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GUIDE TO LENDING AND SECURITY IN SOUTHEAST ASIA

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FOREWORD

This Guide provides a useful overview of key legal and regulatory requirements concerning lending and security in Southeast Asia, focusing on Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

It is increasingly common to see the footprint of finance transactions spanning different jurisdictions. It is thus vital for businesses to be able to manage the cross-border legal issues that may arise from such regional arrangements. In this Guide, we provide an overview of the domestic laws across the region relating to one of the more common aspects of finance transactions – lending and security.

We address typical key issues and considerations related to lending and security in Southeast Asia, such as:

- Regulation of commercial secured lending;
- Common forms of commercial security;
- Registration and perfection of security;
- Granting guarantees;
- Prohibition on granting financial assistance;
- Exchange control on remittances; and
- Withholding tax.

Rajah & Tann Asia's Banking and Finance team comes highly recommended by industry commentators and international clients, including multi-national corporations who rely on Rajah & Tann Asia's experienced Banking and Finance practice to advise them on all aspects on finance transactions, including cross-border arrangements. Our strength lies in offering insightful and comprehensive legal advice made available through our Rajah & Tann Asia network of offices, including offices in Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. With the most extended legal network in Asia, our lawyers have a tight grasp of the local culture, business practices and language not just within their own home countries, but in the other markets that they frequently conduct cross-border deals as well.

Our regional network enables our offices to work together closely to provide seamless "one-stop shop" service to our clients, giving us an unparalleled edge over our competitors in presenting and pursuing solutions that are both practical and cost-effective.

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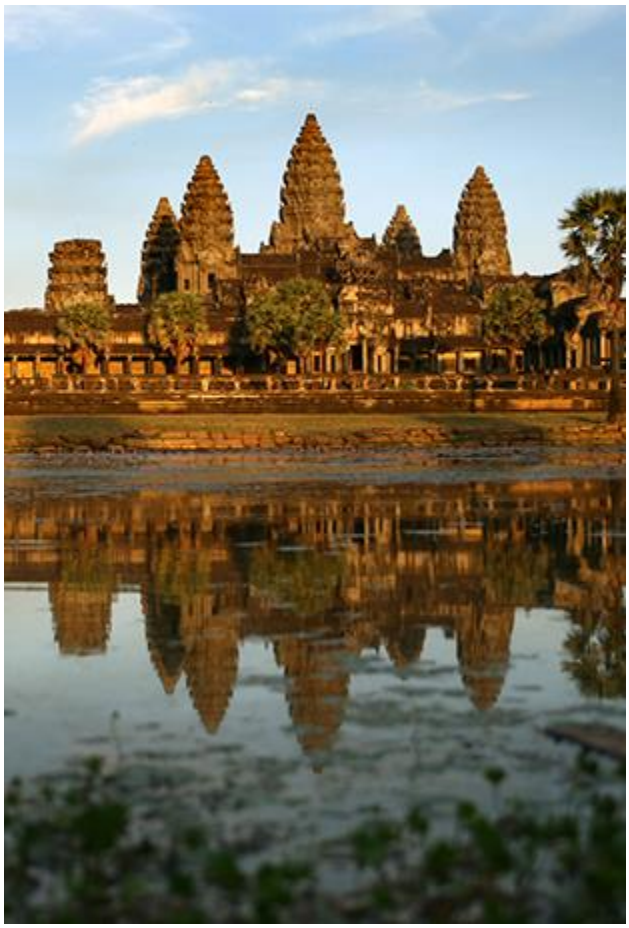
CAMBODIA



1. REGULATION OF COMMERCIAL SECURED LENDING

1.1 Does a lender require licenses or approvals to lend money to a company based in Cambodia?

Under Article 2 of Law on Banking and Financial Institutions of 1999 ("**Banking Law**"), the provision of loans as a regular business is considered as one of the fundamental banking operations. A legal entity that carries out any banking operation is considered to be *de facto* engaged in a banking business, and is subject to the licensing requirements under the Banking Law. Different forms of banking licenses under the Banking Law are regulated and issued by the National Bank of Cambodia ("**NBC**"), with the exception of certain smaller lending businesses in the form of pawnshops which are separately licensed by a different authority covering non-banking financial services. Overall, an entity issuing loans in Cambodia on a regular basis is required to obtain an operating license prior to the commencement of its lending business.

On top of the sectoral licensing requirement, a lending business in Cambodia is also subject to the relevant commercial registration requirements that are generally applicable to all types of commercial activities in Cambodia. A foreign lender or business will be subject to Cambodian laws and jurisdiction and will need to comply with the business registration and licensing requirements in the event that such foreign lender is considered as "doing business or conducting commercial activities, in any forms, in Cambodia". In accordance with the Law on Commercial Enterprises of 2005 ("**Law on Commercial Enterprises**"), a legal entity is considered as doing business in Cambodia when it: (a) rents an office space in Cambodia for more than one month; (b) employs any person in Cambodia for more than one month; or (c) performs any other (commercial) acts allowable for foreign persons by Cambodian law. In general terms, "commercial acts/activities" are defined by the Law on the Commercial Regulations and the Commercial Register of 1995 (as amended in 1999) as any act conducted on a regular basis for an exchange or profit. Under the Law on Commercial Enterprises, a foreign business can be incorporated in Cambodia, with a varying degree of activity scope allowed in one of the following three forms: representative office, local branch, or subsidiary (majority-owned by a foreign entity).

Notwithstanding the above, there is no restriction under Cambodian law in terms of a company in Cambodia obtaining a loan or credit outside of Cambodia. As a matter of practice, a business registration and sectoral license are not stringently required from a foreign lender if the activities of such foreign lender do not strictly fall under the abovementioned criteria.

1.2 What are the consequences of a failure to comply?

According to Article 55 of the Banking Law, any person or legal entity that carries out banking operations without a license is subject to criminal penalties of imprisonment from one to five years and/or a fine from KHR5 million (approximately USD1,250) to KHR250 million (approximately USD 62,500).

2. COMMON FORMS OF COMMERCIAL SECURITY

2.1 What are the common forms of security granted by a company in Cambodia?

In Cambodia, security that can be granted by a company includes: (a) security over immovable property, most commonly in the form of "hypothec"; and (b) certain varying forms of security over movable assets under two separate, co-existing legal regimes.

(a) **"Hypothec" as the most common form of security over immovable property**. "Hypothec" together with "pledge" are the two main forms of security over immovable property allowable under the Civil Code of Cambodia adopted in 2007 and implemented in late 2011 ("**Civil Code**"). Among these two forms, a hypothec is the form most commonly adopted by banks in Cambodia essentially due to the fact that a hypothec does not require transfer of possession of the property to the bank.

In contrast, a transfer of possession (thus including the burden of property management duty) over the property is a main condition for creating and perfecting a pledge, on top of the registration requirement which applies to both hypothec and pledge. Neither hypothec nor pledge requires transfer of ownership over the immovable collateral.

(b) **Security over movable property**. Security interest over movable property or rights can be created under two separate legal regimes: one under the Civil Code, and one under the Law on Secured Transactions of 2007 ("**LST**"). For the Civil Code, "pledge" and "transfer as security" are the two main forms of security agreement over movable property allowed. Both require a transfer of collateral possession for the creation and perfection of the security interest, although the transfer as security additionally requires transfer of ownership over the collateral.

As opposed to the Civil Code, the LST does not specify any particular form of security agreement but broadly covers all types of security agreements having movable property or rights as collateral to secure an obligation. In practice, it is observed that security under the LST is more commonly preferred by bankers for its more general and thus flexible form, and an easier mode of perfection via an online filing system as opposed to the requirement for transfer of possession over collateral under the Civil Code.

2.2 Are there any restrictions on the grant of such security?

There is no restriction on the grant of the abovementioned forms of security under Cambodian laws. In particular, security interests under Cambodian law can be created in favour of both local and foreign lenders.

3. REGISTRATION AND PERFECTION OF SECURITY

3.1 How does a lender take security over assets in Cambodia?

3.2 What perfection requirements are there in relation to taking security over these assets? For example notification, notarisation, registration and stamp duty requirements.

Security may be taken over different assets in Cambodia and perfected in the following manner:

(a) **Security over immovable property**. The creation and perfection of security over immovable property

is governed by the Civil Code, supplemented by the Land Law of 2001 and relevant implementing regulations. Both a hypothec and a pledge over immovable property can be created by private agreement by the parties. However, to be asserted against third parties, they need to be in notarised form and registered at the competent cadastral authority of the location of the subject collateral. In the case of a pledge, the delivery to and possession by the secured creditor of the collateral will be an additional requirement on top of the registration with the cadastral authority. The registration of a pledge over immovable property is valid for five years only, which is renewable. As a pledge has a more restrictive requirement, a hypothec over immovable property is generally preferred by bankers as a matter of practice.

(b) **Security over movable assets**. The creation and perfection of security interests in movable assets vary depending on the chosen governing law being either the Civil Code or the LST. In the case of the Civil Code, delivery to and possession by the secured creditor of the collateral is the main requirement for the creation and perfection of a security interest, without any additional filing or registration mechanism available. In the case of the LST, perfection of security interest is generally satisfied by way of filing a notice to the Secured Transaction Filing Office of the Ministry of Commerce ("**SeTFO**"). However where the collateral is in the form of money, a transfer of possession will be required.

It is required by the LST that the following notices be filed with SeTFO to perfect a security interest over secured property:

(i) **Initial Notice of Security** is valid for the period of five years from the date of filing and shall contain the following information:

- identity and detailed address of the borrower;
- dentity and detailed address of the lender or its representative;
- description of the secured property to be covered by the notice. The notice shall also provide the description of relevant immovable assets if it covers timber to be cut, mineral to be extracted or other fixtures.

(ii) **Notice of Extension/Continuation Statement** shall be filed on a rolling five-year basis in order to continue the protection of the secured property. The notice of extension shall be filed within a six-month period prior to the expiration of the existing notice.

4 Granting guarantees

4.1 Can a company based in Cambodia give a guarantee in respect of credit facilities granted to another company?

A Cambodian company incorporated in Cambodia ("**guarantor**") can guarantee the debt or other credit facilities of another company ("**borrower**") regardless of the country of incorporation of the borrower.

According to the Civil Code, a contract of guarantee is a contract whereby: (a) a prospective guarantor undertakes to warrant part or whole of the borrower's obligations to the lender in the event that the principal borrower fails to perform its obligations, and (b) the lender accepts such undertaking.

Contracts of Guarantee that are commonly used to secure business transactions in Cambodia take the form of: (a) personal guarantees; (b) corporate guarantees; and (c) bank guarantees (or letters of credit).

As a key formality requirement under the Civil Code, it should be noted that a guarantee may be revoked at any time if: (a) the guarantee is not made in writing; or (b) the amount of the monetary guarantee obligation is not handwritten by the guarantor.

4.2 Are there any limits / issues in giving such guarantees?

There are no limits/issues in giving such guarantees under Cambodian laws. The parties have the liberty to set the limit of the guarantee.

5 PROHIBITION ON GRANTING FINANCIAL ASSISTANCE

5.1 Are there any laws preventing a company in Cambodia from granting financial assistance to a borrower seeking to acquire that company?

In Cambodia, currently, there are no rules or regulations preventing a company from providing financial assistance to another company (as the borrower) to acquire the first company.

5.2 Can these prohibitions be overcome by undertaking whitewash procedures?

The concept of the Financial Assistance Whitewash Procedure does not currently exist under Cambodian laws.

6. EXCHANGE CONTROL ON REMITTANCES

6.1 Are there any exchange controls on remittances in place for payments out of Cambodia?

Currently, there are no prohibitions or restrictions on the repatriation of funds, profit dividends, or capital derived from investments made in Cambodia. The funds can be remitted freely to/from foreign countries. However, such remittance may only be done through authorised intermediaries. Banks established in Cambodia are classified as authorised intermediaries.

It should be noted, however, that NBC as the central bank has the right to enact exchange controls under the law in situations of national security or national emergency. There may be a withholding tax imposed on foreign payments.

Moreover, the Law on Investment guarantees that investors can freely remit foreign currencies abroad for the purposes of:

(a) Payment of imported goods and services and repayment of loans including interest and principal made by foreign banks or institutions;

(b) Royalties and management fees;

(c) Profits after discharge of obligations due and payment of all relevant taxes and royalties; and

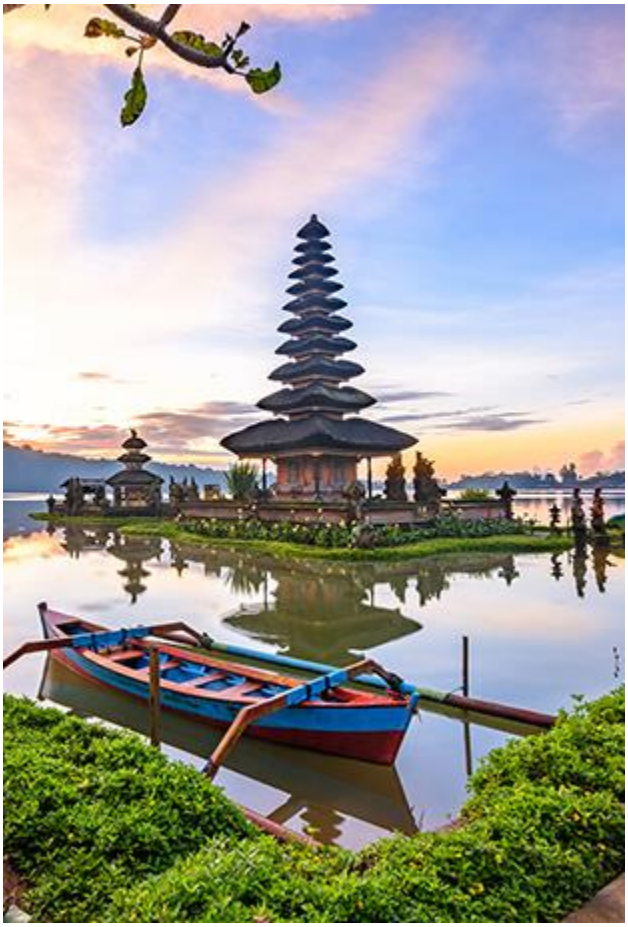
(d) Repatriation of invested capital on dissolution of an investment project.

7. WITHHOLDING TAX

7.1 Is there any withholding tax applicable on payments out of Cambodia in relation to a loan to a company based in Cambodia?

The applicable tax on payments out of Cambodia in relation to a loan to a company based in Cambodia is the withholding tax on interest. Article 26 of the Law on Amendment of the Law on Taxation dated 31 March 2003 imposes a withholding tax at a flat rate of 14% on payment of interest made by Cambodian borrowers to non-resident lenders. However, where Cambodia has executed a double taxation agreement with the relevant country, the rate specified in the relevant double taxation agreements shall supersede the rate specified in the Law on Taxation.

INDONESIA



1. REGULATION OF COMMERCIAL SECURED LENDING

1.1 Does a lender require licences or approvals to lend money to a company based in your country?

Generally, neither Indonesian nor non-Indonesian lenders are required to obtain licenses or approvals to lend to Indonesian borrowers, as long as the lenders' activities do not involve the acceptance of deposits from the Indonesian public.

If a lender lends money that it has received in the form of deposits from the Indonesian public, such lender must obtain a banking license that allows them to accept such deposits.

Apart from the above, financial services in Indonesia are regulated and supervised by the Financial Services Authority (commonly known as the OJK) and Indonesia's central bank, Bank Indonesia ("**BI**"). The OJK regulates traditional financial institutions such as banks, pension funds, and multi-finance companies, and up and coming entities such as peer-to-peer (P2P) lenders. Meanwhile, BI determines and regulates monetary policy and payment systems.

1.2 What are the consequences of a failure to comply?

As lending activities are not regulated, there are no corresponding sanctions.

However, if the lender conducts banking activities, including the collection of deposits, and fails to comply with Indonesian banking law, such lender (or its management) may be subject to imprisonment between five to 15 years and/or a fine of between IDR 10 billion to IDR 20 billion.

2. COMMON FORMS OF COMMERCIAL SECURITY

2.1 What are the common forms of security granted by a company in your country?

2.2 Are there any restrictions on the grant of such security?

There are three types of security *in rem* under Indonesian law:

(a) Pledge

A pledge is a proprietary right that follows the pledged object, which grants the right to the holder of the pledge (the pledgee) to enforce the pledge against anyone who possesses the pledged object. The pledgee will be considered as a preferred creditor, who will be entitled to be paid from the proceeds of the enforcement/sale of the pledged object prior to other creditors. A pledge is typically granted over shares and bank accounts.

To create a pledge, the lender and the borrower will need to enter into a pledge agreement, which is ancillary to the underlying loan agreement. If the obligation under the underlying loan agreement is extinguished, so is the pledge. However, when a loan is partially repaid, the pledge over the pledged object will not be partially released.

The creation and perfection of a pledge will depend on the type of the pledged object. If the pledged object is a tangible moveable object, such object will need to be delivered to the possession of the pledgee. On the other hand, if the pledged object is an intangible object (such as shares), a notice of the pledge to the party against whom the pledge will be enforced (ie the company which issued the pledged shares) will be required.

If a default occurs, the pledge may be enforced through a public auction or a private sale. However, in order to mitigate the risks associated with a private sale, it may be advisable for the enforcement of a share pledge to be done via public auction.

(b) Fiducia

A fiducia is a security that may be granted over a variety of moveable assets, either tangible or intangible, and over fixed assets, except those regulated under the *hak tanggungan* law (which will be discussed below).

A fiducia is usually granted over receivables, machinery, and insurance proceeds. Fiducia security can be created over existing and future assets. Lenders should also note that the security provider in a fiducia security must be domiciled in Indonesia.

If a default occurs, the fiducia can be enforced through a public auction, without requiring a prior court order or, subject to certain conditions, a private sale. In any event, given the uncertainties involved in a private sale, it is generally advisable to enforce a fiducia via a public auction.

(c) *Hak Tanggungan*

Hak tanggungan is a security granted over land rights, which is similar to the concept of land mortgage in other jurisdictions. The security encompasses the land rights and can include buildings and any other fixtures attached to the land, depending on the agreement between the lender and the borrower and/or the guarantor. The lender will have a preferred right over the *hak tanggungan* object in the event of the borrower's default or insolvency.

If a default occurs, the *hak tanggungan* can be enforced without requiring a prior court order through a public auction or, subject to certain conditions, a private sale. Similar to the enforcement of fiducia, it is generally advisable to enforce a *hak tanggungan* via a public auction.

3. REGISTRATION AND PERFECTION OF SECURITY

3.1 How does a lender take security over assets in your country?

3.2 What perfection requirements are there in relation to taking security over these assets? For example notification, notarisation, registration and stamp duty requirements

Security may be taken over different assets in Indonesia and perfected in a number of ways, including the following:

Land

To take security over land, the lender and the borrower and/or guarantor need to execute a deed of *hak tanggungan* before a land deed official and register that deed with the National Land Office having jurisdiction over the land. The National Land Office will annotate the *hak tanggungan* in the land register book and land certificate, and then issue a *hak tanggungan* certificate.

