order for the enforcement of the guarantee, other than where the guarantor defaults on its obligations to meet a claim made thereunder.

Enforcement of other security upon the default of a borrower must be by the lender filing an action as provided for in the relevant statutory provisions.

If the lender is a licensed bank, the Recovery of Loans by Banks (Special Provisions) Act allows the enforcement of a mortgage over property by *parate* execution. The process to be followed for such execution is set out in the said act.

Timing of recovery depends on the circumstances and nature of the procedure involved.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

Even though it is not possible to prevent the actions of a borrower or guarantor, there are instances, as per the Companies Act, where the liquidator or creditor could challenge the acts of the borrower or guarantor as void.

13.1 Transactions having preferential effect (section 367)

A company cannot give a preferential charge to secure a past advance when it is insolvent or close to insolvency. Based on the following grounds, a liquidator or creditor may successfully challenge a transaction entered into by the borrower or the company when it is unable to pay its debts as they fall due and it would be voidable on the application of the liquidator.

There is a rebuttable presumption that any transaction that takes place within one month before the commencement of a winding up is a transaction made when the company was unable to pay its debts. However, such a transaction shall only be set aside if it is made with a view to enable another person to receive preferential treatment in the liquidation. Thus, if the transaction is with a connected person (connected person encompasses directors, nominee, relatives, trustee of directors etc.), it is presumed that such effect was intended.

13.2 Voidable charge (section 368)

A charge over any property or undertaking of a company is voidable on the application of the liquidator if it was given during the specified period (specified or restricted period means one month before the commencement of winding-up – section 373(4)) and unless it falls within the exceptions laid down in the Companies Act. Under section 368, the exceptions to the rule are as follows: where the charge secures money actually advanced or paid, the actual price or value of property sold or supplied to the company, or other valuable consideration given in good faith by the guarantee of the charge at the time of, or any time after the giving of the charge and any interest payable on such amounts. It is also not voidable if the company was able to pay its debts as they fell due after giving the charge. If the charge is given prior to the specified period, such transaction also shall not be avoided.

13.3 Uncommercial transactions (section 369)

A liquidator is entitled to obtain a declaration from the court that certain transactions are void on the grounds that they are uncommercial in nature. An order may be obtained if the transaction concerned took place within the specified period, was uncommercial and, when it took place, the company was either unable to pay its debts or dues, or the resources held by the company were inadequate to enter into such a transaction. According to section 369(2), "an uncommercial transaction" is one which would not be entered into by a reasonable person in the company's circumstances, considering the benefits or detriments it would create, or the benefits it would deliver to a third party. Thus, it may also be deemed uncommercial if the transaction was entered into following a court order even if the creditors of the company are not a party to it.

Section 371 provides for other orders that may be granted when a transaction or charge is set aside. For instance, an agreement relating to the transaction may be declared void or unenforceable. But it shall not affect the title or interest of a person in property which he has acquired from a person other than the company, for valuable consideration and in good faith.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

Except in the instances specified in the Companies Act, a company is prohibited from giving financial assistance directly or indirectly for the purpose of acquiring its own shares. The Companies Act specifies certain formalities that need to be followed by a company in giving financial assistance for the purchase of its own shares. Section 70(2) sets out those formalities: the board must resolve that such assistance is in the interests of the company; that the terms and conditions of such assistance are fair and reasonable to the company and those shareholders not receiving such assistance; and, that the company will satisfy the solvency test immediately after giving such assistance.

If the financial assistance exceeds 10% of the stated capital, the company must obtain a certificate stating that the board of directors is of the opinion that the company shall satisfy the solvency test, as set out in the Companies Act.

Subject to certain exceptions (section 72), the Companies Act prohibits a subsidiary of a company from acquiring the shares of its holding company, in order to circumvent the purchase of the company's own shares through its subsidiaries.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

All charges must be registered with the Company Registrar, as required by the Companies Act. It shall be the duty of any company registered in Sri Lanka (section 102), including overseas companies (section 112), to cause a copy of the instrument to be delivered to the Company Registrar within the time stipulated. In the case of an instrument executed in Sri Lanka, registration shall take place within 21 working days of the date of execution. Any instrument executed abroad must be registered within three months from the date of execution.

Certain other types of security must also be registered. They include security for the issue of debentures, for uncalled share capital, instruments which require registration as a bill of sale, land or an interest in land and book debts, charges on a ship or aircraft, goodwill or intellectual property, trust receipts or inland receipts.

Security relating to land or any interest in land, charge on a ship or aircraft or goodwill or intellectual property shall also be registered with the relevant government authority as provided by the governing laws of that property. Security over movable property must be registered at the land registry relating to the area in which the movable property is located in order for such security to be valid and enforceable.

All mortgages must be registered under the Registration of Documents Act. However, guarantees need not be registered under Sri Lankan law.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

No stamp duty or any other tax or levy is involved for the giving of guarantee. However, stamp duty is imposed on mortgages (ie, 0.1% of the amount secured, at present) and on any share certificate issued consequent to the issue, transfer or assignment of shares (ie, 0.5% of the higher of the consideration paid and the net asset value per share, at present).

Section 125 of the Companies Act provides that an instrument of transfer of shares registered outside Sri Lanka shall be deemed as a transfer of property situated outside Sri Lanka and shall be exempted from stamp duty.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. It is possible to grant such security in Sri Lanka through a Concurrent or Secondary Mortgage Bond. When such second ranking security is granted, the competing creditors with security interests of the same kind over the same asset (who are subject to compliance with any applicable requirements and/or notice) shall rank in the order in which their interest was created and/or registered. The documentation required for the second security is the same as for the first security. Both secured and unsecured creditors may enter into contractual arrangements to modify the priority position that the law confers on them in the event of the borrower's insolvency. However, this is not possible if the agreement is prejudicial to third party creditors who are not a party to the agreement and who would ordinarily rank pari passu. Such an arrangement would be subject to a determination of any statutory creditor's rights.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

No. There is no law preventing the acquisition of companies or assets in the oil or gas industry in Sri Lanka. In fact, there has been an IPO of an oil company, which was subsequently traded on the Colombo Stock Exchange.

The Petroleum Resources Act No 26 of 2003 provides that all petroleum resources occurring naturally within the sub-surface of the land area and in the internal waters, territorial sea, contiguous zone, continental margin and the exclusive economic zone of Sri Lanka shall vest in the State.

18.2 Electricity

Yes. The Sri Lanka Electricity Act No 20 of 2009 (the "**Electricity Act**") established the Public Utilities Commission (the "**PUC**") which grants licences and regulates the electricity industry in Sri Lanka. Any such acquisition will require the permission of the PUC. Such acquisition must not affect the competitive market.

The Electricity Act lists the entities which are eligible for a licence: (i) the Ceylon Electricity Board; (ii) a local authority; and (iii) a company established under the Companies Act of which the government, a public corporation, a company in which the government holds more than 50% of its shares or a subsidiary of such company, holds such number of shares as may be determined by the Secretary to the Treasury, with the approval of the Minister of Finance.

Licences may be assigned with the permission of the Minister in charge of Power and Energy and the PUC. However, given the strict conditions for an applicant seeking a licence and the fact that the Government of Sri Lanka is seeking to control electricity generation in Sri Lanka, such an acquisition by a fully private company is doubtful.

18.3 Natural resources/mines

No. However, under the Mines and Minerals Act No 33 of 1992 (the "**Mines and Minerals Act**"), the ownership of minerals is vested in the State. A person seeking to explore, transport, process or trade for mine or minerals etc. shall apply for a licence from the Geological and Mines Bureau established under the Mines and Minerals Act. Such a licence may be transferred to a licensee. No licence is required for the search or development of mineral water.

In relation to water, any assets of the National Water Supply or Drainage Board established under Law No 2 of 1974 (as amended) could be sold by the said board.

18.4 Telecommunications

Any acquisition or merger of a telecommunications company requires the prior permission of the Telecommunications Regulatory Commission of Sri Lanka (the "**TRC**"), which regulates the telecommunications industry in Sri Lanka. It is the TRC which issues licences to a telecommunications operator to operate within Sri Lanka. Any sale or purchase of a telecommunications company will require the prior approval of the TRC before its ownership structure can be modified or transferred.

These requirements are normally stated in the licences issued by the TRC. Such an acquisition must also not be anti-competitive. The competitive policy is also enforced by the Consumer Affairs Authority (the "**CAA**"). Any intended acquisition or merger may require the approval of the CAA.

Telecommunications companies are traded on the Colombo Stock Exchange. Hence, there is no restriction in the mere purchase of shares in a telecommunications company. The restrictions apply to acquisitions or mergers.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

No. There are no laws in Sri Lanka preventing the taking of or enforcement of security in relation to shares in or assets of oil or gas companies.

19.2 Electricity

No. There are no laws in Sri Lanka preventing the taking of or enforcement of security in relation to shares in or assets of electricity companies.

19.3 Natural resources/mines

No. There are no laws in Sri Lanka preventing the taking of or enforcement of security in relation to shares in or assets of natural resources or mining companies.

19.4 Telecommunications

No. There are no laws in Sri Lanka preventing the taking or enforcement of security over the shares or assets (including telecommunications licences) of telecommunications companies. However, it may be prudent to obtain a comfort letter from the TRC stating that the TRC has no objection in the company mortgaging its shares or assets.

If the enforcement of the security leads to a transfer of shares in the telecommunications company or in the disposal of its assets (including its telecommunications licence), such transfer and disposal will be subject to TRC approval.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Sri Lanka?

Yes. The Reciprocal Enforcement of Foreign Judgments Ordinance No 41 of 1921 allows enforcement of judgments of a superior court in the United Kingdom. However, judgments based on English law per se obtained in other jurisdictions would not be enforceable in Sri Lanka.

Arbitral awards are enforceable irrespective of where the arbitral award was entered, so long as it is not open to challenge under the very limited grounds set out for the refusal of registration of arbitral awards in the Arbitration Act no 11 of 1995. The said act is substantially based on the UNCITRAL Model Law.

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Nithya Partners was established in 1997 with the goal of delivering a modern and responsive service in corporate and financial law. The firm provides a full service, with its partners bringing together a unique combination of multi-disciplinary experience and knowledge gathered over several years in the public and private sector. These strengths have made it possible for the firm to deliver innovative, timely and commercial solutions to clients, and thereby position itself as one of the leading law firms in Sri Lanka within a relatively brief period. Nithya Partners has rapidly earned a reputation for excellence and developed a broad local and foreign client base consisting of several quoted and unquoted companies, multinationals, financial institutions, investment funds, multi-lateral organisations, governments and statutory bodies. The firm is committed towards maintaining the highest standards of service delivery and meeting the needs of its clients. Nithya Partners provides legal services in all aspects of corporate and financial law. Apart from these areas, which remain its primary focus, the firm also provides legal services in other ancillary areas of law to its clients where required.

TAIWAN
LEE AND LI

LENDING

1. Does a lender require a licence to lend money to a company based in Taiwan (the "borrower")? Are there any exemptions available?

No particular licence is required to lend money to a company based in Taiwan. However, the Taiwan Company Act provides that the capital of a Taiwanese company shall not be lent to any person unless the lending arrangement is an inter-firm business transaction or is necessary for inter-firm short-term financing. As a result, no company in Taiwan except banks, insurance companies or pawn shops may engage in lending as a business. Nevertheless, there is no restriction on a foreign lender of making a loan to Taiwanese borrowers outside of Taiwan regardless of whether the foreign lender is licensed.

2. What are the consequences of making a loan to a borrower in Taiwan without a licence?

Since no licence is required to lend money to a borrower in Taiwan, the loan agreement will not be affected by whether the lender has a licence or not. However, as explained above, currently it is not possible to set up a company to operate a lending business in Taiwan. Nevertheless, there is no restriction on a foreign lender of making a loan to Taiwanese borrowers outside of Taiwan regardless of whether the foreign lender is licensed.

3. Will a borrower based in Taiwan have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Yes. A borrower based in Taiwan must deduct withholding tax of 20% on interest payable to a foreign lender. However, an applicable tax treaty between Taiwan and a foreign country may reduce such withholding tax rate to 10%.

4. Is there any limit to the level of interest that can be charged on loans made in Taiwan?

The maximum rate of interest is 20%. The lender will not be entitled to recover any interest in excess of 20%. If the interest rate falls between 12% and 20% per annum, the borrower will be entitled to repay the loan with one month's notice at any time after one year. The one year period starts from the first drawdown date.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. Lenders may seek repayment upon maturity against the borrower's assets irrespective of when the debts were incurred. Moreover, the law does not prohibit lenders from entering into agreements among themselves on the priority of repayment. Where lenders enter into a priority repayment agreement under which one lender agrees for the other lender(s) to have preferential right to repayment, such agreement shall be binding on the parties to such agreement, but not all the other lenders towards the same borrower who do not agree with the agreement.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Taiwan or a guarantee from an entity incorporated in Taiwan?

Yes, as a general rule, a lender has to be registered as a mortgagee or pledgee to take security over assets in Taiwan. A foreign lender which does not have a branch in Taiwan is not a "legal entity" and therefore cannot obtain a registrable security interest. Under Taiwan law, such registrable security interests include security interests created in respect of real estate, machinery, equipment, ships and vehicles. However, a foreign lender which is not a citizen of or not incorporated in a foreign country which allows Taiwan nationals' claims on reciprocity, cannot obtain a security interest over real estate.

However, the Civil Aeronautics Administration customarily will permit a foreign lender without a branch in Taiwan to be registered as a mortgagee in connection with aircraft financing and the Harbour Bureau customarily will permit a foreign lender without a branch in Taiwan to be registered as a mortgagee in connection with ship financing.

Pledges of accounts receivables and unlisted shares are not registrable under Taiwan law, therefore, a foreign lender may take security over accounts receivables and unlisted shares. However, listed shares are transferred through the depository & clearing system, and security interest over listed shares must be registered with the depositary system. According to the current practice, a

foreign lender may have its securities dealer in Taiwan to arrange for the registration of a pledge of listed shares.