Assets with Legal Title

(a) Shares in an Indonesian Company

(i) Shares in a Private Company

Security over shares in a private company is effected by way of a pledge. The lender and the borrower will need to execute a pledge of shares agreement (typically in the form of a notarial deed although a privately executed agreement is permissible).

A pledge over shares in a private company will be effective upon notification to the company issuing the pledged shares. The directors must then register the pledge in the shareholders' register maintained by the company. It is also customary for the pledgor to deliver the share certificates to the lender.

(ii) Shares in a Company Listed on the Indonesia Stock Exchange ("**IDX**")

Similar to the above, the pledge of shares of a public company also requires the lender and the borrower to sign a pledge of shares agreement and deliver a notification to the company issuing the pledged shares.

Thereafter, the pledge must be registered in the scripless trading system of the IDX (C-Best, which is managed by KSEI, Indonesia's Central Securities Depository) through the securities company/custodian bank with which the shares are managed and in the shareholders' register maintained by the Securities Administration Bureau.

To prevent the shares from being traded during the term of the pledge, trade blocking should be put in place with KSEI to block the securities account (or its balance) in which the shares are deposited.

Note that the responsibility to register the share pledge in the security register lies with the board of directors. Failure to register the share pledge in the security register would not affect the validity and enforceability of the share pledge agreement, but may result in the civil and/or criminal liability of the relevant directors.

(b) Tangible Moveable Property

With the exception of vessels, security over tangible moveable property can be taken by fiducia security. The parties must execute a deed of fiducia security before a notary. Fiducia security is effective on the date of its registration at the Fiducia Registration Office maintained by the Ministry of Law and Human Rights.

The lender should note that each item secured by a fiducia must be identified in the security documents. Therefore, it is common practice to attach a schedule to the security documents that identifies each secured object and to require the borrower/security grantor to update the schedule periodically.

Registered vessels with a gross volume of more than 20 m^3 or rights of usufruct on the vessels or shares in the vessels are secured by way of hypothec. The hypothec will be perfected by registration in the main register of vessel maintained by the Vessel Registrar Official.

Commonly, the security provider in a hypothec over vessels also grants an irrevocable power of attorney

to the lender to enforce the hypothec for and on behalf of the vessel owner upon default without the involvement of the security provider. The power of attorney can also incorporate additional clauses such as covenants to:

(i) authorise a private sale of the vessel upon default;

(ii) seek the lender's approval before the security provider leases the vessel;

(iii) transfer any insurance proceeds to the lender as part of repayment if any insured risk occurs; and

(iv) not change the form of the vessel without the lender's consent.

For aircrafts, while security may be created over them, Indonesian law does not specify the form of the applicable security and no registration procedure is currently in place to create security rights over the aircraft's frame and engines.

In practice, lenders rely on non-Indonesian law security documents and register the same along with the irrevocable de-registration and export request authorisation (IDERA) with the aircraft registration authorities. This gives the lender an irrevocable authorisation to procure the de-registration, export and physical transfer of the aircraft and other basic remedies pursuant to the Cape Town Convention.

Other Types of Property

(a) Bank Accounts

Security over bank accounts are secured by way of a pledge. The pledge is created by the lender, while the account holder executing the pledge agreement perfects it by delivering a notice (typically with some additional instructions) to the bank, which then acknowledges the notice.

The pledge agreement must specify whether the account holder may (or may not) continue operating the account so long as default does not occur.

Not all banks are familiar with the concept of a pledge over an account. Hence, lenders typically require the pledged account to be opened and maintained with the lender or the security agent.

(b) Receivables

Security over receivables are usually secured by way of fiducia security. It should be noted that the security provider in a fiducia security must be domiciled in Indonesia. If not, receivables can also be secured by way of:

(i) a pledge; or

(ii) a conditional assignment, whereby upon default, the lender or its assignee will, by way of notice, replace the security provider as party to the contract and assume all rights and liabilities of the security provider under the contract.

(c) Insurance

Insurance claim proceeds are usually secured by way of fiducia security.

Although a fiducia security over an asset by law automatically includes insurance claim proceeds, if the borrower holds several types of insurance policy, typically a separate fiducia security over the insurance claim proceeds is executed.

For the fiducia security to be binding on the insurance or reinsurance company, the insurance or reinsurance company must be notified of the fiducia security, and such notice must be acknowledged/agreed by them, and a loss payee clause must be inserted into the insurance and reinsurance policy.

Registration of Security

As detailed above, the security interests that must be registered are:

(a) *hak tanggungan* over land and buildings/fixtures above it;

(b) fiducia security over tangible assets, including receivables and rights under insurance policies;

(c) fiducia security over intellectual property and stock; and

(d) hypothec over vessels.

Failure to register will result in the invalidity and unenforceability of the security.

All types of security above also involve a registration fee. The highest official fee applicable to the registration of *hak tanggungan* is around USD 4,000 per secured object, which is applicable to *hak tanggungan* over land with a value of more than approximately USD 79.3 million. The official fee applicable to a fiducia security is around USD 945 or less. Lastly, the registration of a hypothec of a ship costs around USD 2,400.

Fees for *hak tanggungan* are applied according to progressive rates depending on the secured liability. One way to minimise the fee is to split the total secured liabilities proportional to the market value of the plots of land under the deeds of *hak tanggungan* if the security is to cover more than one land title. This results in a lower fee bracket being applicable.

However, this must be done with care as otherwise, it may result in a mismatch between the enforcement proceeds (eg higher value plots) and the secured liability (if applied without regard to land plots value).

With regard to a pledge, there is no mandatory fee for this type of security as a pledge does not require any notarial deed or registration. However, the parties usually choose to document the pledge in a notarial deed as a notarial deed is accorded high evidential value and is accepted as primary evidence in the courts.

Notarisation

A *hak tanggungan* and fiducia security must be executed in deed form. A *hak tanggungan* must be executed before an authorised land deed officer and a fiducia security must be executed before a notary.

Further, while other types of security are not required to be notarised, they are often created before a notary so that they will be accorded a high evidentiary value.

Notaries charge varying fees, ranging from USD 400 to USD 1,500 per deed. The authorised land deed officer, however, typically charges 0.05% to 0.1% of the secured liability for each deed of *hak tanggungan*, which typically also includes registration fees.

Stamp Duty

All agreements are subject to a one-time stamp duty at a flat rate of IDR 10,000. Generally, stamp duty is due at the time the documents are executed or when they are introduced as evidence in court proceedings. The means of payment is through the use of a stamp or chop at the post office if done post-transaction. The new Stamp Duty Law (Law No. 10 of 2020) also introduces electronic stamps with unique code and identifier.

4. GRANTING GUARANTEES

4.1 Can a company based in your country give a guarantee in respect of credit facilities granted to another company?

There are generally no applicable restrictions on Indonesian entities granting guarantees. However, the articles of association of the guarantor may set out restrictions on the company in providing a guarantee. As a general rule, directors of an Indonesian company are not authorised to do anything that is contrary to the objects and purposes of the company. There is uncertainty as to whether a guarantee or security given by a private company for the benefit of a third party creditor to secure the obligation of a third party (third party security) can in itself be regarded to be in the furtherance of the company's objects and purposes, and consequently, whether such third-party security may be enforceable, in particular where the company does not derive any comparable commercial benefit from the transaction for which the third-party security is granted. The validity or enforceability of a third-party security may be subject to challenge by:

(a) the company's receiver in an insolvency context;

(b) the company's liquidator in a dissolution and liquidation context; or

(c) the company itself (through actions by its shareholders, board of directors or board of commissioners) in other contexts.

To minimise the risk of a challenge on the basis of corporate benefit, lenders are advised to require the company to obtain written authorisations and consents from its shareholders, board of directors and board of commissioners, along with affirmations that the granting of the third-party security is for the benefit of the company.

As for guarantees given by a public company or its controlled subsidiaries to secure the liabilities of another company, a corporate benefit test must be passed by the public company based on the regulatory framework as well as policies of the OJK. If the granting of a corporate

guarantee by a public company or its controlled subsidiary is considered as a material transaction (ie the transaction value is 20% or more but less than 50% of the total equity of the public company), a disclosure and a fairness opinion will be required, both of which must be procured within two business days after the signing of the corporate guarantee. If the transaction value exceeds 50% of the total equity of the public company, then shareholders' approval will be required, and the disclosure and fairness opinion must be available at the same time as the general meeting of shareholders' announcement, except in the case of a bond issuance that requires a bookbuilding, where a fairness opinion can be available later but at the maximum two business days after the signing of the corporate guarantee.

A public company may guarantee the liabilities of its shareholders/parent company or its subsidiaries, provided that it complies with the related party transaction requirement. If the granting of the corporate guarantee is considered as an affiliated party transaction:

(a) a report to the OJK must be made if the guaranteed subsidiary is at least 99% owned by the public company; or

(b) if the ownership of the public company in the said subsidiary is less than 99%, a disclosure and fairness opinion, as well as an approval from the independent shareholders, is required in addition to the making of a report to the OJK.

A material transaction would necessitate the approval of a general meeting of shareholders, in which the quorum for the general meeting and the voting threshold for approval is a simple majority of shareholders. For a material transaction that contains an affiliated transaction and/or a conflict of interest transaction, approval of the independent shareholders of the company is required – the quorum for the meeting and the voting threshold for approval is also a simple majority of independent shareholders.

In addition to the material transaction requirement, a public company must also submit supporting documentation to OJK no later than two business days after the signing of the corporate guarantee and report the material transaction in the annual report of the public company.

Public companies are exempted from the material transaction requirement in the OJK regulations if the guarantee is provided to banks, venture capital companies, financing companies, or infrastructure financing companies, whether within or outside of Indonesia so long as the loan is directly obtained by the public company or its controlled subsidiaries.

4.2 Are there any limits / issues in giving such guarantee?

As stated above, there is no restriction or limitation in the giving of guarantees by Indonesian companies.

5. PROHIBITION ON GRANTING FINANCIAL ASSISTANCE

5.1 Are there any laws preventing a company in your country from granting financial assistance to a borrower seeking to acquire that company?

There is no prohibition on an Indonesian company from providing financial assistance to a borrower seeking to acquire shares in that company, but the Companies Law (Law No. 40 of 2007) and the Capital Market Law (Law No. 8 of 1995) provide various forms protection and recourse for affected minority shareholders.

In addition, whilst not elaborated under the Companies Law, in practice, Indonesian companies are subject to the corporate benefit principle, in that actions done by the company, including the granting of any financial assistance, must be for the company's best interests.

5.2 Can these prohibitions be overcome by undertaking white wash procedures?

While not required, the Indonesian company may undertake white wash procedures by passing resolutions at the board of directors', board of commissioners' and shareholders' levels, which are typically required by lenders from any company granting security. These approvals should also address the issue of corporate benefit by affirming that the transaction is for the benefit of the company.

6. EXCHANGE CHANGE CONTROL ON REMITTANCES

6.1 Are there any exchange controls on remittances in place for payments out of your country?

Generally, Indonesia has no exchange control restrictions other than the general prohibition against the transfer of Rupiah overseas or to a non-resident and the obligation to provide periodical data and information to BI on foreign exchange activities.

With respect to the general prohibition, any sums transferred overseas or to a non-resident must be converted into a foreign currency prior to it being credited to an offshore account. Any purchase of more than USD 25,000 (or its equivalent) per month per person of foreign currencies via spot transactions must be based on underlying transactions and the purchaser must submit certain documents to the bank making the conversion. There are three types of activities that can be categorised as an underlying transaction: offshore trade, onshore and offshore investment (if the investment is in the form of an intercompany loan, it must first be withdrawn or acknowledged as an underlying transaction) and a financial or credit provision from a bank to be used for trading or investment activities.

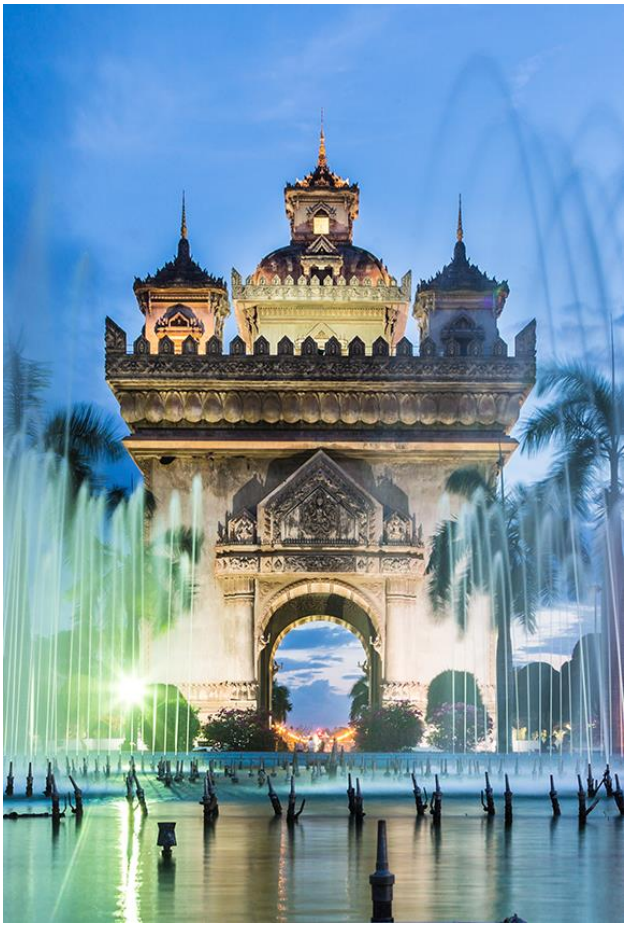
7. WITHHOLDING TAX

7.1 Is there any withholding tax applicable on payments out of your country in relation to a loan to a company based in your country?

Under the Income Tax Law (Law No. 36 of 2008), a withholding income tax of 20% is imposed on the interest paid by an Indonesian borrower to a non-Indonesian lender, subject to a reduced rate should there be an applicable tax treaty. A lender and a borrower can agree on a gross-up arrangement, although the gross-up amount is no longer deductible for the purpose of the borrower's tax obligations.

Payment of principal and other payments to the lenders, including payments of proceeds from enforcement of guarantees or securities, are not subject to withholding tax.

LAO PDR



1. REGULATION OF COMMERCIAL SECURED LENDING

1.1 Does a lender require licences or approvals to lend money to a company based in your country?

A foreign bank not otherwise conducting banking business in Laos may lend money to a company in Laos without licences or approvals from the relevant authorities in Laos. Any party wishing to conduct banking business in Laos shall submit an application for a banking business licence and to establish a commercial bank under Article 8(1) of the Law on Commercial Bank No.56/NA dated 7 December 2018 ("**Commercial Bank Law**"). "Banking business" includes deposit taking, providing credit, providing payment services, buying and selling foreign currency and providing advice on financial and investment matters.

However, the borrower in Laos must submit an application for the Approval on Foreign Borrowing to the Currency Policy Department, the Bank of the Lao PDR ("**BOL**") before signing the contracts. This is provided under the Law on the Management of Foreign Currency No.55/NA dated 22 December 2014 ("**Foreign Currency Management Law**"). Specifically:

- Article 23 (Provision and Receipt of Foreign Loans and Commercial Credit) of the Foreign Currency Management Law provides that prior to providing or receiving foreign loans or commercial credit, persons domiciled in the Lao PDR shall request authorisation from the BOL, whereby such transactions shall be undertaken through the banking system and reported to the BOL in relation to loan repayments until all contractual payments have been made.
- Article 3 (7) of the Foreign Currency Management Law sets out what constitutes "domiciled in the Lao PDR", which includes:

  (a) Lao citizens resident in the Lao PDR;

  (b) Lao State organizations and associations which operate domestically or abroad;

  (c) Lao or foreign individuals and legal entities in the Lao PDR which are authorised to undertake business and lawfully registered in accordance with the laws of the Lao PDR;

(d) Aliens and stateless persons who live and earn a living permanently in the Lao PDR.

1.2 What are the consequences of a failure to comply?

Failure by a lender or a borrower of a foreign loan domiciled in Lao PDR to comply with Article 23 of the Foreign Currency Management Law will result in the following measures under Article 46 of Foreign Currency Management Law being implemented: "Individuals, legal entities and organisations which violate this Law, other relevant laws and regulations relating to the management of foreign currency which bring damage on the State and society shall be subject to measures involving training, discipline, liability for damages or criminally responsible depending on severity".

Failure to obtain the authorisation under Article 23 does not by itself automatically void the loan. First, it is the local borrower's obligation to obtain the authorisation from the BOL. Second, the BOL can grant the authorisation after the loan is disbursed, subject to payment of a fine.

In addition, persons, legal entities and organisations are prohibited from operating a banking business in Laos without obtaining proper licence from the Bank of Lao PDR. This is provided for under Article 66 (1) of the Law on Bank of Lao PDR No.47/NA dated 19 June 2018 ("**Bank of Lao Law**") that prohibits parties from "mobilizing funds and conduct finance, banking business without permission". In addition, Article 90 (2) of the Commercial Bank Law prohibits any person, entity and organisation from "operating banking business without obtaining license from the BOL".

Persons, legal entities and organisations violating Article 66 (1) of the Bank of Lao Law and Article 90 (2) of the Commercial Bank Law will be subject to re-education, warning, disciplinary sanction, fine, civil compensation or criminal charge depending on the severity of the violation.

2. COMMON FORMS OF COMMERCIAL SECURITY

2.1 What are the common forms of security granted by a company in your country?

Article 511 of the Civil Code recognises securities created pursuant to a contract, which essentially refers to agreements to guarantee the payment of a debt between a creditor and a debtor, or an agreement to repay a debt on behalf of the debtor by any individual or juristic entity. Article 520 sets out the nature of the contract and the two types of security under contract.

There are two types of security under contract: (a) security under contract secured by assets; and (b) security under contract with individual or juristic person/entity. A security by assets under contract is an agreement between a creditor and a debtor or third party pursuant to a Pledge or Mortgage as provided for under the Civil Code. A security by a juristic person/entity under contract is a contract whereby an individual or a juristic entity agrees to repay the debt or perform the debtor's obligations in case the debtor is unable to repay its debts or is unable to perform its obligations.

Assets that may be taken as security may comprise moveable assets; immoveable assets and/or rights.

Moveable assets that can be used as security includes:

- Precious metals;
- Machinery;
- Vehicles;
- Goods in warehouse (stock) or raw materials for production;
- Agricultural products;
- Consumable goods;
- Other moveable assets by agreement of the parties.

Immoveable assets that can be used as security includes:

- Land use rights of the individual or entity or organisation;
- Apartment units, buildings such as house, tower and building;
- Assets related to the lease agreement or land concession as provided under the law and relevant contracts.

Rights that can be used as security include:

- Receivables;
- Transferable financial documents such as bonds and letters of guarantee;

- Deposit account;
- Intellectual property;
- Other rights by agreement of the parties.

The three forms of security under contract are: (a) pledge; (b) mortgage; and (c) security by another individual or entity, i.e. a guarantee. The difference between a pledge and a mortgage is who has possession of the asset. In a pledge, the pledgee has possession whereas in a mortgage, the mortgagor has possession.

(a) Pledge

There are three types of pledges: (i) pledge of moveable assets; (ii) pledge of immoveable assets; and (iii) pledge of rights.