A foreign lender may also take a guarantee from an entity incorporated in Taiwan without any licence or registration.

7. Does the taking of security in Taiwan result in a lender being liable to tax in Taiwan?

No. The mere taking of security in Taiwan by a foreign lender will not by itself cause the secured foreign lender to be liable to Taiwanese tax.

However, stamp duty may be payable in relation to the sale of shares and property upon enforcement of the respective security. In addition, there are various fees payable for registering security interests in Taiwan.

8. Can a security interest be taken in Taiwan over the following assets?

8.1 Land

Yes. Security over land is taken by way of mortgage. The mortgage should be registered with the Land Registry within a month of its creation.

8.2 Shares in a Taiwanese company

Yes. Security over unlisted shares in a Taiwanese company is taken by way of pledge.

(a) Shares (in certificated form) in a Taiwanese company

Shares in certificate form shall be pledged only by the holder thereof by way of endorsement on the share certificates, and the name of the pledgee shall be indicated on the share certificates.

(b) Shares and securities listed by a Taiwanese company in scripless form

Listed shares generally held in scripless form with the depositary and clearing system operated in Taiwan by the Taiwan Depositary & Clearing Corporation ("**TDCC**") are generally secured by way of registering the pledge in respect of such shares with the TDCC.

8.3 Bank accounts

Yes. The deposit of a bank account can be pledged by way of a written agreement executed by the depositor and the lender and a notice served to the account bank. The pledge will only be effective when a notice has been served on the bank account.

8.4 Receivables (rights under contracts)

Yes. Subject to the terms of the contract, security over receivables and/or rights under contracts is taken by way of security assignment in favour of the lender. A service of notice of such assignment to the obligor is required for perfection.

8.5 Insurance

If the premium has been fully paid for one year or more, the proposer of life insurance may obtain loans from the insurer by using the insurance contract as security. Customarily, in property insurance, rights under insurance (including the payment of insurance proceeds) may be assigned by way of security, subject to any restriction in respect of assignment and the creation of security interests in that insurance policy.

8.6 Floating charge over all assets

No. Different categories of assets are subject to different perfection procedures. Taiwan law does not permit the taking of security over "all assets" of an entity by way of floating charge.

9. Are trusts recognised in Taiwan? How is a trust used in the context of taking security over securities held a clearing system?

9.1 Are trusts recognised in Taiwan?

Yes, trusts are recognised in Taiwan. Under the Trust Act, the term "trust" refers to the legal relationship in which the settlor transfers or disposes of a right of property and causes the trustee to administer or dispose of the trust property according to the stated purposes of the trust for the benefit of a beneficiary or for a specified purpose.

9.2 Taking security over securities held in a clearing system

The owner of the securities as settlor may create a trust by transferring such securities to the trustee with the mandate that the trustee may follow the instruction of the lender(s) to dispose of the securities upon the occurrence of an event of default and distribute the proceeds from the disposal of the securities to the lender(s). The trust of the securities can be registered with the TDCC.

10. Can a company incorporated in Taiwan (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated outside of Taiwan, would the guarantor still be able to give the guarantee?

Yes, a company may act as a guarantor in respect of the debt of a borrower (whether foreign or otherwise) provided the constitutional documents give it this power. However, if the guarantor is a public company in Taiwan, the provision of the guarantee will be subject to more restrictions, such as the amount of guarantee and the scope of the guaranteed, imposed on public companies.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

Yes. As a general rule, the secured assets are protected from general creditors. Land value incremental tax has priority over all claims and mortgages. There are also special rules in place for security over ships.

11. (b) If an intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

This question is not applicable since the concept of security trustee does not exist under the laws of Taiwan.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

A lender may enforce its security interest without court intervention by agreement with the security provider. If no such agreement can be reached, the lender must obtain a court order to enforce its security interest, by public auction, or a private auction certified by a notary public or a representative of the chamber of commerce if the security is a chattel or stock. It will take two to four weeks for a lender to obtain a court order to enforce such security interest. However, it may take four to six months or longer to process the auction and collect and distribute the proceeds.

A lender must commence court proceedings to claim against the guarantor under the guarantee except where the guarantor has (i) waived the right to refuse performance to the lender unless and until the lender has filed compulsory execution proceedings against the principal debtor's property and subsequently still fails to recover the full amount, and (ii) agreed to the enforcement clause stated in the guarantee which has been certified by a notary public accordingly. It is very difficult to predict the time for court proceedings against the guarantor. If the guarantee has been certified, the lender may apply to the courts for an order of enforcement.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

A creditor of the borrower or guarantor cannot prevent the enforcement of a security interest or guarantee.

A liquidator of the borrower cannot prevent the enforcement of a security interest except where a special liquidation is ordered by the court on the borrower. A liquidator of the guarantor in a bankruptcy or insolvency proceeding can prevent the enforcement of a guarantee.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

No. There are no laws in Taiwan prohibiting a company from providing any financial assistance, granting security, or giving a guarantee to secure a loan used by a borrower to acquire the company (provided that it is permitted by the company's Articles of Incorporation as described in the answer to question 10 above). However, as a matter of company law, unless the directors or officers of such company can demonstrate that the company providing financial assistance, granting security or giving a guarantee, will receive a corporate benefit from the transaction, the directors or officers of the company may breach their fiduciary duties to the company.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Security over real property (such as land or a building) and certain chattels (such as machinery, equipment, ships, aircraft and vehicles) is registrable and must be registered with a competent authority. Registration typically takes several days. A security interest over real property will not be validly created if registration is not duly completed; on the other hand, if the registration is not duly made on the chattels, the security interest so created cannot be used as a valid defence against any bona fide third party.

Security over the unlisted shares of a company need not be registered with any government authority, but must be registered in the shareholders' register of the company; otherwise the security cannot be used as a valid defence against the company. Security over the listed shares shall be registered with TDCC. Registration typically takes several days.

Guarantees do not need to be registered with any government authority.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Yes. Registration fees are payable in respect of the registration of a registrable security. The registration fee for real property is 0.1% of the security interest, NT$900 for a chattel mortgage and NT$18,000 for an aircraft mortgagee. Registration fees for other properties are "nominal". No stamp duty is required for the provision of the security or the guarantee.

Granting of a guarantee by a guarantor does not give rise to any duty, taxes or fees.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Whether it is possible to grant second ranking security over an asset depends on the type of security. It is feasible to create multiple mortgages, including chattel mortgage, over the same property such as real estate, machinery, equipment, ships and vehicles. Where there are multiple mortgages over the same property, the ranks of these mortgages are determined according to the time the mortgages are created or registered. The earlier the registration is made, the higher the priority. Similar to the creation of a first ranking security, a lender and a security provider will enter into relevant security documents (such as a mortgage agreement) for a lower ranking security and then file a registration application with the competent authority as described in question 15 above. The competent authority will issue a certificate evidencing such lower ranking security to the lender after the registration is completed.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

There are no laws preventing the acquisition of companies or assets in the oil and gas industries. However, businesses involved in the import, export, production and sale of oil or gas should be approved by the central government in advance.

18.2 Electricity

There are no laws preventing the acquisition of companies or assets in the electricity industry. However, operators of businesses in the electricity sector should be licensed by the central government. Currently, foreign investment in the electricity industry is restricted by the Ministry of Economic Affairs.

18.3 Natural resources/mines

Yes. Only citizens of Taiwan may obtain mining rights. Operators in the forestry sector should be registered with competent forestry authorities. The forestry industry is not open to foreign investment.

18.4 Telecommunications

Yes. Under the Telecommunications Act, the total direct shareholding by foreigners in a Type I telecommunications company (which installs telecommunications line facilities and equipment in order to provide telecommunications services) may not exceed 49%, and the total of all direct and indirect shareholdings by foreigners may not exceed 60%. The percentage of shareholding by foreigners in Chunghwa Telecom Co., Ltd. (a state-owned telecommunications company) is prescribed by the Ministry of Transportation and Communications.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

A foreign lender without a branch in Taiwan may not take a security interest by way of registration as a mortgagee or pledgee, as explained above.

19.2 Electricity

A foreign lender without a branch in Taiwan may not take a security interest by way of registration as a mortgagee or pledgee, as explained above.

19.3 Natural resources/mines

Only citizens of Taiwan may obtain mining rights. The forestry industry is not open to foreign investment. If a foreign lender takes security over shares in companies in the mining or forestry industries, the foreign lender may not acquire the ownership of such shares on enforcement.

19.4 Telecommunications

A foreign lender without a branch in Taiwan may not take a security interest by way of registration as a mortgagee or pledgee, as explained above.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Taiwan?

A final and binding judgment by a foreign court is enforceable in Taiwan except where:

- the foreign court lacks jurisdiction pursuant to Taiwanese laws;
- a default judgment was entered into in circumstances where the notice or summons of the initiation of action had not been legally served in a reasonable time in the foreign country nor had it been served through judicial assistance provided under Taiwanese laws;
- the performance ordered by the judgment or its litigation procedure is contrary to Taiwanese public policy or morals. For example, a foreign court judgment ordering a Taiwanese company to pay under a loan agreement at a rate of interest of more than 20% could be deemed contrary to Taiwanese public policy; or
- the foreign country in question does not permit reciprocal enforcement of Taiwanese judgments.

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The largest full service law firm in Taiwan, the Republic of China (ROC), Lee and Li traces her roots to the days of Shanghai, China in the mid-1940s. In addition to the main office in Taipei, the firm also has three branch offices in Hsinchu, Taichung and Southern Taiwan. Today, Lee and Li offers premium legal services to over 30,000 clients worldwide.

Lee and Li has more than 700 staff with lawyers and legal professional staff. The firm leads the legal services market in Taiwan by offering a full range of civil and commercial legal services. It focuses on various core practice areas to meet the needs of clients, which include corporate and investment, banking and capital markets, patent and technology, trademark and copyright, IPR management and enforcement, government contracts and infrastructure and litigation and alternative dispute resolution.

THAILAND

HERBERT SMITH FREEHILLS (THAILAND) LIMITED

LENDING

1. Does a lender require a licence to lend money to a company based in Thailand (the "borrower")? Are there any exemptions available?

As a general rule, a lender who operates a "Financial Institution Business" in Thailand must have a licence for such business. Under the Financial Institution Business Act A.D. 2008 (the "**FIBA**"), Financial Institution Businesses include Commercial Banking Business, Finance Business and Credit Foncier Business. Notwithstanding the foregoing, an offshore bank or financial institution may directly grant loans to a domestic company, without a licence, if such a bank or finance institution does not accept deposits from the general public in Thailand.

2. What are the consequences of making a loan to a borrower in Thailand without a licence?

According to the FIBA, a penalty of imprisonment of terms from two to ten years and a fine from THB200,000 to THB1 million shall be imposed on a person who undertakes a Commercial Banking Business, Finance Business, or Credit Foncier Business without a licence. As mentioned in question 1, offshore financial institutions and lenders are not considered as carrying on "Financial Institution Businesses" as long as they do not take deposits from the general public in Thailand.

3. Will a borrower based in Thailand have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Yes. The Thai Revenue Code provides that a company incorporated under foreign laws, not operating a business in Thailand but receiving assessable income in the country from industries stated in the law, is liable to pay tax. Interest payments are categorised as income which is subject to tax under section 40(4)(a) of the Thai Revenue Code.

It is the responsibility of the payer to deduct withholding tax from such assessable income at the applicable withholding tax rate, remit it to the local Revenue Office and file a tax return with the Director-General of the Revenue Department within seven days from the last day of the month on which the income was paid.

Under the Thai Revenue Code, withholding tax has been fixed at 15% for assessable income in the form of interest. The offshore lender shall, subject to the terms of any double taxation treaty, be entitled to tax credit in the home country for the tax deducted in Thailand. Tax liability on other lending fees (eg, commitment fee, facility fee, agency fee) shall be considered on a case by case basis. Interest payments in respect of direct lending by an offshore financial institution, or lender, from or in Thailand, is therefore subject to 15% withholding tax.

4. Is there any limit to the level of interest that can be charged on loans made in Thailand?

The amount of interest that can be charged on loans depends on the types of lenders involved. According to the Ministerial Notification on the Maximum Interest Rate Imposed on a borrower (No.3) A.D. 1982 announced by the Ministry of Finance, the maximum interest rate levied by an offshore financial institution cannot exceed 20% per annum. Lending by corporate or individual lenders is subject to a maximum interest rate at 15% per annum under the Forbidding the Over-Limit Charge of Interest Act A.D. 1932 and under Section 654 of the Thai Civil and Commercial Code.

Lending by a local financial institution (including the local branch of a foreign bank or financial institution) is not subject to the 15% maximum interest rate, which means a higher rate can be established. However, the institution has to comply with the Notification enacted by Ministry of Finance under the Interest on Loans of Financial Institution Act A.D. 1980 to control the interest rate specified by each financial institution.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. In the context of the bankruptcy law, it is possible and valid to subordinate debt by way of a contractual arrangement whereby the junior creditor(s) agrees not to be paid by a borrower until the senior creditor(s) has been paid. The regulations of the Thai Securities and Exchange Commission only recognise subordination in the event of bankruptcy and liquidation of the issuer of debt securities. However, it is uncertain if subordination would be created by a unilateral declaration by a junior creditor or a bilateral agreement between the borrower and a junior lender. In project finance, we often find that the borrower and the creditors (who are syndicate members) as well as the paying agent and security agent enter into a multi-parties credit facilities agreement

and security sharing agreement whereby subordination is created when the junior creditor(s) and the senior creditor(s) agree to a set of pre-arranged distribution rules governing payment and priority of their claims. Another school of thought indicates that a unilateral declaration by a junior creditor or a bilateral loan agreement between the borrower and its junior creditors would be sufficient to subordinate the loans and other senior creditors may rely on this agreement to ensure their priority to receive payments from the borrower.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Thailand or a guarantee from an entity incorporated in Thailand?