(i) Pledge of moveable assets

A pledge of moveable assets is a security that secures the repayment of a debt or the performance of obligations. The pledgor places possession of the asset with the pledgee or another person as agreed. This is set out at Article 528 of the Civil Code.

Article 529 of the Civil Code deals with the conditions required to constitute a pledge of moveable assets, which shall include:

- an agreement to repay the debt or perform the obligation;
- an agreement to create the pledge;
- that ownership of the asset is with the pledgor; and
- that possession of the asset is with the pledgee or another person as agreed.

(ii) Pledge of immoveable assets

A pledge of immoveable assets is a security that secures the repayment of a debt or performance of obligations. The Pledgor places possession of the asset with the Pledgee or another person as agreed. This is set out at Article 535 of the Civil Code.

Article 536 of the Civil Code deals with the conditions required to constitute a pledge of immoveable assets, which shall include:

- an agreement to repay the debt or perform the obligations;
- an agreement to create the pledge;
- that the asset is owned by the pledgor;
- a duration of no more than five years, which can be renewed as agreed between the parties, with each renewal not exceeding five years;
- that the possession of the asset is with the pledgee; and
- the pledge shall be made in writing and shall be registered at the Registration Office of the Natural Resources and Environment Management Office or other relevant organisation.

(iii) Pledge of rights

A pledge of a right is a security that secures the repayment of a debt or the performance of obligations by claiming the right to any activity or rights or interests in a project. This is set out at Article 540 of the Civil Code.

Article 544 of the Civil Code deals with the conditions required to constitute a pledge of rights, which shall include:

- an agreement to repay the debt or perform the obligations;
- an agreement to create the pledge;
- that the asset is owned by the pledgor;
- that a pledge for shares or debentures in a company shall be noted in share register book of the company; and
- that for a pledge of rights in a project, the security is taken over benefits from the project which will arise in the future.

(b) Mortgage

There are two types of mortgage: (i) mortgage of immoveable assets; and (ii) mortgage of moveable assets.

(i) Mortgage of immoveable assets

A mortgage of immoveable assets is a security that secures the repayment of a debt or the performance

of obligations to a creditor without transferring possession of the immoveable assets to the mortgagee. This is set out at Article 548 of the Civil Code.

Article 549 of the Civil Code deals with the conditions required to constitute a mortgage of immoveable assets, which shall include:

- an agreement to repay the debt or perform the obligations;
- an agreement to create the mortgage;
- that the immoveable assets are not in the possession of the mortgagee;
- that the immoveable assets are owned by the mortgagor; and
- the mortgage shall be made in writing and must be registered at the Registration Office of the Natural Resources and Environment Management Office or other relevant office of the government.

(ii) Mortgage of moveable assets

A mortgage of moveable assets is a security that secures the repayment of a debt or the performance of obligations to a creditor without transferring possession of the moveable assets to the mortgagee. The moveable assets shall be moveable assets which have a certificate of ownership. This is set out at Article 552 of the Civil Code.

Article 553 of the Civil Code deals with the conditions required to constitute a mortgage of moveable assets, which shall include:

- an agreement to repay the debt or perform the obligations;
- an agreement to create the mortgage;
- that the moveable assets are not in the possession of the mortgagee;
- that the moveable assets are owned by the mortgagor;
- the mortgage shall be made in writing and must be registered with relevant office of the government.

(c) Guarantee

Please see discussion below under paragraph 4 (Granting Guarantees).

2.2 Are there any restrictions on the grant of such security?

There is no restriction on the granting of such security. However, Article 130(4) of the Law on Enterprise No. 46/NA dated 26 December 2013 prohibits a director, his family members or close relatives from borrowing money from a company. Hence, lenders should avoid taking a guarantee from a company to secure loans from the company to the director, his family members or close relatives.

3. REGISTRATION AND PERFECTION OF SECURITY

3.1 How does a lender take security over assets in your country?

Moveable assets, immoveable assets and rights may be subject to a pledge.

Moveable assets and immoveable assets may also be subject to a mortgage.

3.2 What are the registration and other requirements in your country?

The loan agreement and security documents must be translated to Lao language for notarisation at the Notary Department. A document that is notarised may be submitted as evidence in court.

After notarisation, the loan agreement and security documents must be registered with the Department of State Assets Management to be legally effective and enforceable.

In addition, it should be noted that the pledge and mortgage of immoveable assets shall be registered at the District Office of Natural Resources and Environment where the assets are located. In the event a land use right is pledged or mortgaged to more than one creditor, at the time of registration of the security, the owner of the land use right must deposit the land title with District Office of Natural Resources and Environment where the assets

are located to be kept in the land registration system. This is provided under Article 562 of Civil Code.

4. GRANTING GUARANTEES

4.1 Can a company based in your country give a guarantee in respect of credit facilities granted to another company?

A third party may guarantee the debt of the borrower. This is provided for under Article 556 of the Civil Code. A security by another individual or juristic entity refers to an individual or juristic person agreeing to repay the debt or perform obligations on behalf of the debtor if the debtor fails to repay the debt or defaults on the performance of its obligations.

Article 557 of the Civil Code sets out the form and formalities to be complied with, and states that it shall be in writing, included in the main contract or separated and shall be certified by the Notary Officer or Chief of Village and witnessed.

4.2 Are there any limits / issues in giving such guarantee?

The guarantor enjoys certain statutory protection under Article 558 of the Civil Code.

The guarantor may guarantee to repay the debt or perform the obligations on behalf of the debtor as agreed in the security agreement in full or in part. In case of payment of debt, the guarantor has the obligation to repay the principal amount of the debt only, unless otherwise provided in the agreement.

After expiry of the repayment date as provided in the contract, the creditor must first claim repayment from the debtor. If the debtor is unable to repay the debt, only then shall the creditor have the right to claim repayment from the guarantor.

The guarantor and the debtor are obliged to notify each other of any repayment of debts made.

The guarantor who has repaid a debt or any part thereof on behalf of the debtor shall become the creditor of the debtor and has the right to claim repayment of the principal amount paid including interest and also expenses if agreed in the contract.

5. PROHIBITION ON GRANTING FINANCIAL ASSISTANCE

5.1 Are there any laws preventing a company in your country from granting financial assistance to a borrower seeking to acquire that company?

There are no laws preventing a company in Laos from granting financial assistance to a purchaser seeking to acquire that company.

5.2 Can these prohibitions be overcome by undertaking white wash procedures?

There is no concept of white wash in Laos.

6. EXCHANGE CONTROL ON REMITTANCES

6.1 Are there any exchange controls on remittances in place for payments out of your country?

There are exchange control restrictions in Laos. However, these restrictions do not apply to repayment of principal and interest to foreign lenders.

Domestic and foreign individuals, legal entities and organisations which operate businesses and/or undertake transactions within the Lao PDR may use foreign currency to make repayment of foreign loans and other commercial credit and repatriation or transfer of profits, dividends, principal, interest, and other service charges of foreign investors and wages of foreigners to their home country or a third country. This is provided under Article 10 (3) and (5) of the Foreign Currency Management Law.

7. WITHHOLDING TAX

7.1 Is there any withholding tax applicable on payments out of your country in relation to a loan to a company based in your country?

Article 46(4) read with Article 49 of Law on Income Tax No. 67/NA dated 18 June 2019 ("**Income Tax Law**") imposes income tax at 10% on interest paid to non-residents.

Lao borrowers are responsible for the calculation, withholding, filing of income tax returns to the competent tax administration of where the tax payer resides and properly and fully paying income tax to the State budget according to the law within 15 working days from the date of payment to the foreign lender. This is provided under Article 50 of the Income Tax Law.

MALAYSIA

1. REGULATION OF COMMERCIAL SECURED LENDING

1.1 Does a lender require licences or approvals to lend money to a company based in your country?

A lender requires a licence or an approval by the relevant regulators to lend money in Malaysia. Under the Financial Services Act 2013 ("**FSA**"), no person shall carry on any authorised business unless they are licensed by the Minister of Finance or approved by Bank Negara Malaysia (the Central Bank of Malaysia), as the case may be. An authorised business is:

(a) a licensed business which is a banking business, insurance business or investment banking business; or

(b) an approved business which is any of the following businesses:

  (i) operation of a payment system;

  (ii) issuance of a designated payment instrument;

  (iii) insurance broking business;

  (iv) money-broking business; and

  (v) financial advisory business.

Similarly, under the Islamic Financial Services Act 2013 ("**IFSA**") which provides for the regulation and supervision of Islamic financial institutions, no person shall carry on any authorised business unless it is:

(a) licensed to carry on an Islamic banking business, takaful business, international Islamic banking business or international takaful business; or

(b) approved to carry on any of the following businesses:

  (i) operation of an Islamic payment system;

  (ii) issuance of a designated Islamic payment instrument;

  (iii) takaful broking business; and

  (iv) Islamic financial advisory business

A further piece of legislation which regulates and controls moneylending in Malaysia is the Moneylenders Act 1951 ("**Moneylenders' Act**"). The Moneylenders' Act provides that no person shall carry on, advertise or announce

himself or hold himself out in any way as carrying on the business of moneylending unless he is licensed under the Moneylenders' Act.

Under the Moneylenders' Act, "moneylending" means the lending of money at interest, with or without security, by a moneylender to a borrower and "moneylender" means any person who carries on, advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business.

The Moneylenders' Act shall not apply to such persons specified in the First Schedule or as otherwise exempted by the Minister of Housing and Local Government. The persons listed in the First Schedule are:

(a) any authority or body established, appointed or constituted by any written law, including any local authority;

(b) any co-operative society registered under the Co-operative Societies Act 1993;

(c) any authorised person as defined under the FSA or the IFSA;

(d) any pawnbroker licensed under the Pawnbrokers Act 1972;

(e) a development financial institution prescribed under the Development Financial Institutions Act 2002;

(f) any company which lends money to its related corporation as defined under the Companies Act 1965 ;

(g) any company which lends money to its director, officer or employee as a benefit accorded to such person under his terms of employment;

(h) any person who subscribes or purchases debt securities which include:

  (i) stocks issued under the Loan (Local) Act 1959;

  (ii) Treasury Bills issued under the Treasury Bills (Local) Act 1946;

  (iii) investments under the Government Funding Act 1983; and

  (iv) debentures as defined under section 2 (*Interpretation*) of the Capital Markets and Services Act 2007;

(i) any person licensed, registered or regulated under the Capital Markets and Services Act 2007; and

(j) any company holding a Labuan banking licence or a Labuan insurance licence under the Labuan Financial Services and Securities Act 2010.

1.2 What are the consequences of a failure to comply?

Under the FSA and IFSA, any person who carries on any authorised business without obtaining the requisite licence from the Minister of Finance or approval from Bank Negara Malaysia commits an offence and on conviction, shall be liable to imprisonment for a term not exceeding ten years or a fine not exceeding RM50,000,000 or to both. However, save and except as otherwise provided under the FSA or IFSA, no contract, agreement or arrangement entered into in breach or contravention of any provision of the FSA or IFSA shall be void solely by reason of such breach or contravention.

Any person who carries on, advertises or announces himself or holds himself out in any way as carrying on the business of moneylending 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 RM250,000 but not more than RM1,000,000 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 the aforesaid punishment. Any moneylending agreement by an unlicensed moneylender shall be unenforceable.

2. COMMON FORMS OF COMMERCIAL SECURITY

2.1 What are the common forms of security granted by a company in your country?

In Malaysia, the common forms of security provided by a company are the charge, assignment, pledge and guarantee.

2.2 Are there any restrictions on the grant of such security?

The most common restrictions on the grant of security by a company in Malaysia are provided under the Companies Act 2016 ("**Companies' Act**") and they are:

(a) section 225 (*Prohibition of loans to persons connected with directors*), which provides that a

company (other than an exempt private company as defined under the Companies Act) ("**Said Company**") shall not make a loan to any person connected with a director of the Said Company or of its holding company (collectively referred to as the "**Related Persons**"), or enter into any guarantee or provide any security in connection with a loan made to the Related Persons by any other person. The exceptions are:

(i) where the loan is made, or the guarantee or security is provided in relation to a loan made, to a subsidiary or holding company of the Said Company or a subsidiary of the Said Company's holding company;

(ii) to a company whose ordinary business includes the lending of money or the giving of guarantees in connection with loans made by other persons; or

(iii) to any loans made to a person connected with a director who is engaged in the full-time employment of the Said Company or its related company and where the loan is for the purpose of meeting expenditure in purchasing or acquiring a home or in accordance with the Said Company's approved scheme for the making of loans to employees.

(b) section 123 (*Financial assistance by a company in dealings in its shares, etc.)*, which provides that a company ("**Subject Company**") cannot give, whether directly or indirectly, and by means of a loan, guarantee or the provision of any security, any financial assistance for or in connection with a purchase or subscription by any person of or for any shares in the Subject Company or the holding company of the Subject Company, or (in the case where the Subject Company is a subsidiary), in any way purchase, deal in or lend money on the Subject Company's shares. In addition, the Subject Company shall not give financial assistance directly or indirectly for the purpose of reducing or discharging the liability if a person has acquired shares in the Subject Company or its holding company, and the liability has been incurred by any person for the purpose of the acquisition of such shares.

The exceptions to section 123 are:

(i) where the lending of money is part of the ordinary business of the Subject Company, the Subject Company may lend money in the ordinary course of its business.

(ii) where the Subject Company has an employee share scheme and the provision of money is for the purchase of, or subscription for, fully paid shares in the Subject Company or its holding company, and such purchase or subscription is by trustees for the benefit of the employees, including directors holding salaried employment in the Subject Company or its subsidiary.

(iii) the giving of financial assistance by the Subject Company to employees (excluding directors) who are *bona fide* employed by the Subject Company or its subsidiary to enable the said employees to purchase fully paid shares in the Subject Company or its holding company and the aforesaid shares shall be held by the employees by way of beneficial ownership.

(iv) the making of a loan or the giving of a guarantee or the provision of security in connection with one or more loans made to one or more other persons by the Subject Company is in the ordinary course of its business where the activities of the Subject Company are regulated by any written law relating to banking, insurance or takaful or which are subject to the supervision of the Securities Commission and where:

- the lending of money or the giving of guarantees or the provision of security in connection with loans made to such other persons, is done in the course of such activities; and
- the loan that is made by the Subject Company, or, where the guarantee is given or the security is provided in respect of a loan, such loan is made on ordinary commercial terms as to the rate of interest or returns, the terms of repayment of principal and payment of the interest or returns.

(c) Notwithstanding section 123 (*Financial assistance by a company in dealings in its shares, etc.*), the Companies Act permits the Subject Company to provide financial assistance subject to compliance with the provisions of section 126 (*Financial assistance not exceeding ten per centum of shareholders' funds*), as discussed below under

paragraph 5.2 of this chapter on overcoming prohibitions by undertaking whitewash procedures.

3. REGISTRATION AND PERFECTION OF SECURITY

3.1 How does a lender take security over assets in your country?

The following are the common forms of security taken over assets in Malaysia:

(a) Charge – By the creation of a charge, an asset or a property is encumbered. Examples of assets which can be taken as security pursuant to a charge are land, shares in a company (private limited company or public listed company), goods and cash deposits.

(b) Assignment – A security interest can be created pursuant to an assignment over the rights, title, interest and benefit in and under a contract by a company as the assignor, in favour of the lender as the assignee. An example of an assignment is the assignment of sale and purchase agreements where there is no separate individual document of title to a property, an assignment of tenancy agreements where the rental proceeds are assigned for the benefit of the lender and an assignment of insurance policies where the proceeds under the insurance policies are assigned to the lender.

(c) Pledge – A company can provide security by way of a pledge of its property or goods, as security for its debt owing to a lender. A pledge must be by express agreement and the company as the pledgor must have the requisite intention to pledge its property or goods as security to the lender. By virtue of the pledge, the company gives possession of its property to the lender by the transfer of actual (i.e. physical possession of the goods) or constructive (for example by handing over the documents of title or by a third party in possession of the goods attorning to the lender) possession of the property. However, the company retains ownership of the property in question. The lender only takes possession of the property when the terms of the pledge agreement are satisfied. Examples of properties which may be pledged are goods such as commodities stored in a warehouse.

3.2 What perfection requirements are there in relation to taking security over these assets? For example notification, notarisation, registration and stamp duty requirements

Registration

In respect of any security created pursuant to a charge over land or any interest in the land under the National Land Code (Revised 2020), the legal charge must be registered with the relevant land office in order to be valid and enforceable.

The Companies Act provides that where a charge is created by a company in favour of the lender, that charge shall be registered with the Companies Commission of Malaysia within 30 days after the creation of the charge. In the event of any failure to comply, the charge on the company's property or undertaking shall be void against a liquidator and any creditor of the company. The charges which must be registered are:

(a) a charge to secure any issue of debentures;

(b) a charge on uncalled share capital of a company;

(c) a charge on shares of a subsidiary of the company which are owned by the company;

(d) a charge or an assignment created or evidenced by an instrument which if executed by an individual within Peninsular Malaysia and affecting property within Peninsular Malaysia would be invalid or of limited effect if not filed or registered under the Bills of Sale Act 1950;

(e) a charge on land wherever situate or any interest therein;

(f) a charge on book debts of the company;

(g) a floating charge on the undertaking or property of a company;

(h) a charge on calls made but not paid;

(i) a charge on a ship or aircraft or any share in a ship or aircraft;

(j) a charge on goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright; and

(k) a charge on the credit balance of the company in any deposit account.

Powers of Attorney

In order to facilitate the enforcement of security, the lender may require the borrower/donor to execute a power of attorney to appoint the lender/donee as the borrower's lawful attorney. Such power of attorney is usually incorporated within the security document. The power of attorney must be submitted for stamping to the Collector of Stamp Duties and stamped for a nominal amount of RM10.

All powers of attorney within Peninsular Malaysia must be registered in the High Court for it to take effect. In addition, if the power of attorney relates to land, the power of attorney needs to be registered with the relevant land registry or office. The power of attorney instrument must be executed in the presence of the following persons, and authenticated by them in the form set out in the First Schedule of the Powers of Attorney Act 1949 ("**PAA**"), by virtue of section 3(1)(a) of the PAA:

(a) a magistrate;

(b) a Justice of Peace;

(c) a Land Administrator;

(d) a notary public;

(e) a Commissioner for Oaths;

(f) an advocate and solicitor, or

(g) an officer acting in the course of his employment, of a company carrying on the business of banking in Peninsular Malaysia and incorporated by or under any written law in force in Peninsular Malaysia.

The PAA does not apply to Sabah, Sarawak and Labuan. Hence in Sabah, Sarawak and Labuan, there is no legal requirement for powers of attorney to be registered with the High Court. However:

(a) some Magistrates' Courts in Sabah allow for lodgement of powers of attorney. The land laws of Sabah strictly require that all powers of attorney in relation to land must be properly attested and the power of attorney must be filed in the land office concerned.

(b) the land laws of Sarawak strictly require that all powers of attorney in relation to land must be properly attested and the power of attorney must be filed in the Land Office concerned.

(c) in Labuan, as a matter of practice, the provisions of the PAA are applied and all powers of attorney must be properly attested and filed with the Magistrates' Court for registration.