As a general rule, there is no licensing or registration requirement for a foreign or offshore lender to take security over any assets in Thailand. However, a foreign lender who takes a mortgage over land in Thailand cannot foreclose the land as the Land Code prohibits foreigners from owning land. The enforcement of a mortgage can be made by way of a sale through a public auction.

7. Does the taking of security in Thailand result in a lender being liable to tax in Thailand?

No. Other than the withholding tax on incomes including interests, the fact that an offshore lender accepts security in Thailand is not conclusive evidence that he/she is doing business in Thailand. In that case, the lender shall not be liable to personal or corporate income tax under the Thai Revenue Code. A foreign or offshore lender is liable to corporate income tax if it has granted a loan through its "Permanent Establishment" in Thailand. However, stamp duty may be levied on some types of security under the Revenue Code and the borrower should be responsible for paying the duty.

8. Can a security interest be taken in Thailand over the following assets?

Thai law recognises two types of security interest that may be created by contract - mortgage and pledge. Under Thai law, mortgages may only be granted in respect of immovable property (which includes land and buildings) and certain types of movable property (eg, ships and vessels (of a certain tonnage), machinery and transportation and animals). Pledges may be created over all types of movable property, shares in the share capital of a company as well as contractual rights represented by negotiable instruments (eg, bills of exchange, promissory notes, certificate of deposits). However, despite the fact that automobiles, truck trailers and road rollers are movable property that can be mortgaged under the Motor Vehicle Act, at present they are still not capable of being mortgaged as there is no ministerial regulation under the Motor Vehicle Act to implement such mortgages.

8.1 Land

Yes. A security interest over land can be created in the form of a mortgage. An agreement to create mortgage over land and/or buildings must be in writing and registered with the appropriate land registry office where the land or buildings are situated. Failure to register will result in the proposed mortgage being null and void.

As a result of the change in the meaning of a "Credit Foncier Business" under the FIBA, a mortgagor may now register a mortgage in favour of an offshore financial institution or other lender without obtaining prior clearance from the Fiscal Policy Office, provided the Land Office is satisfied that the loan does not come from public deposits and the mortgagee does not accept deposits from the general public in Thailand. To be considered as a business entity engaged in the "Credit Foncier Business", a business entity must (i) accept monetary deposits from the general public; and (ii) use such deposits either to lend to the public by taking a mortgage over immovable property or by purchasing the immovable property by way of a sale with the right of redemption.

8.2 Shares in a Thai company

Yes, securities interest in a Thai company can be created in a form of a pledge. The share in a Thai company could be either a registered form share or a bearer share. It should be noted that the Civil and Commercial Code prohibits a Thai private company from accepting a pledge over its own shares.

(a) Shares (in certificated form) in a Thai company

In the case of a pledge of a registered form share, if a certificate representing the share or debenture in registered form is pledged, the pledge agreement needs to be made in writing and signed by the pledgor and the pledgee. The certificate representing the share subject to a pledge must be delivered to the pledgee. In addition, in order to make a pledge valid against the company and a third party, the creation of the pledge has to be recorded in the share register book of the company.

In the case of a pledge of a bearer share, a pledge can be created just by a transfer of relevant share certificate to the pledgee.

(b) Shares and securities listed by a Thai company in scripless form

A pledge of shares in a Thai listed company in scripless form can be pledged only by the pledgor notifying its broker to proceed with a pledge. In doing so, the broker will have such transaction recorded in Thailand Securities Depository Company Limited's system on behalf of a pledgor who is a shareholder.

8.3 Bank accounts

No. Thai law does not recognise any security interest over bank accounts. As noted above, Thai law only recognises pledges over rights represented by negotiable instruments, eg, bills of exchange, promissory notes and certificates of deposit. There is a Thai court ruling to the effect that a bank deposit evidenced by a passbook is not an instrument which can be pledged. However, the taking of bank accounts as collateral through conditional assignments is not uncommon among bank lenders.

8.4 Receivables (rights under contracts)

No. Thai law does not recognise any security interest over receivables. Even though it is not written in the law, bank lenders, in practice, have taken receivables as collateral through conditional assignment. The Civil and Commercial Code requires such assignment to be made in writing with the signature of an assignor affixed on the instrument. No signature of the assignee is required. In addition, in order to make the assignment valid against the debtor or a third party, the assignor or the assignee has to either send a notice informing the debtor of such assignment or procure the debtor's consent to such assignment in writing.

8.5 Insurance

No. In Thailand, insurance policies are not regarded as an instrument which may be subject to a valid pledge. In practice, the insured would transfer the insurance policy to a third party rather than using the insurance policy as an instrument for pledge. However, the taking of insurance policies as collateral through conditional assignments is possible.

8.6 Floating charge over all assets

No. A draft Personal Properties Securities Bill A.D. 2008, which allows a floating charge to be created as a security interest, is now under consideration by the legislators.

9. Are trusts recognised in Thailand? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Thailand?

At present, Thailand allows a trust to be created only for specific objective of undertaking transactions in the capital market pursuant to the Trust for Transactions in Capital Market Act B.E. 2550 (2007). A trust is a legal relationship arising from a trust instrument by settlor, transfers or creates real right or any right appertaining to property to or for another person, called a trustee, with trust and confidence in order that the trustee shall manage such property for the benefit of beneficiaries between a trustee and a beneficiary. The trustee holds the trust assets for the benefit of the beneficiary. While the trustee has technical or legal ownership of trust assets, the beneficiary has economic or beneficial ownership.

9.2 Taking security over securities held in a clearing system

Under the Capital Market Act B.E. 2550 (2007), the case where a trust may be created for the issuance of securities in a category of debt instrument on the condition that monies for repayment to investors who hold such instruments shall be under trustee's care or management so as to ensure instrument holders that even if securities issuer is subject to execution by other creditor or becomes bankrupt, property set aside in the trust shall be available for repayment to securities holders.

It is important to note that an arrangement by the trustee to keep the beneficiary's securities segregated from its own assets is an important indication of a trustee-beneficiary relationship, giving rise to a trust. It is important to note that an arrangement by an Intermediary (as defined below) to keep the beneficiary's securities segregated from its own assets is an important indication of a trustee-beneficiary relationship, giving rise to a trust.

10. Can a company incorporated in Thailand (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Yes, as far as the corporate capacity to give a guarantee has been included as one of the company's objectives. Guarantees do not create security interest over any particular assets of the guarantor, but are commonly included in commercial transactions as part of the security package required by a lender.

A practical restriction imposed by the exchange control authority is that funds recovered from the guarantor may be remitted to an offshore beneficiary only if they have obtained a favourable court order.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

Yes. As a general rule, a secured creditor has the right to enforce its security in priority over other creditors. Thai bankruptcy law gives certain secured creditors (ie mortgagee and pledgee) the right to enforce their claim over assets of the debtor prior to other unsecured creditors.