Notification

With respect to assignments, save where a contract expressly provides that consent is required prior to an assignment (in which event, such consent must be obtained prior to the assignment being executed), an assignor may freely enter into an assignment by way of security, in favour of a lender without the consent of the counterparty to the contract. However, the counterparty must be served with a notice informing it that the relevant contract has been assigned by the assignor in favour of the lender as the assignee pursuant to the requirements of section 4(3) of the Civil Law Act 1956.

Stamp Duty

Instruments (defined as "every written document" under the Stamp Act 1949) that are subject to stamp duty are specified in the First Schedule to the Stamp Act 1949 ("**Stamp Act**"). The facility agreement and collateral security documents are subject to stamp duty. *Ad valorem* stamp duty is payable on a principal instrument whilst nominal stamp duty is payable on a subsidiary instrument. The facility agreement is usually treated as the principal instrument and stamped at *ad valorem* stamp duty whereas the security documents are stamped at nominal stamp duty. The stamp duty payable on a principal instrument is RM5 for every RM1,000 of the facility for Ringgit denominated facilities, whilst maximum stamp duty of RM2,000 is payable on principal instruments granting foreign currency facilities. Nominal stamp duty of RM10 is payable in respect of copies of each instrument.

4. GRANTING GUARANTEES

4.1 Can a company based in your country give a guarantee in respect of credit facilities granted to another company?

A company incorporated in Malaysia is generally allowed to give a guarantee in respect of credit facilities granted to another company, provided that the company providing the guarantee ("**Guarantor**") is allowed to do so under its constitutional documents, there are

commercial benefits to the company in giving the guarantee and the provisions of the Companies Act such as sections 123 (*Financial assistance by a company in dealings in its shares, etc.*), 224 (*Loans to director*) and 225 (*Prohibition of loans to persons connected with directors*) are observed.

4.2 Are there any limits/issues in giving such guarantee?

A company giving a guarantee in respect of credit facilities granted to another company must ensure that sections 123 *(Financial assistance by a company in dealings in its shares, etc.*), 224 (*Loans to director*) and 225 (*Prohibition of loans to persons connected with directors*) of the Companies Act are complied with. Under the Companies Act:

(a) Section 224 (*Loans to director*) provides that a company (other than an exempt private company, as defined under the Companies Act) shall not enter into any guarantee or provide any security in connection with a loan made to its director or a director of its related company (as defined under section 7 (*When corporations deemed to be related to each other*) of the Companies Act); and

(b) Section 225 (*Prohibition of loans to persons connected with directors*) provides that a company (other than an exempt private company, as defined under the Companies Act) shall not enter into any guarantee or provide any security in connection with a loan made to any person connected with a director of the said company or of its holding company.

5. PROHIBITION ON GRANTING FINANCIAL ASSISTANCE

5.1 Are there any laws preventing a company in your country from granting financial assistance to a borrower seeking to acquire that company?

Section 123 (*Financial assistance by a company in dealings in its shares, etc.*) of the Companies Act provides that "a company shall not give 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 subscription made or to be made by any person of or for any shares in the company or, in the case where the company is a subsidiary, any shares in its holding company, or in any way purchase, deal in or lend money on its own shares".

Accordingly, a company ("**Guarantor Company**") cannot directly or indirectly give financial assistance to enable any person to purchase or subscribe for the shares in the Guarantor Company or the holding company of the Guarantor Company. The financial assistance would include the Guarantor Company directly giving any loan to fund the purchase or subscription for shares in the Guarantor Company or the Guarantor Company's holding company or indirectly by way of the Guarantor Company providing any guarantee or security for any financing to be used for purchasing or subscribing for shares in the Guarantor Company or the Guarantor Company's holding company.

5.2 Can these prohibitions be overcome by undertaking white wash procedures?

A company (other than a listed company) may, by a special resolution, give financial assistance for the purpose of the acquisition of shares in the company or its holding company or for the purpose of reducing or discharging the liability incurred for such acquisition if:

(a) the directors resolve, before the assistance is given, that the company can give the assistance, which will be in the best interests of the company and the terms and conditions are just and reasonable to the company;

(b) on the same day that the directors pass the resolution, the directors who voted in favour of the resolution make a solvency statement that complies with the provisions in relation to the giving of the assistance;

(c) the aggregate amount of the financial assistance does not exceed 10% of the aggregate amount received by the company in respect of the issue of shares and the reserves of the company, as such aggregate amount is disclosed in the most recent audited financial statements of the company;

(d) the company receives fair value in connection with the giving of the assistance; and

(e) the assistance is given not more than 12 months after the day on which the solvency statement is made.

6. EXCHANGE CHANGE CONTROL ON REMITTANCES

6.1 Are there any exchange controls on remittances in place for payments out of your country?

In accordance with the current Exchange Control Notices of Malaysia issued by Bank Negara Malaysia (the Central Bank of Malaysia) which took effect on 30 April 2020, a resident is allowed to make payment to a non-resident in foreign currency for any purpose save for payment made for foreign currency denominated derivatives offered by a resident or non-resident or a derivative which is derived from, referenced to or based on Ringgit.

A non-resident is allowed to repatriate from Malaysia funds, including any income earned or proceeds from divestment of Ringgit assets, provided that the repatriation is made in foreign currency.

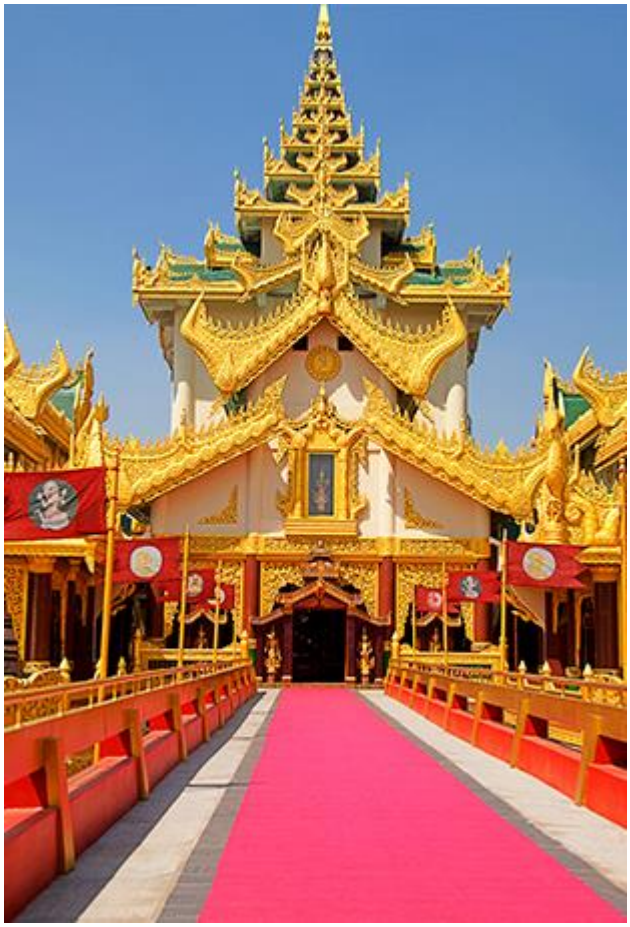
7. WITHHOLDING TAX

7.1 Is there any withholding tax applicable on payments out of your country in relation to a loan to a company based in your country?

Withholding tax is applicable on payments out of Malaysia in relation to loans to a company based in Malaysia ("**Resident Company**"). Section 109 (1) of the Income Tax Act 1967 provides that where any person (in this section referred to as the payer) is liable to pay, among other things, interest derived from Malaysia to any other person not known to him to be resident in Malaysia ("**Non-Resident**"), other than interest attributable to a business carried on by the Non-Resident in Malaysia, the payer shall upon paying or crediting the interest, deduct therefrom, tax at the applicable rate to such interest, and (whether or not that tax is so deducted) shall within one month after paying or crediting the interest render an account and pay the amount of that tax to the Director General. Under Schedule 1 to the Income Tax Act, the rate chargeable on the income of a Non-Resident consisting of interest derived from Malaysia is 15% of the gross sum. However, where Malaysia has executed a double taxation agreements with the relevant country, then the rate specified in the double taxation agreements shall supersede the rate specified in the Income Tax Act.

Notwithstanding the aforesaid, if, however, a loan is granted by an offshore financial institution to a company incorporated under the laws of Labuan, Malaysia ("**Labuan Company**"), payment of interest by the Labuan company to the offshore financial institution will not be subject to withholding tax by virtue of the Income Tax (Exemption) (No.16) Order 1991.

MYANMAR



1. REGULATION OF COMMERCIAL SECURED LENDING

1.1 Does a lender require licences or approvals to lend money to a company based in your country?

As compared to the previous isolated market, the Central Bank of Myanmar ("**CBM**") has implemented a step-by-step approach toward modernisation and development of the banking industry in Myanmar. This has been achieved largely through the enactment of a series of laws and regulations, including the Central Bank of Myanmar Law (2013), Financial Institutions Law (2016), Foreign Exchange Management Law (2012) ("**FEML**") and Securities and Exchange Law (2013).

The Financial Institutions Law 2016 ("**FIL**") provides detailed guidance for local and foreign financial institutions to ensure that financial institutions carry on financial services activities in line with international standards. Under section 12 of the FIL, any person seeking to carry out banking business (i.e. commercial banking or development banking) must be:

(a) a company incorporated in Myanmar that holds a valid license issued by CBM;

(b) a foreign bank subsidiary or branch with a valid license issued by CBM; or

(c) a person who is exempted under section 19 (namely scheduled institutions, e.g. Rural Development Bank, the Agricultural Bank, micro finance institutions licensed under the Microfinance Business Law, credit societies and the Postal Savings Bank).

Any person seeking to conduct banking business in Myanmar under the FIL may apply to CBM for a license under section 8, and CBM may approve the application under section 10 if the licensing requirements under the FIL are satisfied.

Under section 24 of the FIL, a foreign financial institution seeking to set up a representative office in Myanmar must obtain a registration certificate issued by CBM. CBM will issue foreign banks with representative offices in Myanmar with either a branch licence or a subsidiary licence. Branch licence holders will be able to conduct wholesale banking activities, while subsidiary licences

allow both wholesale and, from January 2021, onshore retail banking services.

Under the FEML, approvals must be sought from CBM (and in the case of an onshore borrower holding a Myanmar Investment Commission ("**MIC**") Permit, approval from the MIC) before off-shore loans may be made to a company based in Myanmar. CBM has recently updated the criteria for obtaining an offshore loan. The offshore loan criteria published by CBM stipulates that all MIC companies must have at least USD 500,000 in equity capital and must have brought into Myanmar at least 80% of its equity capital as approved by MIC. For non-MIC companies, the equity capital requirement has been reduced from USD 500,000 to USD 50,000. CBM has set the maximum debt to equity ratio for MIC companies at 4:1 and 3:1 for non-MIC companies.

1.2 What are the consequences of a failure to comply?

In the event that the requisite approval is not sought and an off-shore loan is made to a company based in Myanmar, the company may be faced with an inability to repatriate the funds, resulting in a default on payments of the principal and interest to the foreign lender.

2. COMMON FORMS OF COMMERCIAL SECURITY

2.1 What are the common forms of security granted by a company in your country?

The types of collateral generally available for secured loans in Myanmar include the following:

(a) real estate, buildings, immovable property;

(b) shares;

(c) tangible moveable property (e.g., plant and machinery, equipment, motor vehicle);

(d) claims, receivables and contractual rights (e.g., debts and other rights to the payment of money, rights to claim under insurances, rights to require performance of non-financial obligations); and

(e) cash deposits.

2.2 Are there any restrictions on the grant of such security?

Real Estate

The general rule is that a foreigner is restricted from owning or taking an interest in immovable property under section 3 of the Transfer of Immoveable Property Restriction Law of 1987 ("**TIPRL**"). As a mortgage involves the transfer of an interest in immoveable property, this effectively prohibits a foreign lender from exercising its power to sell or transfer by any means any immovable property under its mortgage upon the occurrence of an event of default in respect of a loan.

There is an exception to the general rule of foreign ownership of immovable property under the MCL. A company with foreign shareholding of not more than 35% is not deemed as a "foreign company" under the MCL and hence would be able to own immovable property.

To overcome the restrictions against foreign ownership of immovable property, a local entity (typically a local bank) is usually appointed to act as onshore security trustee and real property may then be charged in favour of such onshore security trustee to secure an offshore loan. The onshore security agent will only enforce the security, on the foreign lender's instructions, in the event of the borrower's default under the loan documents. A MIC company is required to notify the MIC before any mortgage of the relevant land is granted to any person during the permitted investment period.

Shares

For transfer of shares in a company with a MIC Permit, the company must notify MIC in respect of the transfer. Prior approval by the MIC is required for transactions that can result in a non-related entity acquiring a company's majority ownership or control, or 50% or more of its assets, if the company has a MIC permit.

Assignment of contractual rights

The issue of whether a contract may be assigned depends on the type of contract and the language in the underlying contract. Some contracts contain a prohibition on assignment clauses while other contracts contain clauses that require a party to obtain consent before assigning its rights thereunder. Consent to assignment that allows a party to assign a contract and transfer its

obligations to another party or the lender must be obtained for the proper and legal completion of the assignment. In most cases, concession agreements cannot be assigned, and government entities are generally not amenable to such a proposition.

3. REGISTRATION AND PERFECTION OF SECURITY

3.1 How does a lender take security over assets in your country?

Real Estate

In practice, mortgage over land is in the form of a registered mortgage, simple mortgage or mortgage by deposit of title deeds.

(a) English Mortgage

An English mortgage is created by way of a registered deed, whereby the mortgaged property is absolutely transferred to the mortgagee with re-transfer upon repayment of the mortgaged amount as agreed. An English mortgage can be created with or without possession.

(b) Simple Mortgage

The Transfer of Property Act ("**TPA**") provides that it is a charge when a person creates a security over his immovable property for payment of money to another and the simple mortgage rules apply. Under the simple mortgage, neither ownership nor possession of the immovable property is transferred to the mortgagee. The mortgagor keeps possession of the property. Upon an event of default, the mortgagee has the right to cause the mortgaged property to be sold and to apply the proceeds towards payment of the debt owed.

(c) Mortgage by deposit of title deeds

This mortgage is completed by the deposit of the title deed by the mortgagor with the mortgagee, with an intention to create a mortgage.

Shares

The shares of a Myanmar company can also be pledged/charged as security for financing in Myanmar. An equitable charge is the most common form of security created over certificated and non-certificated (listed) shares and debt securities.

Tangible Movable Property

The most common forms of security over tangible movable property are pledge, mortgage, charge or debenture.

A debenture is a security document that is usually entered into when creating a fixed and floating charge over the assets and undertaking of a borrower. It is common for tangible movable property such as plant and machinery, motor vehicles (which are not the subject of a hire-purchase agreement) and equipment to be charged by way of a fixed charge in a debenture. However, stock-in-trade is charged by way of a floating charge to enable the borrower to continue to deal with it.

The following types of charges can apply:

(a) Fixed charges – the creation of a fixed charge has the immediate effect of appropriating a specific asset to the satisfaction of a debt in the event of a default by the borrower/chargor. It deprives the chargor of the right to deal with the appropriated asset without the consent of the chargee.

(b) Floating charge – A floating charge is a charge on assets that allows the assets to be dealt with in the ordinary course of business until some event occurs that causes the floating charge to crystallise into a fixed charge. When a floating charge crystallises into a fixed charge, the chargor can no longer deal with those assets. A crystallised floating charge fastens on all assets presently owned as well as all future assets from the moment the company acquires an interest in the assets.

Claims, Receivables and Contractual Rights

Security is created over claims and receivables by an assignment by way of security.

Cash Deposits

It is common to grant security over cash deposits by charging and assigning the bank accounts that contain the deposit in favour of the lender/security holder. Where the lender is the account bank, it is common to reinforce that charge by granting set-off rights to the lender with respect to the deposit.

3.2 What perfection requirements are there in relation to taking security over these assets? For example notification, notarisation, registration and stamp duty requirements.

Perfection Requirements

Under section 229 of the MCL, charges created by a company (over its movable or immoveable property) must be registered with the Directorate of Investment Company Administration ("**DICA**") within 28 days of creation. Otherwise, the security interest will be void and unenforceable against the liquidator and other creditors of the borrower company. The Registrar is responsible for giving a certificate of the registration of any mortgage or charge, stating the amount thereby secured. The certificate is conclusive evidence that the requirements as to registration of mortgage or charge have been complied with. Either a mortgagor or mortgagee may register the mortgage or charge with the DICA.

(a) Real Estate

The Registration of Deeds Law 2018 ("**RDL**") requires that all security interests in relation to immoveable property must be registered with the Office of Registration of Deeds ("**ORD**"), except a "mortgage by deposit of title deeds". Failure to register with the ORD will render the mortgage void and not effective against the subject land. The RDL requires the document to be registered with the ORD to be in Myanmar language and the signatories to the security document to be present at the ORD.

(i) English Mortgage & Simple Mortgage

Section 59 of the TPA provides that if the principal loan secured is MMK 100 or more, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested to by at least two witnesses.

(ii) Mortgage by deposit of title deeds

The TPA does not set out any formalities for the creation of mortgages by deposit of title deed. However, it would be advisable to document the intent to create security over such documents in writing and the deposit of the title deed by the mortgagor with the mortgagee.

(b) Shares

Security interests in shares are typically created by way of a pledge or charge, and are perfected by furnishing the secured party with control over share certificates and executed blank transfer forms in favour of the lender. Certain additional mechanisms (e.g. amendment of the constitution to remove directors' discretion over registration of share transfers) to enhance security are recommended.

(c) Tangible Moveable Property

When a fixed and/or floating charge is created by a company under a debenture, the charge must be registered with the DICA within 28 days from creation of the charge.

(d) Claims and Receivables

Assignments of rights and benefits in and to claims and receivables must be effected in writing and are created when the security provider enters into the assignment. A power of attorney in favour of the security holder is usually included in the security document. Express notice in writing of the assignment must be given to the debtor, insurer, trustee or other person from whom the security provider would have been entitled to claim the debt or chose in action. Otherwise, the debtor or the relevant party is not bound by the assignment and such security may be characterised as a floating charge and will rank behind any other security.

(e) Cash Deposits

In order to perfect the security created over cash deposits and bank accounts, the bank must be notified of the assignment and the charge over the bank account.

Documentation formalities

Contracts, including mortgage deeds, may generally be made in English. However, translation of the instruments into the Myanmar language and notarisation or legalisation may be required by the relevant government departments at the time of filing of the documents.

Stamp Duty Requirements

Section 3 of the Myanmar Stamp Act of 1899 ("**MSA**") provides for the types of instruments on which stamp duty is payable.

These instruments include:

(a) contract;

(b) bill of exchange transacted in Myanmar;

(c) every bill of exchange payable, other than an on-demand or promissory note, that is drawn or made out of Myanmar, but that is subsequently accepted, paid, endorsed or negotiated in Myanmar;

(d) bonds;

(e) debentures;

(f) indemnity bonds;

(g) mortgages; and

(h) transfer of shares or debentures.

Schedule I to the MSA provides for the amount of stamp duty payable on different instruments. All instruments chargeable with duty and executed in Myanmar must be stamped before or at the time of execution. If the instrument has been executed outside of Myanmar, it may be stamped within three months from receipt in Myanmar under section 18(1) of the MSA. Failure to stamp within the prescribed period will attract a penalty of either MMK 500 or three times the amount of the unpaid/underpaid stamp duty.

However, an unstamped or insufficiently stamped instrument will not affect the validity of the relevant legal documents but will render such legal documents inadmissible as evidence in a Myanmar court.

The stamp duty for most instruments is of a nominal amount only. However, some instruments are taxed at a percentage of their value which sometimes results in significant exposure. For loan agreements, an *ad valorem* stamp duty of 0.5% of the loan amount is payable on the principal instrument (i.e. facility agreement). The relevant security documents will be stamped as subsidiary instruments at a nominal rate of MMK 2500 or MMK 300 per instrument.

Stamp duty on the transfer of shares and debentures is payable at 0.1% of the value of the shares, or debentures (as the case may be). The sale of immoveable property may be subject to either 2% on the sale price or market value of the property.

In the absence of an agreement to the contrary, section 29(a) of the MSA requires that stamp duty in most instances should be borne by the person drawing, making, or executing the instrument. Parties should further be aware that stamp duty rates are often subject to change, and as such, local counsel advice should be sought to confirm the accuracy of any stamp duty rates.

Registration Fees

The registration fees payable by the borrower are as follows:

(a) Registration fee for a mortgage or charge with DICA is MMK 30,000; and

(b) Registration fee for mortgage deeds are calculated at the rate of 0.5% of the amount of loan being secured.

4. GRANTING GUARANTEES

4.1 Can a company based in your country give a guarantee in respect of credit facilities granted to another company?

The general rule is that a private company can give a guarantee for the debt of another company, regardless of whether the borrower is incorporated in Myanmar or elsewhere.

4.2 Are there any limits / issues in giving such guarantee?

Lenders should be wary of accepting guarantees from a public company and subsidiaries of a public company due to the general restriction against financial assistance under section 128 of the MCL. Please refer to paragraph

5.1 of this chapter below on the discussion of section 128 of the MCL.

Guarantees generally do not need to be registered or filed with a government body or court. Please note, however, the requirement for payment of stamp duty on guarantees mentioned earlier.

5. PROHIBITION ON GRANTING FINANCIAL ASSISTANCE

5.1 Are there any laws preventing a company in your country from granting financial assistance to a borrower seeking to acquire that company?

"Financial Assistance" is defined under the MCL as the giving of financial assistance by means of the making of a loan, the giving of a guarantee, the provision of security, the release of an obligation or the release of a debt or otherwise.

Under section 128 of the MCL, a company limited by shares, except a private company (not being a subsidiary of a public company), is prohibited from providing any Financial Assistance (directly or indirectly) for the purpose of or in connection with a purchase or subscription made (or to be made) by any person of or for the company's shares.

Despite the above, section 128 does not apply to a company if lending of money by the company is part of the ordinary business of the company.

5.2 Can these prohibitions be overcome by undertaking white wash procedures?

A company can, however, by passing a board resolution and special members' resolution, give financial assistance for the purpose of acquiring shares in the company or its holding company.

6. EXCHANGE CONTROL ON REMITTANCES

6.1 Are there any exchange controls on remittances in place for payments out of your country?

Foreign currency exchange matters are primarily governed by the FEML. Pursuant to the FEML and its implementing regulations, the Foreign Exchange Management Regulations, Myanmar citizens, foreigners and companies in Myanmar are permitted to undertake "ordinary transactions" (i.e. "current account transactions") without the approval of the Foreign Exchange Management Department of CBM. Such "ordinary transactions" include the following:

(a) payments made in connection with trading and services, and payments for short term loans;

(b) interest payable on loans and net income from investments;

(c) repayments of loan instalments or depreciation from direct investments; and

(d) remittance of money for family expenses.

All other transactions which are not "ordinary transactions" or are capital in nature are considered "capital account transactions" that require approval from CBM.

Once such approval is obtained, the local or foreign company may undertake remittances off-shore in accordance with the terms of the grant of such approval. Payments out of Myanmar must be arranged through a bank with a foreign currency trading licence that is issued by CBM. The bank undertaking the remittance of monies off-shore will be responsible for notifying CBM of the flow of monies off-shore.

In practice, we understand that the initial approval of CBM and/or MIC would need to be sought for the undertaking of an off-shore loan, including terms of repayment of the principal or interest on the off-shore loan. Subsequently, the financial institution undertaking the remittance of monies off-shore is responsible for notifying CBM of the flow of monies off-shore.

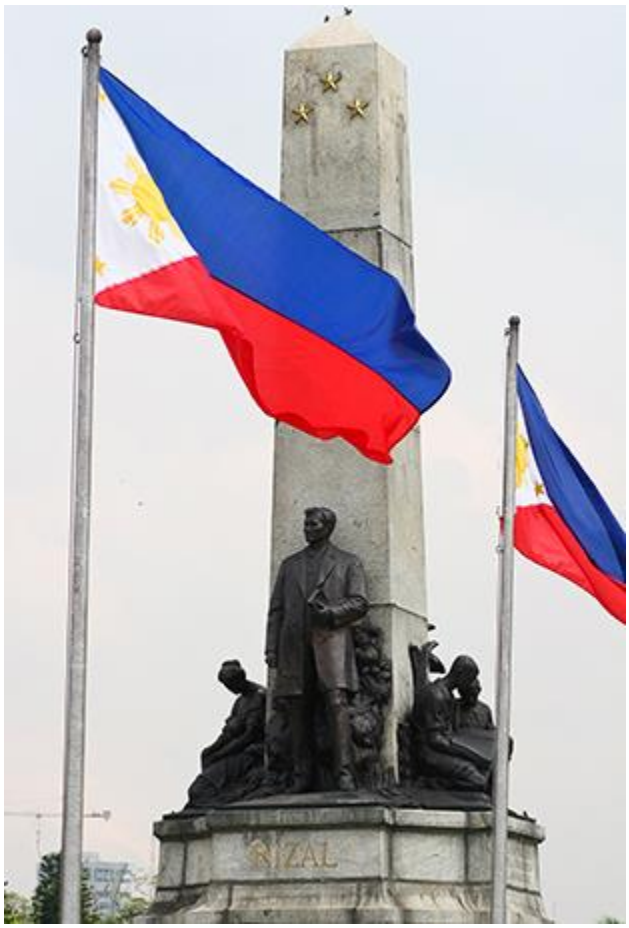
7. WITHHOLDING TAX

7.1 Is there any withholding tax applicable on payments out of your country in relation to a loan to a company based in your country?

Yes, withholding tax of 15% on interest payments made to overseas lenders is payable by the borrower. However, interest payments made to registered branches of foreign banks are exempted from withholding tax by virtue of the Ministry of Planning and Finance Notification No. 47/2018.

Royalties made to foreign entities or persons not being Myanmar residents are subject to 15% withholding tax. It should be noted that the withholding tax rates on interest and royalty payments may be reduced in the event that such payment is made to residents in countries such as Singapore, which have double taxation treaties with Myanmar in place.

PHILIPPINES



1. REGULATION OF COMMERCIAL SECURED LENDING

1.1 Does a lender require licences or approvals to lend money to a company based in your country?

In general, a company that proposes to engage in the business of lending money in the Philippines would have to secure a licence for the particular business of lending money and also a licence to engage in business in the Philippines generally.

(a) *Licence for the particular business of lending money*. If the company will be a lending company, then it should secure an authority to operate as a lending company from the Securities and Exchange Commission ("**SEC**") under the Lending Company Regulation Act of 2007 ("**LCRA**"). If it will be a financing company, then it should secure an authority to operate as a financing company from the SEC under the Financing Company Act of 1998 ("**FCA**"). If the company will operate as a bank, then it should secure authority to engage in banking operations from the Bangko Sentral ng Pilipinas ("**BSP**") under the General Banking Law of 2000 ("**GBL**") or – if it is a foreign bank – the Act Liberalizing the Entry and Scope of Operations of Foreign Banks in the Philippines.

A lending company is defined as a corporation engaged in the granting of loans from its own capital funds or from funds sourced from not more than nineteen persons. On the other hand, a financing company is a corporation primarily organized for the purpose of extending credit facilities to consumers and to industrial, commercial, or agricultural enterprises, by: (i) direct lending; (ii) discounting or factoring commercial papers or accounts receivable; (iii) buying and selling contracts, leases, chattel mortgages, or other evidence of indebtedness; or (iv) financial leasing of movable and immovable property. Both exclude banks, investment houses, savings and loan associations, pawnshops, insurance companies, cooperatives, and other credit or financial institutions established under and regulated by other laws. Banks refer to entities engaged in the lending of funds obtained in the form of deposits.

(b) *Licence under the Revised Corporation Code ("**RCC**")*. For companies, including foreign companies, this would be the primary licence required in order to engage in business in the Philippines. The licence to operate as a lending company, financing company or bank would be considered as the secondary licence. Generally, the primary licence is a prerequisite for the secondary licence[1]. For foreign companies, they may set up either a branch office or a subsidiary corporation in the Philippines and secure the appropriate licence from the SEC which will be their primary licence.

However, if a company will not be "doing business" in the Philippines (generally understood as performing acts that imply a continuity of commercial dealings or arrangements and so contemplate, to that extent, the performance of acts or exercise of functions that are normally incident to and in progressive prosecution of commercial gain or the purpose and object of the business entity), then it will not be required to secure any licence in the Philippines, whether primary or secondary.

1.2 What are the consequences of a failure to comply?

Unauthorised operation as a lending company, a financing company or a bank is penalised by a fine, imprisonment, or both[2]. The unauthorised operation may also be enjoined through the issuance of a Cease and Desist Order by the SEC or the BSP pursuant to their regulatory authority.

In addition, transacting business as a corporation in the Philippines without the appropriate primary licence from the SEC may be deemed a violation of the RCC and the rules and regulations issued by the SEC, which is punishable by a fine of up to PhP4,000,000.00 or, in case of a foreign company, PhP5,000,000.00.[3] A foreign company transacting business in the Philippines without a licence is also prohibited from maintaining or intervening in any action, suit, or proceeding in any court or administrative agency of the Philippines, but it may be sued or proceeded against before Philippine courts or administrative tribunals on any valid cause of action recognised under Philippine laws.

2. COMMON FORMS OF COMMERCIAL SECURITY

2.1 What are the common forms of security granted by a company in your country?
2.2 Are there any restrictions on the grant of such security?

In the Philippines, common forms of security would include the mortgage on immovable property (real property) and the security interest over movable property (personal property). A mortgage directly subjects the real property mortgaged to the fulfillment of the obligation for whose security the mortgage was constituted, regardless of who the possessor of the real property might be. A security interest is a property right in personal property that secures the payment or other performance of an obligation. This security interest is broad and all encompassing and parties are allowed to enter into any form of security arrangements as long as it is not inconsistent with the Personal Property Security Act ("**PPSA**") or the PPSA Implementing Rules and Regulations. Personal properties which may be the object of security arrangements include tangible assets (such as money, negotiable instruments, negotiable documents, and certificated non-intermediated securities but only if the mere possession of such instruments results in the ownership of the underlying rights or property embodied by them), as well as intangible assets (such as investment property, deposit accounts, commodity contracts, and receivables). Prior to the passage of the PPSA in 2018, the common forms of security over

[1] *See for example* section 4 of the LCRA and section 6 of the FCA which mandate lending companies and financing companies to be established only as a corporation. For banks, however, note that they are under the primary authority of the BSP and a certificate of authority from the BSP is a prerequisite document for a bank's registration with the SEC. See GBL, section 6 in relation to RCC, section 183; and GBL, section 14 in relation to RCC, sections 183, 16, and 45. See also An Act Liberalizing the Entry and Scope of Operations of Foreign Banks in the Philippines and for other purposes, section 2.

[2] The maximum penalty for engaging in the business of lending money as a lending company, financing company, or bank without the required authority to operate as such are as follows:

(a) As a lending company, a fine of PhP50,000.00 and ten years imprisonment (LCRA, sections 12(1) and 12(2)(a));
(b) As a financing company, a fine of PhP100,000.00 and six months imprisonment (FCA, section 14(1)(a));
(c) As a bank, a fine of PhP2,000,000 and ten years imprisonment (New Central Bank Act ("**NCBA**"), section 36 in relation to GBL, section 66).

[3] *See FIA*, section 14. A separate fine is imposed on the president and/or the officials of the company responsible for the violation up to PhP200,000.00.

personal property were the pledge and the chattel mortgage which were governed by the Civil Code. However, the PPSA repealed the Civil Code provisions on pledge and chattel mortgage.

In the Philippines, agreements which lack the formalities of a mortgage might constitute an equitable mortgage, i.e., one which, although lacking the proper formalities, form or words, or other requisites prescribed by law for a mortgage, nonetheless shows the real intention of the parties to constitute the property subject of the contract as a security for debt and contains nothing impossible or anything contrary to law in this intent. Thus, a contract of sale, for instance, whether an absolute sale or a sale with right of repurchase, is presumed by law to be an equitable mortgage where the seller remains in possession of the property sold, where the buyer retains for himself a part of the purchase price, where the seller binds himself to pay the taxes on the property sold, or in any other case where it may be fairly inferred that the real intention of the parties is to have their transaction secure the payment of a debt or the performance of any other obligation.

The following may be considered as restrictions on the creation or operation of a mortgage on real property or a security interest in personal property:

(a) Mortgage on Real Property

(i) Future property cannot be the object of a contract of mortgage.

(ii) The security creditor cannot appropriate or dispose of the real property given by way of mortgage. Thus, while the creditor might have a mortgage on a parcel of land, the creditor will not be allowed to automatically take that land after there has been a default on the loan. The remedy of the security creditor will be to foreclose on the mortgage and have the land sold to satisfy the outstanding indebtedness.

(iii) In cases of liquidation in insolvency, foreclosure may not be available to a secured creditor within 180 days from the date of issuance of the liquidation order.

(iv) If the real property mortgaged is already the subject of a prior mortgage, the first mortgagee will have superior rights over the creditor who will be considered a junior mortgagee.

(b) Security Interest in Personal Property

(i) Future property may be the object of a security agreement, but the security interest in that property will be created only when the grantor acquires rights in it or the power to encumber it.

(ii) After default, a secured creditor may sell or otherwise dispose of the collateral, publicly or privately. However, the disposition must be in conformity with commercial practices among the dealers in that type of property.

(iii) In case of the grantor's insolvency, the security interest perfected prior to the commencement of the insolvency proceedings will remain perfected and retain the priority that it had before the commencement of the insolvency proceedings, subject to applicable insolvency law. During insolvency proceedings, the perfected security interest shall constitute a lien over the collateral.

(iv) In the enforcement of a security interest, another secured creditor whose security interest has priority over that of the enforcing secured creditor shall be entitled to take over the enforcement process.

3. REGISTRATION AND PERFECTION OF SECURITY

3.1 How does a lender take security over assets in your country?

3.2 What perfection requirements are there in relation to taking security over these assets? For example notification, notarisation, registration and stamp duty requirements.

Mortages on real property and security interests in personal property are created and perfected in the manner described below.

(a) Mortgage on Real Property

As a contract of mortgage creates real rights over real property, it must appear in a public document, i.e., a document acknowledged before a notary public. However, even if it does not, it will still be obligatory between the parties and either one of them will have a

right to compel the other to execute the contract of mortgage in a public instrument. A contract of mortgage should also be duly recorded or registered in the Registry of Property, in order to bind third parties. If not recorded, the mortgage will nevertheless be binding between the parties.

(b) Security Interest in Personal Property

A security interest is created in personal property by executing a security agreement. A security agreement is a written contract signed by the parties setting out their intent to create a security interest. It should identify the collateral and also the secured obligation. The Department of Finance has prepared model security agreements, in English and in Filipino. Note that a grantor may opt to execute his security agreement in Filipino.

A security interest will be effective against third parties once it is perfected. Perfection may be by registration, possession, or control: (i) registration of a notice[4] with the registry [5] for personal property security interests; (ii) possession of the collateral by the secured creditor; or (iii) control of the investment property collateral or the deposit account collateral. Perfection by control is accomplished as follows: (i) by creating a security interest in favor of the deposit taking institution or intermediary; (ii) by executing a control agreement[6]; or (iii) for an electronic security that is not held with an intermediary, by noting the security interest in the books of the issuer for recording the name of the holder of the security.

Below is a summary of the manner by which a security interest in various types of personal property may be perfected:

Personal Property	*Registration*	*Control Agreement*	*Others*
Tangible Assets	Yes	No	Possession
Intangible Assets	Yes	Yes	N/A
Intermediated Securities or Deposit Accounts	Yes	Yes	Creation of a security interest in favor of the deposit-taking institution or intermediary
Electronic Non-Intermediated Securities	Yes	Yes	Notation of a security interest in the books maintained by or on behalf of the holder of the securities
Intermediated Electronic Securities	Yes	Yes	N/A

4. GRANTING GUARANTEES

4.1 Can a company based in your country give a guarantee in respect of credit facilities granted to another company?

As corporations organised under Philippine law can exercise all powers granted to them by law or by their articles of incorporation, and all other powers necessary or incidental to those expressly granted, a corporation may give a guarantee in respect of another corporation's debt as long as its articles of incorporation expressly authorise it to do so or the granting of the guarantee is

[4] A "notice" is a statement of information that is registered in the Registry relating to a security interest or lien (see PPSA, section 3(e)).
[5] "Registry" refers to the centralised and nationwide electronic registry established in the Land Registration Authority where notice of a security interest and a lien in personal property may be registered (see PPSA, section 3(h)).

[6] "Control agreement" is an agreement in writing according to which:
(a) With respect to intermediated securities, the issuer or the intermediary agrees to follow instructions from the secured creditor with respect to the security, without further consent from the grantor;
(b) With respect to rights to deposit accounts, the deposit-taking institution agrees to follow instructions from the secured creditor with respect to the payment of funds credited to the deposit account without further consent from the grantor;
(c) With respect to commodity contracts, the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured creditor without further consent by the commodity customer or grantor (see PPSA, section 3(b)).

necessary or incidental to a power expressly granted. This rule applies even where the proposed guarantee is in respect of loans of corporations in which the guarantor has an interest, or even where the by-laws of the guarantor allow its board of directors to guarantee, on its behalf, obligations of other corporations in which it has a lawful interest. Note that, if there is nothing in its articles of incorporation which grants a corporation the power to enter into a contract of guarantee or suretyship, then it is deemed that the corporation has no power and is not authorised to do so, especially since such act could be disadvantageous to the corporation.

4.2 Are there any limits / issues in giving such guarantee?

A guarantee must be in writing and signed; otherwise, it is unenforceable.

In addition, if the lender and the guarantor share an interlocking director, and the share of the interlocking director in one party (e.g., the lender) exceeds 20% of its outstanding capital stock but is merely nominal in the other party (e.g., the guarantor), then the guarantee is voidable, unless all of the following conditions are met with respect to the latter party:

(a) The presence of the interlocking director in the board meeting in which the agreement was approved was not necessary to constitute a quorum for such meeting;

(b) The vote of such director was not necessary for the approval of the agreement;

(c) The contract is fair and reasonable under the circumstances; and

(d) In the case of a corporation vested with public interest, material contracts are approved by at least two-thirds of the entire membership of the board, with at least a majority of the independent directors voting to approve the material contract.