11. (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

A party who acts as a middle person dealing with payment and delivery of securities for members who are the agents of the investors ("**Intermediary**") shall segregate the assets of the person authorising the management of the private fund from its assets. Therefore, the securities would be held in segregated accounts in the clearing system. In the event of an Intermediary's insolvency, a secured lender may be conferred a right to trace into such account.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

To enforce a mortgage, a court order must be obtained by the mortgagee. The court would order a foreclosure or sale through a public auction. Foreclosure may be ordered if: (i) there are interest arrears accrued over a period of five years; (ii) the value of the property does not exceed the redemption value; and (iii) there are no other registered mortgages or preferential claims over the same property. Estimated time for the court to reach an order to sell a secured asset is approximately one to two years.

To enforce a pledge, an enforcement notice must be given to the borrower and the pledgor requiring him/her to settle all outstanding indebtedness secured by the pledge within a reasonable time. A pledge may be enforced without initiating any court proceeding. Enforcement will be arranged through the sale of the pledged asset by a public auction. Either the pledgee or a licensed professional auctioneer may conduct the auction. If the sale proceeds are inadequate to settle the entire indebtedness, the debtor remains liable for any shortfall. To enforce such claim for the shortfall amount, the creditor must obtain a court order.

A default by the principal debtor triggers the duty of the guarantor under a guarantee to pay the guarantee debts. If the debtor and the guarantor have agreed to be jointly liable, the beneficiary will be able to claim from the guarantor before the principal debtor. If a guarantor fails to repay the debt, a claim under such guarantee may be enforced by initiating court proceedings which are likely to take approximately one to three years to complete.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

Yes. A liquidator or creditor is entitled to petition for a court order to cancel any security taking agreement or guarantee executed by the debtor, provided that (i) such juristic act is done by the debtor with the knowledge that it would prejudice his creditor (a fraudulent act); and (ii) at the time of the act, the person taking security or guarantee knew the consequence stated under (i).

The Bankruptcy Act sets out a presumption that when a fraudulent act arises within one year before the application for adjudication of bankruptcy and thereafter, or if it is a gratuitous act or if the debtor received compensation of a less than reasonable amount, it shall be presumed that the debtor and the person taking security or guarantee were aware that the security taking agreement would prejudice other creditors as mentioned in the previous paragraph.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

No.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

A mortgage of immovable properties must be registered with the appropriate land registry office where the relevant property is located. A mortgage of machineries must be registered with the relevant machinery registration office within the Department of Industrial Works. The registration process for the registration of a mortgage of land represented by "Chanote" (top grade land title deed) would normally take one day to complete. However, registration of mortgage over land represented by a certificate of possession (known in Thai as "*Nor.Sor. 3*") or a mortgage over a building can be made after 30 days from the date the mortgage notice has been displayed at the land registry office. A proposed mortgage which is not registered will become null and void.

Pledges and guarantees are not subject to any registration or filing with a government body/court. However, pledge of shares in a company must be recorded in the share register book of the company in question.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Registration fees are payable on a mortgage. The fee for registering a mortgage on land or a building is 1% of the mortgage amount, with a maximum fee of THB200,000. In addition, proof must be presented that 0.05% stamp duty on a loan agreement (subject to a maximum duty of THB10,000) has been paid. If the stamp duty has not yet been paid, it has to be paid at the time that the mortgage is registered.

A pledge contract and a guarantee are also subject to stamp duty payment as follows:

NATURE OF INSTRUMENT	STAMP DUTY	PERSON LIABLE TO DUTY
GUARANTEE		
(A) FOR AN UNLIMITED AMOUNT OF MONEY	THB10	GUARANTOR
(B) FOR AN AMOUNT NOT EXCEEDING THB1,000	THB1	GUARANTOR
(C) FOR AN AMOUNT EXCEEDING THB1,000 BUT NOT EXCEEDING THB10,000	THB5	GUARANTOR
(D) FOR AN AMOUNT EXCEEDING THB10,000	THB10	GUARANTOR
EXEMPTION FROM PAYMENT OF DUTY		
(A) GUARANTEE OF DEBT FROM A LOAN PROVIDED BY THE GOVERNMENT TO CITIZENS FOR THE PURPOSE OF CONSUMPTION OR AGRICULTURE		
(B) GUARANTEE OF DEBT FROM A LOAN PROVIDED BY A COOPERATIVE TO ITS MEMBER		

NATURE OF INSTRUMENT	STAMP DUTY	PERSON LIABLE TO DUTY
PLEDGE		
FOR EVERY THB2,000 OR FRACTION THEREOF OF THE DEBT	THB1	PLEDGEE
IF THE AMOUNT OF DEBT IS NOT LIMITED	THB1	PLEDGEE
EXEMPTION FROM PAYMENT OF DUTY		
(A) PAWN TICKETS ISSUED BY A LEGALLY LICENSED PAWNSHOP		
(B) PLEDGE FOR LOAN AGREEMENT WHICH DUTY STAMP HAS BEEN PAID		

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. Under Thai law, it is possible to grant a second ranking mortgage over an asset (see question 8 for the types of assets that can be mortgaged). Generally, where there are several competing creditors with security interests of the same kind over the same asset, they will, subject to compliance with any applicable perfection requirements and/or notice, rank in the order in which their interest was created and registered. The first ranking mortgagee would be entitled to receive repayment of debt in full from the mortgagor or from the sale proceeds of the auction prior to the repayment of the second ranking mortgagee. Documenting a second ranking mortgage would be arranged in the same way as how the first ranking mortgage is prepared. The second ranking mortgage must be registered with the relevant registry office when a written consent is obtained from the first ranking mortgagee.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

The Petroleum Act (the "**PA**") and the Petroleum Income Tax Act are the principal laws and regulations relating to the oil and gas industry. A concession system was established by the PA in 1971.

Although not expressly required by law, the Thai practice is to award concessions only following the publication of an international invitation, usually on at least a 45-day notice. Applications are evaluated on a point system by the Petroleum Committee, which forwards its recommendations to the Cabinet for approval. Once the approval is granted, applicants are required to strictly follow and comply with the requirements, eg shareholding limitation imposed by the Ministry of Energy and the relevant authorities. Conditions of the concession would be considered and imposed on a case-by-case basis; any investor therefore would have to carefully review the concession before making an investment to acquire a company in the oil and gas industry.

18.2 Electricity

The Energy Industry Act established a new regulatory regime for electricity businesses. One of the purposes of the Act was to restructure the energy industry management by separating the policy making, regulation and operating functions.

Operators in the energy industry, including the electricity industry, must obtain a licence from the Energy Regulatory Commission. The Commission will award a licence that suits a particular industry, considering its impact on the economy and society and the competition in each industry. The Commission may impose conditions on a case-by-case basis.

Exemptions may be prescribed by Royal Decree. Any investor should carefully review the terms of the licence before acquiring a company in the electricity industry.

18.3 Natural resources/mines

The general principal is that all minerals belong to the state. No one can explore minerals or undertake mining unless a prospecting licence or mining lease is obtained. The government, however, has a policy to promote private sector development of the mineral industry. The Department of Primary Industry and Mining (the "**DPIM**") administers the mineral law and issues ministerial regulations.