Where any of the first three conditions is absent, the guarantee may also be ratified by the vote of the stockholders of the latter party (e.g., the guarantor) representing at least two-thirds of the outstanding capital stock in a meeting called for the purpose of such ratification. Full disclosure of the adverse interest of the directors involved must be made at such meeting and the contract must be fair and reasonable under the circumstances.

5. PROHIBITION ON GRANTING FINANCIAL ASSISTANCE

5.1 Are there any laws preventing a company in your country from granting financial assistance to a borrower seeking to acquire that company?

5.2 Can these prohibitions be overcome by undertaking white wash procedures?

No specific or explicit prohibition exists in any Philippine law against the grant by a corporation of financial assistance to a borrower who is seeking to acquire such corporation.

On the other hand, to the extent that such grant of financial assistance might, in a particular case, violate the trust fund doctrine under Philippine corporation law, then it may be set aside and declared null and void by the courts. Under the trust fund doctrine, the subscribed capital of a corporation constitutes a fund for the payment of the debts of the corporation to which the creditors of the corporation may look for the satisfaction of their claims. In general, corporate capital may not be distributed unless pursuant to a decrease of its capital stock, a redemption of redeemable shares, or a dissolution and liquidation of the corporation. To the extent that a grant of financial assistance will involve or result in a prohibited distribution of corporate capital to a shareholder, then it might violate the trust fund doctrine under Philippine law.

6. EXCHANGE CONTROL ON REMITTANCES

6.1 Are there any exchange controls on remittances in place for payments out of your country?

If repayments on a foreign loan will be serviced with the foreign exchange ("**FX**") resources of authorised agent banks ("**AABs**"), which includes all categories of banks duly licensed by the BSP[7], or of subsidiaries or affiliates

[7] BSP Manual of Regulations on Foreign Exchange Transactions ("**MORFXT**"), Glossary, p. 99. An Offshore Banking Unit, which refers to a branch, subsidiary, or affiliate of a foreign banking corporation which is duly authorised by the BSP to transact offshore banking business in the Philippines, is not considered an AAB (see MORFXT, Glossary, p. 102).

of an AAB engaged in the business of buying and selling FX ("**AAB-forex corps**"), then the loan will have to be registered with the BSP.

(a) Registration of Foreign Loans

The BSP's Manual of Regulations for Foreign Exchange Transactions ("**MORFXT**") sets out certain requirements with respect to the approval, registration, and reporting of offshore borrowings of domestic corporations. These rules include the following:

(i) Prior BSP approval shall be obtained for publicly-guaranteed private sector foreign/foreign currency loans/borrowings. "Publicly-guaranteed" private sector loans/borrowings refer to foreign/foreign currency loans/borrowings (including those in the form of bonds/notes/other debt instruments) that are guaranteed by public sector entities such as government-owned and controlled corporations, government financial institutions (except short-term interbank borrowings), and local government units.

(ii) Foreign loans/borrowings (including those in the form of bonds/notes/other debt instruments and those covered by derivatives transactions) of the private sector that are not publicly-guaranteed shall be registered with the BSP if these will ultimately be serviced with FX resources of ABBs or AAB-forex corps.

(iii) Foreign loans/borrowings (including those in the form of bonds/notes/other debt instruments) or foreign currency loans (including interbank loans) that are not publicly-guaranteed, obtained by private sector banks operating in the Philippines, as well as those obtained by private sector non-bank financial institutions with quasi-banking functions, shall not be subject to prior BSP approval and subsequent registration but shall comply with: (a) specific reporting obligations set out in the MORFXT; (b) the relevant provisions of the BSP Manual of Regulations for Banks and the BSP Manual of Regulations for Non-Bank Financial Institutions; and (c) other applicable laws, rules and regulations.

(iv) All resident entities (public and private sectors) intending to obtain medium- and long-term foreign loans, including offshore issuances of debt instruments, shall submit to the BSP's International Operations Department ("**BSP-IOD**") their annual foreign borrowings plan every end-September for borrowings for the following year. Medium- and long-term loans are credits with maturities exceeding one year.

(v) For statistical purposes, all foreign loans/borrowings (including those in the form of bonds/notes/other debt instruments), whether BSP-approved/registered or not, shall be regularly reported to the BSP-IOD until the obligations are fully extinguished.

In relation to the servicing of foreign loans/borrowings, all loan payments, irrespective of the source of FX funding, shall be reported to the BSP-IOD. Generally, prepayments on BSP-registered private sector loans/borrowings that are not publicly-guaranteed, as well as payments on such loans/borrowings that are past due for more than one month from their original due dates, will require prior notice from the borrower to the BSP. Prepayments on BSP-registered short-term private sector loans/borrowings that are not publicly-guaranteed do not require prior BSP notification.

If a borrower decides to register its foreign loans, it will need to comply with the following notice and registration obligations:

(i) Submit a notice to the BSP, supported with a copy of the signed covering agreement(s)/document(s), within one month from the date of signing;

(ii) Send a notification to the BSP for: (a) any change/s in the loan's financial terms and conditions or (b) cancellation (whether partial or full) of the loan within 15 banking days from availability of information/signing of the amended or supplemental agreement/effectivity date as the case may be, for monitoring purposes; and

(iii) Apply for loan registration with the BSP within one month from drawdown date (for short-term loans) and within six months from utilisation of proceeds (for medium- and long-term loans) using the prescribed form. Short-term loans are credits with maturity not exceeding one year.

(b) Registration of Guarantees

Guarantees that are related to private sector foreign/foreign currency loans/borrowings (except foreign currency loans of resident borrowers from banks operating in the Philippines) must already form part of the loan terms submitted or reported to the BSP. Thus, if the repayments for the loan will ultimately be serviced with FX resources of AABs or AAB-forex corps, the guarantee to be executed by a guarantor must be included as part of the terms of the loan to be registered with the BSP.

In case of a call on such guarantee, the borrower or the guarantor is required to notify the BSP at least ten banking days prior to target date of settlement of the call on the guarantee to allow servicing using FX resources of AABs or AAB-forex corps, and the borrower must comply with the relevant rules covering the underlying obligation (including reportorial requirements).

(c) Borrowers Engaged in Quasi-Banking Functions

If the borrower is authorised to engage in quasi-banking functions by the BSP (i.e., it is a non-bank financial institution exercising quasi-banking functions), prior BSP approval and registration of the loan are not required, subject to the compliance obligations discussed in paragraph 6.1(a) above (*Registration of Foreign Loans*).

However, given that the guarantee relating to such a loan may give rise to an actual foreign obligation of a resident to a non-resident, the guarantee relating to the loan shall be:

(a) Registered with the BSP to allow the servicing of the payments related thereto (e.g., guarantee fees/charges; payments for call on the guarantees and obligations resulting from such call on the guarantee) using the FX resources of AABs or AAB-forex corps. The filing of the application for registration shall be made within six months from the date of signing of the covering agreement but not later than 15 banking days from the target date of the purchase of FX; and

(b) Reported regularly to the BSP by the resident obligee until the contingent obligations are fully extinguished.

7. WITHHOLDING TAX

7.1 Is there any withholding tax applicable on payments out of your country in relation to a loan to a company based in your country?

In general, a final withholding tax at the rate of 20% is imposed on the amount of interest on foreign loans. If the creditor is a national of a foreign country with which the Philippines has a tax treaty, a different rate may apply, as the rates under the Philippines' Tax Code are subject to the rates or exemptions under these treaties.

The rate under an applicable tax treaty may be availed of by a borrower even without obtaining a ruling from the local tax authority recognising the applicability of the tax treaty to the withholding tax involved, as long as the appropriate tax return procedure is followed by the borrower.

SINGAPORE

1. REGULATION OF COMMERCIAL SECURED LENDING

1.1 Does a lender require licences or approvals to lend money to a company based in your country?

A moneylender's licence from the Registrar of Moneylenders is required to engage in a moneylending business in Singapore, unless the lender is either an "excluded" or "exempt" moneylender under the Moneylenders Act (Chapter 188) ("**MLA**") of Singapore. Section 5(1) of the MLA provides that:

"No person shall carry on or hold himself out in any way as carrying on the business of moneylending in Singapore, whether as principal or as agent, unless –

(a) he is authorised to do so by licence;

(b) he is an excluded moneylender, or

(c) he is an exempt moneylender."

Under section 5(1A) of the MLA, persons carrying on a business of moneylending in Singapore from a place outside of Singapore are also caught by section 5(1).

The term "excluded moneylender" is defined under section 2 of the MLA. Key "excluded moneylenders" are:

(a) banks licensed under the Banking Act (Chapter 19) of Singapore ("**Banking Act**");

(b) merchant banks approved as financial institutions under the Monetary Authority of Singapore Act (Chapter 186) of Singapore ("**MAS Act**");

(c) finance companies licensed under the Finance Companies Act (Chapter 108) of Singapore ("**FC Act**");

(d) any person lending money solely to corporations; and

(e) 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.

"Exempt moneylenders" are moneylenders who have been granted an exemption on application pursuant to section 35 of the MLA, or a class exemption under section 36 of the MLA, from the MLA's licensing requirements.

Apart from the MLA, banks and merchant banks are required to obtain licences and to comply with the Banking Act and the MAS Act, whilst finance companies are licensed and regulated under the FC Act. These entities all fall under the Monetary Authority of Singapore's regulatory watch.

1.2 What are the consequences of a failure to comply?

Under section 14 of the MLA, unlicensed moneylending is a criminal offence. Additionally, a loan made by an unlicensed moneylender will be unenforceable against the borrower, as will any security or guarantee given for such loan. Failure to comply with the licensing requirements of the Banking Act, the MAS Act and the FC Act is also an offence.

2. COMMON FORMS OF COMMERCIAL SECURITY

2.1 What are the common forms of security granted by a company in your country?

2.2 Are there any restrictions on the grant of such security?

Security in Singapore is commonly taken in the following forms:

(a) Legal or Equitable Mortgage

A legal mortgage is a conveyance or assignment of legal title in property, subject to the equity of redemption. In Singapore, a legal mortgage may be taken over:

(i) land, by deed;

(ii) assets with legal title – e.g. tangible movable property, such as ships, aircraft, plant and machinery, registered securities and registered intellectual property rights;

(iii) choses in action – e.g. intangible property, such as receivables and contractual rights (please also see sub-paragraph (d) below (*Assignment by Way of Security*)); and

(iv) chattels – e.g. personal property.

A legal mortgage offers greater protection to a lender than an equitable mortgage and where possible, it is advisable to prefer a legal mortgage to an equitable mortgage as security.

An equitable mortgage is the assignment of an equitable title or interest in property. Unlike in a legal mortgage, the mortgagee attains only a beneficial interest in the property without full legal ownership. It usually arises when:

(i) the full legal formalities for a legal mortgage have not been complied with;

(ii) the mortgagee's interest in the asset being mortgaged is an equitable interest; or

(iii) there is an agreement to create a legal mortgage over future assets.

(b) Fixed or Floating Charge

A charge is a security interest in property, created by contract. No transfer of title in the property will take place. A fixed charge is a charge which attaches to a specified asset (whether presently in existence or acquired in the future) and is normally taken over fixed or moveable assets. The chargee's control of the secured asset is the definitive feature of a fixed charge.

A floating charge is a charge usually taken over a class of assets, which in the chargor's ordinary course of business changes from time to time. Upon the occurrence of some future event, the floating charge "crystallises" into a fixed charge and the chargor will henceforth be precluded from dealing freely with the charged assets.

(c) Pledge

In a pledge, the pledgor transfers possession of the property to the pledgee, but retains legal ownership. It may only be taken over property capable of actual or constructive delivery and is ordinarily taken over documents of title to property (e.g. bills of lading and bearer securities).

(d) Assignment by Way of Security

An assignment is a transfer of rights from one party to another and is often the means by which a mortgage or charge is created over choses in action. Statutory assignments may arise by statute or failing this, in equity.

In Singapore, a statutory assignment must fulfil the conditions in section 4(8) of the Civil Law Act (Chapter 43) of Singapore. The assignment must be made in writing by the assignor, absolute and not be by way of charge only. Express notice of the assignment must be given to the debtor or to any other person from whom the assignor would be entitled to make a claim against.

Non-compliance with the requisite conditions will give rise to an equitable assignment. The assignee of an equitable assignment will be unable to enforce in his own name and will have to join the assignor as a party to an action to enforce the security.

3. REGISTRATION AND PERFECTION OF SECURITY

3.1 How does a lender take security over assets in your country?

3.2 What perfection requirements are there in relation to taking security over these assets? For example notification, notarisation, registration and stamp duty requirements

Security may be taken over different assets in Singapore and perfected in the following manner:

Land

Security over land is usually taken by way of mortgage. Under the Land Titles Act (Chapter 157) of Singapore ("**LTA**"), a legal mortgage over title to registered land must be in the statutory prescribed form and priority depends on the date of registration of the mortgage. Unlike a traditional mortgage, a legal mortgage under the LTA does not transfer title to land and only takes effect as a charge.

A legal mortgage of unregistered land is created when a mortgagor conveys his legal title to the mortgagee, subject to a right of redemption. Under section 53 of the Conveyancing and Law of Property Act (Chapter 61) of Singapore ("**CLPA**"), the conveyance must be made by way of deed and in English. The deed should also be filed at the Registry of Deeds to ensure priority and admissibility in court proceedings. However, unregistered land in Singapore is rare as the majority of the land in Singapore is now registered.

An equitable mortgage over land may be: (a) made in writing by deed or (b) by the deposit of title deeds with the mortgagee, with an intention to create a mortgage. The mortgagor's intention to create a mortgage is usually evidenced by a memorandum of charge which is signed by the chargor. For perfection, the deed or memorandum of charge should be registered at the Singapore Registry of Deeds. A caveat can be lodged with the Singapore Land Authority to protect an equitable mortgagee's interest.

Assets with Legal Title

(a) Shares in a Singapore Company

(i) Shares in a Private Company

Security over shares in a private company may be effected by way of charge. Share certificates and a blank share transfer form are typically delivered to the chargee and the chargor may waive their pre-emption rights (if applicable). Additionally, the company's constitution should be amended if it contains restrictions on share transfers. It is also possible to effect security over shares in a private company by way of a legal mortgage. This will entail the shares in the private company being transferred into the name of the chargee, subject to a right of redemption.

*(ii) Shares in a Company Listed on the Singapore Exchange Securities Trading Limited ("**SGX**")*

Security over scripless shares listed on SGX must comply with section 81SS of the Securities and Futures Act (Chapter 289) of Singapore ("**Securities and Futures Act**") and any other laws and regulations made pursuant to section 81SU of the Securities and Futures Act.

There are three ways in which a security may be created over scripless shares, namely by:

- common law security under regulation 21 of the Securities and Futures (Central Depository System) Regulations 2015 of Singapore ("**CDP Regulations**");
- statutory charge under section 81SS(2)(b) of the Securities and Futures Act; and

- statutory assignment under section 81SS(2)(a) of the Securities and Futures Act.

Statutory charges and assignments created under section 81SS of the Securities and Futures Act need to follow prescribed statutory forms and the chargee/assignee must either be a depository agent or a direct account holder with the central depository.

A common law security interest created pursuant to regulation 21 of the CDP Regulations usually takes the form of a charge and is generally preferred to statutory charge or statutory assignment as it is easier to create: the security provider agrees to charge in favour of the chargee its rights, title and interests in a sub-account maintained with a depository agent and there is no requirement that the chargee be either a direct account holder or a depository agent.

However, common law security interests are subordinated to statutory interests and future statutory interests may be created over and in priority to existing common law ones. This risk is usually mitigated by notifying the depository agent of the creation of the common law security and requiring the depository agent to acknowledge notice thereof. The depository agent will simultaneously be instructed not to deal with the secured shares unless it has the secured party's prior consent.

(b) Tangible Moveable Property

A mortgage or a charge may be used to create a security interest in tangible moveable property. A pledge may be used for security over chattels and documents of title.

Security over ships is governed by the Merchant Shipping Act (Chapter 179) of Singapore. Such security must be created using the statutory prescribed form and be registered with the Singapore Registry of Ships.

Security over aircraft may require registration with the International Registry established for the purposes of the Convention on International Interests in Mobile Equipment 2001 and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment 2001, pursuant to the International Interests in Aircraft Equipment Act, Chapter 144B of Singapore

Choses in Action

(a) Bank Accounts

A charge or assignment may be taken over bank accounts. Notice of the security interest will usually be given to the relevant account bank. Whether or not the charge will be considered fixed or floating depends on the extent of the chargee's control over the charged accounts. If the bank account is opened with and controlled by the lender, a fixed charge usually arises.

(b) Receivables

Security over receivables is usually taken by way of assignment (statutory or equitable) or charge. This will be subject to any contractual restrictions on assignment or the creation of security interests in the underlying contract for receivables. For the requirements on creation and perfection of assignment in Singapore, please see paragraph 2(d) above (*Assignment by Way of Security)*.

(c) Insurance

Subject to any contractual restrictions on assignment or creation of security interests, security is usually taken over insurance by way of assignment. The creation of a security interest in a life assurance policy must comply with the Policies of Assurance Act (Chapter 392) of Singapore. For the requirements on creation and perfection of assignment in Singapore, please see paragraph 2(d) above (*Assignment by Way of Security*).

Registration of Charges and Mortgages

Other than the requirements above, where the person giving the security is a Singapore-incorporated company, section 131 of the Companies Act (Chapter 50) of Singapore ("**Companies Act**") is also applicable to certain charges. Within 30 days of the charge's creation, a statement of particulars of charge must be lodged for registration with the Accounting and Corporate Regulatory Authority of Singapore ("**ACRA**"). An

additional period of seven days is given if the document is executed outside of Singapore. A SGD 60 fee is payable to ACRA for registration and an extra SGD 50 is due if a certificate of registration is requested.

Under section 131 of the Companies Act, the security interests required to be registered are:

(a) a charge to secure any issue of debentures;

(b) a charge on uncalled share capital of a company;

(c) a charge on shares of a subsidiary of a company which are owned by the company;

(d) 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;

(e) a charge on land wherever situated or any interest therein;

(f) a charge on the book debts of the company;

(g) a floating charge on the undertaking or property of a company;

(h) a charge on calls made but not paid;

(i) a charge on a ship or aircraft or any share in a ship or aircraft; and

(j) a charge on goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright or on a registered design or a licence to use a registered design.

The definition of a "charge" under the Companies Act includes a mortgage, which should be registered with ACRA as well.

Failure to register a charge requiring registration under section 131 of the Companies Act will render the charge as void against the creditors and liquidators of the company. In the event of insolvency, a chargee with an unregistered charge will rank as an unsecured creditor.

Notarisation

Notarisation is generally not required for documents executed in Singapore, for use in Singapore.

Stamp Duty

In Singapore, stamp duty is applicable to documents relating to immovable property (e.g. land), stocks or shares. It is usually payable on security documents creating interests in such assets, and in respect of any transfer documents henceforth related to enforcement of the security.

Stamp duty on such instruments is subject to a maximum duty of SGD 500 and payment must be made within 14 days after the date of the document, if it is executed in Singapore. Payment will be due within 30 days after the date of receipt of the document in Singapore, if executed overseas. A penalty of up to four times the duty may be imposed if documents are found not to be stamped, stamped late or insufficiently stamped.

4. GRANTING GUARANTEES

4.1 Can a company based in your country give a guarantee in respect of credit facilities granted to another company?

Generally, a Singapore company may, subject to compliance with any applicable restrictions, give guarantees in respect of credit facilities granted to another company. This is permitted even if the debtor is incorporated outside of Singapore. However, the guarantee must at least be in writing and signed by the guarantor. In a joint and several guarantee, all parties named as guarantors must execute the guarantee or it will not be binding.

Where guarantees are given in transactions under the MLA and Hire-Purchase Act (Chapter 125) of Singapore, full compliance with the requirements of those statutes will be necessary.

4.2 Are there any limits / issues in giving such guarantee?

In Singapore, corporate guarantees are subject to the following restrictions:

(a) Sections 162 and 163 of the Companies Act

Section 162 prohibits a Singapore company from giving a loan or a quasi-loan (or related guarantee/security) to its own directors and directors of related companies or entering into a credit transaction as creditor (or related guarantee/security) for the benefit of such directors.

Section 163 prohibits a Singapore company ("**lending company**") from giving a loan or a quasi-loan (or related guarantee/security) to another company ("**borrowing company**") or entering into a credit transaction as creditor (or related guarantee/security) for the benefit of the borrowing company, in each case if the director(s) of the lending company is/are together interested in 20% or more of the total voting power in the borrowing company. The borrowing company may either be a Singapore or foreign incorporated company, and the interest of a member of the director's family will be treated as the director's interest.

A company will be exempted from Sections 162 and 163 if it is (i) a private company with no more than 20 shareholders and no corporation holds (directly or indirectly) any beneficial interest in the company's shares; or (ii) a private company wholly owned by the Singapore government that is declared to be exempt.

Pursuant to section 163(4)(a) of the Companies Act, the section 163 prohibition does not apply to anything done by a lending company where the borrowing company is a related corporation.

(b) Directors' Duties

Directors have a duty to act *bona fide* in the best interests of the company. As such, directors of the guarantor company must ensure that some corporate benefit accrues, either directly or indirectly, to their company if the company were to grant a guarantee. In a group company scenario, consideration may be given to the group's interests as a whole, but this must be done without compromising the individual interests of the guarantor company.

Corporate benefit is easily established in downstream guarantees (i.e. a parent company guarantees the obligations of a subsidiary company), as the parent company will usually derive some benefit from the enhanced financial position of its subsidiary company. However, corporate benefit is harder to establish in an upstream guarantee (i.e. a subsidiary company guarantees the obligations of a parent company) and cross-stream guarantee (i.e. one subsidiary company guarantees the obligations of another subsidiary company). If no corporate benefit can be established, a liquidator may be able to challenge the guarantee even if there has been shareholder ratification or approval.

(c) Financial Assistance

The giving of guarantees is subject to Singapore laws on financial assistance. Please see paragraph 5 below (*Prohibition on Granting Financial Assistance*).

5. PROHIBITION ON GRANTING FINANCIAL ASSISTANCE

5.1 Are there any laws preventing a company in your country from granting financial assistance to a borrower seeking to acquire that company?

Under section 76 of the Companies Act, a Singapore company (which is a public company or a company whose holding company or ultimate holding company is a public company) is generally prohibited from giving direct or indirect financial assistance for the acquisition of shares in itself or its holding company or ultimate holding company (as the case may be). Prohibited means of financial assistance include the making of a loan, the giving of a guarantee, the provision of security and the release of an obligation or debt or otherwise. Section 76(1) of the Companies Act also prohibits a company from lending money on the security of its own shares or the shares of its holding company or ultimate holding company (as the case may be).

5.2 Can these prohibitions be overcome by undertaking white wash procedures?

Yes, the Singapore company can undertake one of several white wash procedures set out in sections 76(9A), 76(9B), 76(9BA) and 76(10) of the Companies Act.

6. EXCHANGE CHANGE CONTROL ON REMITTANCES

6.1 Are there any exchange controls on remittances in place for payments out of your country?

Singapore currently has no foreign exchange controls on remittances in place.

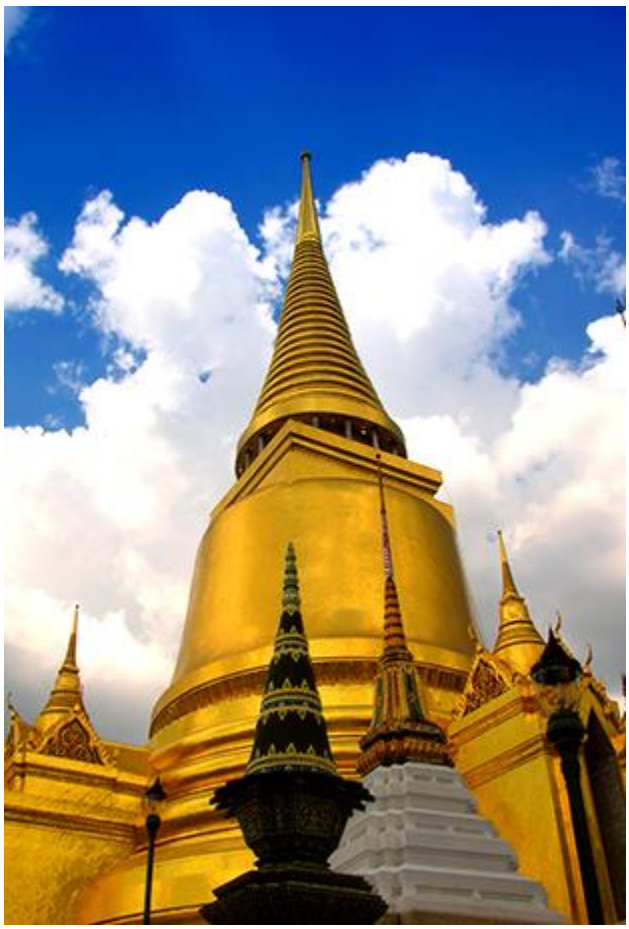
7. WITHHOLDING TAX

7.1 Is there any withholding tax applicable on payments out of your country in relation to a loan to a company based in your country?

Under section 45 of the Income Tax Act (Chapter 134) of Singapore ("**Income Tax Act**"), payments of (or in the nature of) interest, commissions, fees or other payments made by a Singapore company to any other person not resident in Singapore in connection with a loan made to that Singapore company are subject to withholding tax.

The current tax rate for such payments is 15%. However, withholding tax is not applicable for payments made to non-resident banks, if its Singapore branch has been exempted from section 45 of the Income Tax Act.

THAILAND



1. REGULATION OF COMMERCIAL SECURED LENDING

1.1 Does a lender require licences or approvals to lend money to a company based in your country?

The main statute regulating money lending activities in Thailand is the Financial Institutions Business Act B.E. 2551 (2008) (as amended) ("**Financial Institutions Act**"). The Financial Institutions Act is enacted to control and supervise a person who engages in the financial institution businesses in Thailand, which mainly consist of "commercial banking business (including subsidiaries and branches of foreign banks)", "finance business" and "credit foncier business" (as defined in the Financial Institutions Act). In order to engage in any of the aforesaid businesses in Thailand, the relevant licence is required to be obtained.

Under the current laws and regulations (including the Financial Institutions Act and notifications of the Ministry of Finance ("**MOF**") and notifications of the Bank of Thailand ("**BOT**") issued pursuant thereto), the granting of a loan, without taking any deposit in Thailand, would not fall to be considered as conducting "commercial banking business", "finance business" or "credit foncier business" in Thailand as ascribed in the Financial Institutions Act. Therefore, if an offshore bank or financial institution does not accept the deposits from the general public in Thailand, such offshore bank or financial institution will not be considered as engaging in "commercial banking business", "finance business" or "credit foncier business" in Thailand and would not be subject to a licence requirement under the Financial Institutions Act.

In addition to the Financial Institutions Act, an offshore lender who grants a loan directly to a company in Thailand may have to consider the Foreign Business Act B.E. 2542 (1999) (as amended) ("**FBA**") as it sets out some restrictions on foreigners or foreign entities from operating business in Thailand, subject to certain exceptions prescribed under the FBA.

Pursuant to the FBA, if foreigners (including foreign individuals and entities, and companies registered under Thai law in which at least half of the shares are held by foreign individuals or entities) operate businesses which fall within the ambit of those set out in Annex 3 of the FBA (including service business), the foreign business license

("**FBL**") must be obtained from the Department of Business Development, Ministry of Commerce ("**DBD**") (upon obtaining the permission from the Director-General of the DBD with the approval of the foreign business commission) prior to commencing such business in Thailand. Currently, there is no definition of "service business" provided in the FBA, and it shall presumably include all types of services, other than service businesses specified by the Ministerial Regulation. In practice, the DBD uses wide interpretation to include relevant service activity partly incurred in Thailand to be deemed as conducting service business in Thailand.

In relation to the conducting of money lending activity in Thailand, the DBD has, in October 2013, opined that "a foreign business entity that lends money to a Thai juristic entity for purchasing machinery where the lending activity or transaction is operated in whole or some part within Thailand shall be deemed to have operated a service business under Annex 3(21) of the FBA in Thailand where the FBL must be obtained prior to commencing the lending business in Thailand".

Based on such DBD's opinion, lending money to a company in Thailand (where part of the activities are incurred in Thailand) may possibly be interpreted by the DBD as engaging in service business in Thailand which requires one to obtain the FBL prior to commencing such transaction.

It is noteworthy that the DBD's opinion is not conclusive and is not considered as law (and currently there is no Supreme Court's judgment in relation to the DBD's opinion on this issue). Therefore, a party who is alleged by the DBD to have violated the FBA, based on its interpretation, still has the right to challenge the DBD in court proceedings.

In addition to the above, with respect to any security to be provided by a security provider in Thailand, the DBD views that providing a guarantee or security for any third party's debt is considered as engaging in a "service business" under Annex 3(21) of the FBA in Thailand. As a result, if a security provider falls under the definition of "foreigner" under the FBA, such security provider is required to obtain the FBL before providing a security to guarantee any third party's debt.

1.2 What are the consequences of a failure to comply?

A person who engages in the "commercial banking business (including subsidiaries and branches of foreign banks)", "finance business" or "credit foncier business" in Thailand without obtaining a licence shall be subject to an imprisonment for a term of two to ten years and a fine of THB 200K to THB one million pursuant to the Financial Institutions Act.

The consequence of the failure to obtain the FBL prior to operating business in Thailand is potential imprisonment for a term not exceeding three years and/or a fine of THB 100K to THB one million in accordance with the FBA. In the event where a juristic person commits such offence, directors, partners or persons with the authority to represent the juristic person, who connive in the commission of such offences or fail to take reasonable action in preventing such offence shall be liable to the same criminal penalty.

2. COMMON FORMS OF COMMERCIAL SECURITY

2.1 What are the common forms of security granted by a company in your country?

There are four types of securities currently available/recognised under Thai laws: (a) guarantee, (b) mortgage, (c) pledge and (d) business security under the Business Security Act B.E. 2558 (2016) (the "**BSA**"). Certain types of securities will provide preferential right to the creditors while others may serve only as added security, and certain types of securities may be more beneficial in various situations.

Guarantee

(a) Creation of guarantee

Under the laws of Thailand, a guarantee (also known as suretyship) is a contract, whereby a guarantor binds himself/herself to a creditor to satisfy an obligation in the event that the debtor fails to perform it. A contract of guarantee is not enforceable unless there is written evidence signed by the guarantor.
A guarantee can be given only for a valid obligation. The objective and the nature of the obligation, the maximum amount of guarantee, and the period of

time for making the secured obligation shall be clearly stated, except for a guarantee for a series of transactions in respect of which such a period may not be stated.

Under the laws of Thailand, an agreement requiring the guarantor to be liable in the same manner as the debtor or as a joint debtor is void, except where such guarantor is a juristic person and agrees to be bound as a joint debtor with the debtor.

(b) Enforcement of guarantee

Upon the default of the debtor, the creditor is entitled to demand the guarantor to make payment of the debt. The creditor shall send a written notice to the guarantor within 60 days from the date of the default. Before the guarantor obtains the written notice, the creditor cannot demand the guarantor to make payment. However, it shall not prejudice the guarantor's right to make payment when the debt is due.

If the creditor fails to issue a written notice within the 60-day period, the guarantor shall be released from the liability for interest, compensation and other charges associated to the debt that arise after the 60-day period.

It is worth noting that a guarantor can, in addition to the defences which the guarantor has against the creditor, raise defences which the debtor has against the creditor. Any provision that prohibits the guarantor from raising defences that the debtor has against the creditor or requiring the guarantor to waive such defences is not enforceable.

Unlike a mortgage or pledge, the creditor has no preferential right over the guarantor or any property of the guarantor.

(c) Extinguishment of guarantee

A guarantee is extinguished:

(i) as soon as the underlying obligation which is secured by that guarantee is extinguished by any cause whatsoever;

(ii) when a creditor grants to the debtor an extension of time (in a case where a guarantee has been given for an obligation which is to be performed at a definite time), except in a case where the guarantor agrees to such extension of time; or

(iii) in a case where a guarantee is made for a series of transactions without limitation of time in favor of a creditor, when a guarantor gives a notice to a creditor terminating its guarantee for future obligations. In such a case, the guarantor is not liable for transactions carried out by the debtor after such notice reaches the creditor.

Mortgage

(a) Creation of mortgage

Under the laws of Thailand, a mortgage is a contract where one party, a "mortgagor", places an immovable property (such as land, buildings and structures on the land, condominium units and machinery or equipment (which can be registered under the Machinery Registration Act B.E. 2514 (1971) (as amended))) or certain types of movable property (such as vessels of five tons and over) with another party, a "mortgagee", as a security for the repayment of debt, without physically handing over the property to the mortgagee. Only the owner of the mortgaged property can create a mortgage over the property.

A contract of mortgage must be made in writing, specifically identify the property to be mortgaged and shall be executed and registered in Thai language with the competent authority in Thailand (i.e. the Land Department, the Central Office for Machinery Registration, or the Marine Department, as the case may be). In addition, the Civil and Commercial Code of Thailand prescribes that provisions on the validity of a guarantee (as described above) shall apply to the validity of a mortgage agreement to the extent applicable.

(b) Benefits of creating mortgage

In creating a mortgage, the creditor or mortgagee will have "preferential rights" where such creditor or mortgagee will have a right over the mortgaged property and to receive therefrom performance of an obligation due to him before other creditors (e.g. the creditor has a first right to get the money from the enforcement of mortgaged land / property before

other creditors). This preferential right also applies in the case of bankruptcy proceeding or rehabilitation proceeding of the debtor.

(c) Enforcement of mortgage

To enforce the mortgage upon default by the debtor, the mortgagee must first notify the debtor in writing to perform the obligation within a reasonable time to be fixed in such notice (which must be no less than 60 days from the date the debtor receives such notice). In the event that the debtor is not the same person as the mortgagor, within 15 days after the notice has been served to the debtor, the mortgagee shall also notify the mortgagor of the debtor's default. Otherwise, the mortgagor shall be discharged from the liability for interest, compensation and other charges associated with the debt incurred after the lapse of such 15-day period.

Under Thai law, the enforcement of the mortgage can be carried out by taking court action to obtain a judgment to have the mortgaged property seized and sold at a public auction by the Legal Execution Official. This is, however, subject to certain exceptions e.g. foreclosure or mortgagor's notification of enforcement under the conditions prescribed by the Civil and Commercial Code of Thailand.

In the event the mortgage has been enforced and the value of the mortgaged property is lower than the outstanding debt owed, the debtor is not liable for the remaining debt, except in certain circumstances e.g. the mortgagor is the debtor or the mortgagor is a person with management powers of a juristic person who is the debtor, and has also entered into a separate guarantee agreement.

(d) Extinguishment of mortgage

A mortgage is extinguished:

(i) when the underlying obligation which is secured by that mortgage is extinguished, other than by prescription (statute of limitations);

(ii) when the release of mortgage is granted in writing to the mortgagor;

(iii) when the mortgagor is discharged;

(iv) when the mortgage is removed;

(v) when the mortgaged property is sold by public auction according to the court order as a result of enforcement or removal of mortgage, or by public auction upon demand of the mortgagor without having to take court action as mentioned above; or

(vi) when there is a foreclosure of the mortgaged property.

Pledge

(a) Creation of pledge

A pledge is a contract whereby the pledgor delivers to the pledgee a movable property as security for the performance of an obligation. The parties to a pledge may agree to have the pledged property kept by the pledgee or by a third person. The pledge entitles the pledgee to retain all the pledged property, until such time as the pledgee has received full performance of the obligation and accessories thereof. The creditor or the pledgee will have a preferential right over the pledged property in the same way as a mortgagee.

The property placed under a pledge can secure the principal obligation and its accessories i.e., interest, damages for non-repayment, fees to enforce the pledge, expenses to upkeep the pledged property and damages for loss from defect of the pledged property invisible to the eyes. Unless otherwise agreed, any interest, dividend or other types of legal rights and interests arising from the pledged property shall first be set-off against the interest of the debt owed to the pledgee. If there is no interest from the principal debt, the interest, dividend or other types of legal rights and interests arising from the pledged property shall be set-off against the principal debt.

(b) Enforcement of pledge

The enforcement of pledge under Thai law can be carried out by the creditor/pledgee without having to first take court action. On enforcement of the pledge in the case where the debtor has failed to perform the obligations, the pledgee must first notify the debtor in writing to perform the obligation and accessories thereof within a reasonable time to be fixed in such notice. In this regard, although there is no specific ruling on what is "a reasonable time", a

period between 15 to 30 days would be considered as reasonable.

If the debtor fails to comply with the said notice, the pledgee is entitled to sell the pledged property, but only by public auction. The pledgee must also notify the pledgor in writing of the place and time of the auction. If notification cannot be made, the pledgee may sell the pledged property by public auction after one month from the time the obligation became due. In any event, if several properties are pledged as security for one obligation, the pledgee may sell any of such properties pledged as he/she may select, but the pledgee may not sell more than is necessary for the satisfaction of his/her right.

Upon enforcement of the pledge, the pledgee must appropriate the net proceeds to the extinguishment of the obligation and accessories thereof, and must return the surplus to the pledgor or any person entitled thereto. If the proceeds derived from enforcement of the pledge are less than the amount due, the debtor of the obligation still remains liable for the difference. Unless it has been agreed upon in advance, the pledgor shall not be liable for such difference. In light of the foregoing, it will be in the pledgee's interest to ensure that the pledge agreement includes a statement that the pledgor and the debtor, if different, shall remain liable for the outstanding debts.

(c) Benefit of creating pledge

In creating a pledge, the pledgee will have "preferential rights" where such pledgee will have a right over the pledged property and to receive therefrom performance of an obligation due to him before other creditors (e.g. the pledgee has a first right to get the money from the enforcement of pledged property before other creditors). This preferential right also applies in the case of bankruptcy proceeding or rehabilitation proceeding of the debtor.

(d) Extinguishment of pledge

A pledge is extinguished:

(i) when the obligation secured is extinguished otherwise than by prescription (statute of limitations); or

(ii) when the pledgee allows the pledged property to return to the possession of the pledgor.