DPIM has a policy not to grant mineral rights to foreigners (including companies with a foreign ownership exceeding 49%). However, DPIM may grant mineral rights to a foreign company under a special agreement or if the project is promoted by the Board of Investment. In practice, the BOI does not consider an application from a foreign company unless it has obtained a foreign business licence under the Foreign Business Act (the "**FBA**").

18.4 Telecommunications

Under the FBA, foreigners cannot apply for Type Two and Type Three licences (a Type Two licence is for those who want to provide a service to a specific target group while a Type Three licence is for those who have large telecommunications networks and whose competition has an impact on the community as a whole). The FBA prohibits foreigners from engaging in certain businesses in Thailand and requires foreigners to obtain permission before conducting certain restricted businesses. According to the FBA, a "foreigner" means a natural person or juristic person without Thai nationality, including a company with half or more than half of its shares held by foreigners.

In this regard, a Type Two licence is granted to the telecommunications business operators having or not having their own network for providing telecommunications services. The Type Two Licence is mainly intended for a limited group of people, or services, with no significant impact on fair competition, the public interest and consumers.

Type Three licences are granted to telecommunications business operators with their own network for providing telecommunications services. It is intended for the general public, or services which may have a significant impact on fair competition, public interest or a service which requires special consumer protection.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

There is no law preventing the taking of or enforcement of security in relation to shares in or assets of companies in the oil and gas industry. Any restriction on the company in relation to taking of or enforcement of security would be contained in the concession granted to such company.

19.2 Electricity

There is no law preventing the taking of or enforcement of security in relation to shares in or assets of companies in the electricity industry. An investor should review conditions imposed by the Energy Regulatory Commission on a case-by-case basis to see whether there is any restriction relating to the taking of security in relation to shares in or assets of the investor.

19.3 Natural resources/mines

There is no law preventing the taking of or enforcement of security in relation to shares in or assets of companies in the natural resources and mines industry. Any restriction on the company in relation to taking of or enforcement of security would be contained in the terms of the licence granted.

19.4 Telecommunications

There is no law preventing the taking of or enforcement of security in relation to shares in or assets of companies in the telecommunications industry. Any restriction on the company in relation to taking of or enforcement of security would be contained in the terms of the licence granted.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Thailand?

Thai courts will not enforce the judgments of foreign courts, but such judgments can be used as evidence in a separate suit brought by the plaintiff in Thailand.

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VIETNAM
FRASERS LAW COMPANY

LENDING

1. Does a lender require a licence to lend money to a company based in Vietnam (the "borrower")? Are there any exemptions available?

Vietnam has promulgated the Law on Credit Institutions (No. 47/2010/QH12, dated 16 June 2010) which came into effect on 1 January 2011. Any onshore lender proposing to provide banking services (including lending) in Vietnam must be licensed as a credit institution. Under the Law on Credit Institutions, credit institutions in Vietnam comprise: (i) banks; (ii) non-banking credit institutions; (iii) micro-financial institutions; and (iv) people's credit funds. Moreover, branches of foreign banks which are to be issued with a licence and have completed the relevant business registration procedures shall be entitled to provide banking services (including lending) in Vietnam.

In addition, a borrower may seek a loan from an offshore lender and such offshore lender is not required to be granted a licence under Vietnamese law to lend money to a Vietnam domiciled borrower. However, all loan facilities provided by offshore lenders to companies in Vietnam (whether foreign invested or domestic) for 12 months or longer ("medium to long term loans") must be registered by the borrower with the State Bank of Vietnam (the central bank of Vietnam) within 30 working days from the execution date of the loan facility agreement and before any loan drawdown is made. Failure to register the loan facility agreement will cause the loan to be unenforceable and no monies for repayment of principal and payment of interest can be remitted abroad.

2. What are the consequences of making a loan to a borrower in Vietnam without a licence?

Any onshore lender providing banking services without being licensed as a credit institution shall be (depending on the seriousness of its act) subject to a monetary fine or criminal prosecution.

As noted above, no licence is required for an offshore lender lending to the borrower. An unregistered medium to long term loan is unenforceable and no monies for repayment of interest and principal could be remitted abroad.

3. Will a borrower based in Vietnam have to deduct amounts for withholding tax on interest payments made to an overseas lender?

Yes. Interest payments on the relevant loan facility made to an offshore lender (which qualifies as a credit institution under the Law on Credit Institutions) is subject to a withholding tax of 5%.

4. Is there any limit to the level of interest that can be charged on loans made in Vietnam?

No. The interest rate is subject to negotiation between the bank and the borrower in accordance with applicable law. However, the State Bank of Vietnam is entitled to provide a mechanism for fixing charges where there are abnormal developments in the monetary market, or determine the maximum interest rates to serve some economic sectors and fields such as serving the agricultural and rural development, executing the plans and projects of production and trading of exports and serving the production and trading of medium-sized and small-sized enterprises.

5. Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Contractual subordination of debt is possible and is becoming increasingly common in Vietnam. It can be achieved by way of an agreement between senior and junior lenders.

TAKING SECURITY

6. Does a lender have to be licensed or registered in order to take security over assets in Vietnam or a guarantee from an entity incorporated in Vietnam?

Onshore and/or offshore lenders are not required to be licensed in order to take security over assets in Vietnam. However, a security interest must be registered in order to be legally effective against third parties. In any case, the mortgage of a land use right, planted forest land for production, or an aircraft or ship must be registered with the relevant security registration authorities.

7. Does the taking of security in Vietnam result in a lender being liable to tax in Vietnam?

No. The mere taking of security in Vietnam by an offshore lender will not by itself result in an offshore lender being liable to tax in Vietnam.

8. Can a security interest be taken in Vietnam over the following assets?

8.1 Land

All land in Vietnam is owned by the people and administered by the State of Vietnam. Land users cannot own any land, but hold land use rights which allow the use of the land in question in perpetuity.

Offshore lenders may not take security interests in land. Vietnam domiciled credit institutions may take security interest by way of a mortgage over land use rights held by a borrower.

8.2 Shares in a Vietnamese company

(a) Shares (in certificated form) in a Vietnamese company

Yes, an offshore lender may take a mortgage over shares (in certificated form) in a Vietnamese company. However, the enforcement of such mortgage is subject to foreign ownership caps under Vietnamese law.

(b) Shares and securities listed by a Vietnamese company in scripless form

Yes. Mortgages of listed shares or securities in scripless form are subject to securities laws and regulations and the generally applicable regulations on secured transactions. The mortgaged shares or securities will be theoretically "blocked" by the Vietnam Securities Depository (the "**VSD**") in the securities mortgage account.

8.3 Bank accounts

Yes. The onshore account owner may mortgage all monies standing to the credit of its account in favour of an offshore or onshore lender.

8.4 Receivables (rights under contracts)

Yes. The borrower may mortgage its property rights under contracts in favour of an (offshore or onshore) lender. Vietnamese law requires that such rights can be valued in terms of money and may be transferred in civil transactions.

8.5 Insurance

Yes. The borrower may mortgage its rights under an insurance policy (similar to other rights under contracts) in favour of an offshore or onshore lender.