Business Security

(a) Creation of business security

Pursuant to the BSA, a business security is an agreement where one party ("**security provider**"), grants security over property to another person, ("**security receiver**"), as security for the performance of an obligation of the security provider or any other person, without delivering such property to the security receiver. The security provider can either be a natural person or a juristic person, while the security receiver must be a financial institution or any other person as prescribed in the ministerial regulation, which includes, among others, foreign banks but only in the case of joint credit facility with a financial institution in Thailand.

Examples of the properties which can be provided as security under the BSA include, among other things, business, right of claim, machinery, inventories or raw materials, and intellectual property rights.

A business security agreement and its amendment thereto must be made in writing and registered with the Business Security Registration Office of the DBD. The business security agreement must contain details which are required under the BSA, for instance, date and time of the registration, name and address of a debtor and security provider and the secured obligation.

(b) Enforcement of business security

The enforcement of business security can be categorized into two types depending on whether the security is over a property or a business operation as defined under the BSA ("**Business Operation**").

(i) Enforcement of Property

Upon the occurrence of an event for the enforcement of security, the security receiver shall send a notice stating such enforcement event to the security provider in order to request for the delivery of the possession of property provided as security to the security receiver. Procedure for the enforcement of property also

depends on whether the security provider agrees or refuses to deliver the property to the security receiver as follows:

- In the event where the security provider or the person holding the property provided as security agrees to deliver such property together with the consent letter for disposal of the security:
  - the security receiver shall, within 15 days from the date that security receiver has received the possession of such property, notify the debtor and the security provider in writing to repay the debt within 15 days from the date of receipt of such notice and that the failure to repay the debt within such 15-day period shall entitle the security receiver with the right to enforce the property provided as security, either by way of foreclosure or sale by auction in accordance with rules and procedure specified in the BSA.
- In the event where the security provider or the person holding the property provided as security refuses to deliver such property:
  - the security receiver may file a petition to the court for the enforcement of such property.

(ii) Enforcement of Business Operation

The enforcement of security over Business Operation must be done by a security enforcer, who must obtain the relevant licence to become a security enforcer under the BSA. The security enforcer shall then proceed with the enforcement of security over Business Operation in accordance with the rules and procedure specified in the BSA.

It is noteworthy that under the BSA, the security receiver may enforce the security even if the secured debt expires in accordance with the statute of limitations but shall not enforce the unpaid interest of more than five years under the business security agreement.

(c) Benefit of creating business security

In creating a business security, the security receiver will have "preferential rights" where such security receiver will have a right over the property given as security and to receive therefrom performance of an obligation due to him before other creditors (e.g. the security receiver has a first right to get the money from the enforcement of property given as security before other creditors). This preferential right also applies in the case of bankruptcy proceeding or rehabilitation proceeding of the debtor.

(d) Extinguishment of business security

A business security agreement is extinguished:

(i) when the underlying secured obligation is extinguished, other than by prescription (statute of limitations);

(ii) when the security receiver and security provider agree in writing to terminate the business security agreement;

(iii) when the property provided as security is released; or

(iv) when the property provided as security is disposed in the course of enforcement of security or when there is a foreclosure of such property.

In addition to the types of security mentioned in paragraph 2.1 above, in the Thai market, there are also some other types of arrangement that are commonly used as security (but not recognised by the Bankruptcy Act B.E. 2483 (1940) (as amended)). Although the beneficiary of such type of security will not be recognised as a secured creditor, this type of security still provides lenders with a certain level of protection or benefit. The most popular types of security used by lenders are a conditional assignment or an absolute assignment of contractual arrangements.

2.2 Are there any restrictions on the grant of such security?

Generally, there is no licensing requirement for a foreign or offshore lender to take any of the aforementioned securities over assets in Thailand. However, if the security is a mortgage over land in Thailand, it is

noteworthy that a foreign or offshore lender cannot foreclose the land as the law prohibits the foreigner from owning land (but it is still possible to enforce by way of a sale through a public auction).

As mentioned above at the end of paragraph 1.1, pursuant to the recent interpretation of the authorised officer under the FBA, the provision of security for another person's debt is considered as engaging in a service business. As a result, if a security provider is a "foreigner" under the FBA, the foreign business licence for that specific purpose is required to be obtained prior to the provision of any security to secure any debt of a third party.

If land or machinery is obtained under the privilege granted by the Board of Investment of Thailand ("**BOI**"), the BOI's approval is required to be obtained prior to the creation of mortgage over such land or machinery.

With respect to a land mortgage, although the prior clearance from the Ministry of Finance is no longer required for a foreign mortgagee, an officer of the Land Department may ask for the evidence, to its satisfaction, that the loan does not come from public deposits and the mortgagee does not accept deposits from the general public in Thailand.

3. REGISTRATION AND PERFECTION OF SECURITY

3.1 How does a lender take security over assets in your country?

A lender may take a pledge, mortgage or business security depending on the type of asset and the qualification of the security receiver.

3.2 What perfection requirements are there in relation to taking security over these assets (for example notification, notarisation, registration and stamp duty requirements)?

Guarantee

Subject to the requirements on the creation and validity of a guarantee as set out in paragraph 2.1 above on "*Guarantee*", a guarantee must be made in writing and signed by the guarantor, failing which the guarantee is unenforceable.

A guarantee shall be subject to stamp duty at the rate of: (a) THB 1 in case of guarantee for an amount not more than THB 1K; (b) THB 5 in case of guarantee for an amount more than THB 1K but not more than THB 10K; and (c) THB 10 in case of guarantee for an amount more than THB 10K.

Mortgage

The registration of a land mortgage shall be made at the Department of Land where the land is located. A registration fee in connection with the registration of a mortgage is in the amount of 1% of the maximum registered mortgage amount secured by such mortgage, but not exceeding THB 200K.

The registration of a mortgage of machinery can be made at the Central Office for Machinery Registration. It is noteworthy that only machinery that is already registered with the Central Machinery Registration Office is eligible to be mortgaged. The fee for registration of mortgage is THB 1 for every THB 1K of the maximum registered mortgage amount, but not exceeding THB 120K.

Pledge

There is no restriction under Thai law that a pledge must be made in writing or must be evidenced in writing. Therefore, a contract of pledge may be agreed verbally or in writing. The fundamental requirement of a pledge is that the pledged property must be delivered to the pledgee or a third person (i.e. security keeper) and the pledgor must intentionally deliver it as security for the performance of an obligation. Additionally, the pledgee must keep the pledged property throughout the period of the pledge. If the parties agree to deliver the property as security but there is no actual delivery, it shall not be regarded as a pledge.

A pledge shall be subject to stamp duty at the rate of THB 1 for every THB 2K or fraction thereof of the amount of debt or THB 1 in case the pledge does not limit the amount of debt, except for: (a) pawn tickets issued by a legally licensed pawnshop; and (b) a pledge where the underlying debt is a loan and stamp duty has been duly paid on such loan.

Business Security

The registration of a business security shall be made via online platform managed by the Business Security Registry Division of the DBD.

In the event a property provided as security is a plot of land, the registration fee would be the same as the mortgage registration fee i.e. in the amount of 1% of the maximum amount secured by such business security, but not exceeding THB 200K .

In the event other property or Business Operation is provided as security, the registration fee is 0.1% of the amount secured by such property as security but shall not exceed THB 1K.

4. GRANTING GUARANTEES

4.1 Can a company based in your country give a guarantee in respect of credit facilities granted to another company?

A company (and directors as representatives) is required to carry on business in accordance with its business objective specified in the company's affidavit and in compliance with its internal requirement as specified in its articles of association. Thus, if the company has a business objective to provide a guarantee for other people's debt, the company can provide a guarantee. To provide a guarantee, the company has to also check its articles of association to determine whether it requires the prior approval or resolution from either the board of directors of the company or the shareholders of the company.

Please also note the FBL requirement mentioned above at the end of paragraph 1.1 and under paragraph 2.2.

4.2 Are there any limits / issues in giving such guarantee?

Please refers to the FBL requirement mentioned above at the end of section 1.1 and in section 2.2.

The Public Limited Company Act B.E. 2535 (1992) (as amended) prohibits the company from granting a loan including granting a guarantee in the matters of purchase or discount of a bill, and granting securities in connection with a loan to its directors, staff or employees unless such a loan is granted in accordance with: (a) the regulations on members' and employees' assistance schemes; or (b) the laws on commercial banking, the laws on life assurance or other laws.

Further, the company shall not grant such financial assistance to:

(a) the spouse or a child who is not *sui juris* (attain legal adulthood) of a director, staff, or employee;

(b) an ordinary partnership of which a director, staff or employee, or spouse or a child who is not *sui juris* of such director, staff, or employee is a partner;

(c) a limited partnership of which a director, staff or employee, or spouse or a child who is not *sui juris* of such director, staff, or employee is a partner with unlimited liability; or

(d) other company or a private company in which a director, staff or employee, or spouse or a child who is not *sui juris* of such director, staff, or employee holds an aggregate number of shares exceeding half of the total number of shares of such other company or private company.

5. PROHIBITION ON GRANTING FINANCIAL ASSISTANCE

5.1 Are there any laws preventing a company in your country from granting financial assistance to a borrower seeking to acquire that company?

In general, there is no restriction or prohibition to directly restrict a company from granting financial assistance to a borrower to purchase the shares of that company. However, there are certain aspects which should be considered.

A public limited company cannot grant a financial assistance to certain people as mentioned in section 4.2 above regardless of the purpose of the underlying loan agreement.

In respect of a listed company, lending of money, providing credit facility, guarantee, engaging in juristic acts binding the company to increase its cost of capital (in cases where a third person lacks liquidity or is unable to perform the obligation) or giving financial assistance to other persons by any other means which is not the ordinary business of the company, regardless of whether the said act is done by the company or the subsidiary, will have to be approved at the shareholders' meeting if it is considered significant to the company in accordance with rules as specified by the notification of the Capital Market Supervisory Board. In the event of a failure to obtain such

shareholders' approval prior to carrying out any such acts, a shareholder or shareholders holding not less than 5% of the total number of the voting rights of the company may file a motion with the court to order the cancellation of such act.

5.2 Can these prohibitions be overcome by undertaking white wash procedures?

There is no concept of white wash procedures under Thai law.

6. EXCHANGE CONTROL ON REMITTANCES

6.1 Are there any exchange controls on remittances in place for payments out of your country?

Thailand's exchange control regulation is governed by the Exchange Control Act B.E. 2485 (1942) (as amended) ("**Exchange Control Act**") and is administered by the BOT under relevant ministerial regulations and BOT's notification. All foreign exchange activities (including, but not limited to, the remittance of money out of Thailand) must be done only with an authorised agent of the BOT under the Exchange Control Act and must be done by an authorised agent of the BOT under the Exchange Control Act. The Exchange Control Act provides that the transfer of foreign currency or Thai Baht outside Thailand is restricted and prohibited except in the case where such transfer of foreign currency or Thai Baht is made in accordance with the permitted objective and amount specified by the BOT.

In the case where a person would like to remit any amount out of Thailand other than in accordance with the permitted objective and/or the amount specified by the BOT, permission of the BOT is required to be obtained (such permission will be granted on a case-by-case basis) before entering into such a transaction. That person is required to submit an application to the competent official of the Foreign Exchange Administration and Policy Department at the BOT or through an authorised agent of the BOT along with its reason and necessity for the remittance and its supporting documents. The approval/denial of such request is at the sole discretion of the BOT.

7. WITHHOLDING TAX

7.1 Is there any withholding tax applicable on payments out of your country in relation to a loan to a company based in your country?

A payment of interest (and any type of payment of fees, expenses and/or other income (if any) having a similar nature to interest e.g. commitment fee, front-end fee, cancellation fee and prepayment fee) on loan by a company based in Thailand to a lender outside Thailand is subject to a withholding tax in accordance with the Revenue Code.

VIETNAM

1. REGULATION OF COMMERCIAL SECURED LENDING

1.1 Does a lender require licences or approvals to lend money to a company based in your country?

Lending is a form of credit extension which is one of the banking activities that are subject to the Law on Credit Institutions.

In order to provide onshore lending, the onshore lender must be a credit institution or a branch of a foreign bank licensed to conduct banking operations in Vietnam. A "credit institution" is defined as being inclusive of banks, non-banking credit institutions, micro-financial institutions and people's credit funds. Banking operations include receipt of deposits, extension of credit and provision of payment services via accounts.

Where lending is a cross border transaction from outside Vietnam, the offshore lender is not required to be a credit institution nor does it need to be licensed to conduct banking operations. If the term of the offshore loan is 12 months or longer, the borrower must register the loan with the State Bank of Vietnam ("**SBV**") for the purpose of State management and supervision.

1.2 What are the consequences of a failure to comply?

If an onshore lender operates without a banking operation license, it shall be liable for an administrative penalty which includes a monetary fine (from VND 400 million to VND 500 million) and a remedial measure of compulsory payment to the State budget of illegal profit earned from such violation.

Where the borrower fails to register an offshore loan with SBV, the legal consequences are: (a) the loan will be entirely unenforceable; (b) the borrower will not be permitted to remit money out of Vietnam to repay the principal or pay interest thereon; (c) a monetary fine may be imposed on the borrower for its failure to register the loan (from VND 20 million to VND 30 million); and (d) a mandatory remedy to register the loan at SBV. The above monetary fines are applicable to a violation committed by an individual. The monetary fines applicable to a violation committed by an organisation/entity would be double.

2. COMMON FORMS OF COMMERCIAL SECURITY

2.1 What are the common forms of security granted by a company in your country?

The different forms of security are outlined in the Civil Code and guiding Decree 163/2006 (as amended), and include: pledge, mortgage, deposit, security collateral, escrow deposit, title retention, guarantee, fidelity guarantee, and lien on property. Among these forms of security, pledges and mortgages of property are the most common.

Property that is capable of being provided as security would be current property or future property which the law does not prohibit from being traded. A pledge of assets involves the physical delivery by the pledgor of certain assets under its ownership to the pledgee as security for the performance of an obligation. A mortgage of assets involves the use by the mortgagor of assets under its ownership as security for the performance of an obligation to the mortgagee but without physical transference of such property to the mortgagee.

2.2 Are there any restrictions on the grant of such security?

Basically, there are no restrictions on the grant of a security interest, except that offshore lenders are not permitted to take security interests in land use rights and assets attached to land, including mortgages, from an onshore borrower. However, as a matter of practice, an offshore lender(s) will often cooperate with an onshore lender (credit institution or branch of foreign bank in Vietnam) to provide a syndicate loan to an onshore borrower and the onshore creditor shall act as security agent and take mortgage of the land use rights and assets attached to land for its onshore loan, whilst the surplus proceeds over the land shall be mortgaged to the offshore creditor (acting through security agent) for the offshore loan.

3. REGISTRATION AND PERFECTION OF SECURITY

3.1 How does a lender take security over assets in your country?

Security assets and property are divided into two main categories in accordance with the Civil Code: movable assets and immovable assets. Depending on the type of asset subject to a secured transaction, a lender may take a pledge or mortgage of assets as the security interest. Registration of security transactions is not compulsory except for mortgages of land use rights and/or assets attached to land which have been recorded in the land use right certificate, mortgages or pledges of aircraft, and mortgages of sea-going ships.

Depending on the type of asset, lenders may need to register their security interests with the relevant authorities responsible for registration. There are different authorities for different types of assets. The National Registration Agency for Secured Transactions (NRAST) under the Ministry of Justice is responsible for the registration of secured transactions in which the security assets are movable. With respect to immovable assets, known as land use rights and assets attached to the land, the branch of Land Registration Office and the Land Registration Office under the Department of Natural Resources and Environment at the provincial/municipal level is responsible for the registration of the secured transaction. For aircraft and sea-going ships, the Civil Aviation Authority and Vietnam Maritime Administration or Maritime Bureaus and Port Authorities as delegated by Vietnam Maritime Administration, respectively, are the competent registration authorities.

3.2 What perfection requirements are there in relation to taking security over these assets? For example notification, notarisation, registration and stamp duty requirements.

Apart from some particular instances where, as outlined in the preceding paragraph, security interests must be registered with the relevant authorities, contracts for the mortgage of land use rights and contracts for mortgages of a residential house are required to be notarised in accordance with the prevailing regulations.

A secured creditor will defeat both general and statutory (i.e. employees, government taxes) creditors in a priority dispute. However, and despite the fact that registration of

secured transactions (other than mortgage of land use rights) are not required by law, it is strongly recommended that the secured party registers the secured transaction with the relevant authority. The time of registration determines the priority ranking of secured interests. As such, prompt registration will ensure that it will prevail in a priority dispute against possible subsequent secured creditors upon realisation of the security property.

4. GRANTING GUARANTEES

4.1 Can a company based in your country give a guarantee in respect of credit facilities granted to another company?

The laws of Vietnam permit granting a guarantee by a company in respect of credit facilities to another company. A guarantee is defined as an undertaking made by the guarantor to the beneficiary to perform an obligation on behalf of the principal if the obligation falls due and the principal fails to perform or incorrectly performs the obligation. The parties may agree that the guarantor shall only be obliged to perform the obligation if the principal is incapable of performing it.

4.2 Are there any limits / issues in giving such guarantee?

In the case of a guarantee granted by an onshore company to guarantee an offshore obligation in part or in whole, such guarantee must be approved in advance by the Prime Minister of Vietnam. Though such requirement has been established for years, the official guidance on how the relevant approval may be applied for and processed in practice has yet to be promulgated. Absence of an official guidance as such has given rise to difficulties and lack of transparency for applicants to carry out the necessary steps to obtain the approval. In July 2020, a draft decision of the Prime Minister regulating the sequence and procedure for applying for the approval of guarantee to non-residents has been introduced by the law makers in an effort to fill this gap. However, it is unclear when such decision will be officially issued.

In addition, where security is made in the form of a guarantee, it is recommended that the guarantee be accompanied by a pledge or mortgage agreement as this may facilitate the process of realisation when the obligor fails to perform its obligations.

5. PROHIBITION ON GRANTING FINANCIAL ASSISTANCE

5.1 Are there any laws preventing a company in your country from granting financial assistance to a borrower seeking to acquire that company?

Generally, Vietnamese law does not have any specific regulation preventing a company from granting financial assistance to a borrower seeking to acquire that company. A company would be able to grant a loan, grant security or give a guarantee to secure a loan made to a borrower that will be used to acquire the company, as long as the borrower is still able to satisfy in full its debts and property obligations. However, it is worth noting that extension of financial assistance should not be conducted on a regular basis as it could be challenged by the authorities as a routine lending business, which is a privilege accorded to credit institutions only.

6. EXCHANGE CONTROL ON REMITTANCES

6.1 Are there any exchange controls on remittances in place for payments out of your country?

Vietnam has adopted the Ordinance on Foreign Exchange Controls in 2005, which was recently amended in 2013. As a general rule, money is not allowed to be remitted out of the country except for the following reasons: import and export of goods and services, foreign loans, direct and indirect investments, one-way payments for consumption purposes, and other similar transactions.

7. WITHHOLDING TAX

7.1 Is there any withholding tax applicable on payments out of your country in relation to a loan to a company based in your country?

Yes, there is. The borrower is required to withhold and pay withholding tax of 5% applied to the interest payments to the tax authority prior to remitting any amount out of Vietnam.

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