8.6 Floating charge over all assets

There is no such type of security interest as "floating charge" under Vietnamese law. "Future assets" can be used as security for a loan and a security package can be put in place to achieve similar objectives as a floating charge. The term "future assets" includes both movable and immovable property under the ownership rights of the borrower once the obligation is created or the secured transaction is entered into. In practice, the borrower normally pledges or mortgages its future movable assets (eg vehicles and equipment), immovable assets (eg buildings and construction works), or rights under future contracts which will be bought or created from the lent money.

9. Are trusts recognised in Vietnam? How is a trust used in the context of taking security over securities held in a clearing system?

9.1 Are trusts recognised in Vietnam?

No, Vietnamese law does not recognise the concept of a security trust, but this can typically be achieved by way of a security agency arrangement in accordance with Circular 42/2011/TT-NHNN.

9.2 Taking security over securities held in a clearing system

A trust is not used in the context of taking security over securities held in a clearing system in Vietnam.

10. Can a company incorporated in Vietnam (the "guarantor") give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

As a general rule, a Vietnamese company may, subject to its bye-laws, give a guarantee for the debt of a borrower incorporated in Vietnam.

Prior approval of the Prime Minister must be obtained before a non-banking Vietnamese company can act as a guarantor in relation to an offshore loan facility transaction where a borrower is incorporated outside of Vietnam.

11. (a) If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

Yes, provided that the security is legally effective prior to the insolvency, the secured debts will have priority over the claims of statutory creditors (eg employees and government taxes) if the value of the secured assets is sufficient to pay the amount of the secured debts. However, please note that after the commencement of formal insolvency proceedings, secured creditors' rights to enforce against the secured assets are suspended, and the security may be void if created during a three months 'suspect period'.

11. (b) If an Intermediary becomes insolvent, how does this affect the claims of the secured lender in relation to securities held in a clearing system?

Where a securities company or a licensed bank, as an intermediary ("**Intermediary**") is insolvent, if the mortgaged securities held by the Intermediary are blocked by the VSD in a segregated "securities mortgage account" of the Intermediary, then there is a possibility that the secured lenders may claim their right in respect of such mortgaged securities in the event of the Intermediary's insolvency.

12. Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

A lender may enforce its security in accordance with the agreement of the parties without requiring a court order. If there is no such agreement, then the secured assets shall be sold by auction in accordance with the law.

As regards the guarantee, a lender may make demands against a guarantor without recourse to a court order.

13. Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

Not if the security or guarantee is legally effective and the conditions for realising the security or guarantee have been met.

14. Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

Currently, there are no specific regulations in Vietnam which prevent a company that has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company.

15. Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

Certain types of security must be registered with the relevant security registration authorities in order to be effective. Such types of security include:

- mortgages of land use rights;
- mortgages of planted forest land for production; and
- mortgages of aircraft and ships.

Other security may be registered with the National Registration Agency for Secured Transactions if both parties agree, but such registration is not compulsory and only protects a mortgage / pledgee's rights of priority over and above other mortgagees / pledgees.

Mortgages of land use rights and immovable assets must be notarised at the Notary Office. The registration of land use rights will be confined to between 5 to 15 working days after the submission of the registration dossier. With respect to other assets, the registration will be confined to between 1 and 3 working days after the submission of the registration dossier.

16. Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Nominal registration fees are payable where security is registered.

17. Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes, an asset may be used to secure the performance of multiple civil obligations. The pledgor must inform the second pledgee about the first pledge. Moreover, the provision of security on each occasion must be made in writing.

REGULATED INDUSTRIES

18. Are there any laws preventing the acquisition of companies or assets in the following industries?

18.1 Oil/gas

Companies. Yes, upstream oil and gas exploration is known as a "conditional sector" in Vietnam, in which foreigners must enter into a joint venture or production sharing contract (the "**PSC**") with Vietnam's State-owned oil and gas company, Petrovietnam. Any direct transfer of upstream interests is subject to the Prime Minister's prior approval and Petrovietnam's pre-emptive rights.

Assets. Yes, title to assets acquired, owned and used by contractor parties exclusively for petroleum operations in the PSC licensed area and charged to petroleum operation costs shall be transferred automatically to Petrovietnam when the total cost of such assets has been fully recovered by the contractor parties or at the termination date of the PSC.

18.2 Electricity

Companies. Generally, there are no restrictions, but acquisitions are subject to prior approval of the licensing authorities, albeit that the State monopolises activities in transmission, national electrical system regulation, the construction and operation of nuclear power plants and certain large hydro-electric plants (as determined by the state). In addition, investors must meet certain technical and other fitness requirements to invest in electricity activities.

Assets. Generally there are no restrictions. However, there may be licensing and regulatory issues to consider, depending on the asset in question and its subsequent use in the project.

18.3 Natural resources/mines

Companies. Yes. A foreign investor must obtain an operating permit from the Ministry of Natural Resources and Environment or relevant provincial People's Committee. The sale of a foreign investor's interest in a company in this sector also requires approval from the above authorities.

Assets. Generally, there are no restrictions. However, there may be licensing and regulatory issues to consider, depending on the asset in question and its subsequent use in the project.

18.4 Telecommunications

Companies. Yes, this is known as a "conditional sector" in Vietnam and foreign investors may enter into a joint venture or a business cooperation contract (the "**BCC**") with Vietnam's State-owned telecommunications company, Vietnam Post and Telecommunications (the "**VNPT**"). The cap on foreign ownership is 49% for facility based operators and 65% for service based operators. Foreign investors must obtain the licensing authority's approval in order to sell their interest in a venture.

Assets. Generally there are no restrictions. However, please note that a foreign investor is not allowed to sell telecoms assets of the BCC or the joint venture.

19. Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

19.1 Oil/gas

Difficulties may arise in enforcing security over assets which must be transferred to Petrovietnam at the end of the term of the project.

19.2 Electricity

Generally, there are no restrictions. However, there may be licensing and regulatory issues relating to the transfer of ownership of shares or assets in question.

19.3 Natural resources/mines

Generally, there are no restrictions. However, there may be licensing and regulatory issues relating to the transfer of ownership of shares or assets in question.

19.4 Telecommunications

Generally, there are no restrictions. However, there may be licensing and regulatory issues relating to the transfer of ownership of shares or assets in question.

GOVERNING LAW

20. On the basis that the loan agreement and/or guarantee are governed by English law, is an English law judgment in relation to the loan agreement enforceable in Vietnam?

No. Vietnam is not a signatory to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the Hague Convention 1971).

A foreign court judgment may only be enforced in Vietnam pursuant to a reciprocal agreement between Vietnam and the country where the judgment was given. To date, Vietnam has not signed a reciprocal agreement with England. It is theoretically possible to enforce an English court judgment on a case by case basis with the agreement of the Vietnamese authorities, although this would only be granted in circumstances where reciprocal arrangements could be made.

Please note that Vietnam is a signatory to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the 1958 New York Convention), and as such, a foreign arbitral award, from a signatory jurisdiction, may be considered for recognition and enforcement in Vietnam provided the foreign arbitral award itself is not contrary to the fundamental principles of Vietnamese law.

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