



# ICLG

## The International Comparative Legal Guide to: **Lending & Secured Finance 2016**

### 4th Edition

A practical cross-border insight into lending and secured finance

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# Taiwan



Hsin-Lan Hsu



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## 1 Overview

### 1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

In spite of its weak economic performance, Taiwan was the sole bright spot in a shrinking Asian loan market in 2015 as easier funding conditions for the island's lenders helped buck a regional decline in deal volumes. The volume of syndication loans in Taiwan increased by 9% compared to 2014. However, most of the syndication loans were refinancing. The top five banks in the recent syndication loan transactions are all state-run banks.

Because of oversupply in Taiwan's domestic lending market, offshore lending has since become a major growth driver for several large banks. However, exposure to China's private sector was still a sticking point, as country limits and growing fears of corporate defaults underlined the importance of working with the right credits. In addition, consumer lending slowed significantly in 2015 compared to 2014. A combination of factors impacted on growth. Low consumer confidence, lack of income growth and employment uncertainty all led to flagging growth. Card lending is well developed, while the development and popularity of other non-lending payment methods, such as pre-paid and debit cards, appeal to many consumers. Mortgages/housing also continued to take a hit from declining housing affordability.

On October 19, 2015, the Bankers Association of the Republic of China and the Japanese Bankers Association signed a memorandum of understanding (MOU) on cooperation that pledged to jointly promote the future development of the banking industry in the two countries. The two organisations will work together to create better and healthier conditions for the future development of the banking industry in the two countries by sharing information and learning from each other through seminars.

Taiwanese banks also strengthened their international capacity by entering into memorandums of understanding with foreign banks, especially Japanese banks. On October 20, 2015, Bank of Taiwan, the largest lender in Taiwan, and Japan's third largest bank, Mizuho Bank, Ltd., signed a memorandum of understanding (MOU) on cooperation in a wide variety of business fields, including syndicated lending, trade lending, funding support, electronic finance, personnel training and trust management. CTBC Bank also signed a memorandum of understanding with a Japanese bank, Aozora Bank, in June 2015 to cooperate in the international syndication business.

### 1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

- (1) It was reported that in November 2015, the National Communications Commission (NCC) of Taiwan approved Dafu Media's acquisition of 20% shares in Kbro Co. from Carlyle Group's, and a syndicated loan with the lending amount of NT\$59 billion was formed by seven local banks led by Bank of Taiwan.
- (2) In February 2015, Formosa Plastics Group entered into a syndication loan of US\$1.2 billion with 13 local and foreign banks led by Bank of Taiwan to finance the capital expenditure of its steel plant in Ha Tinh, Vietnam. The term of the loan is five years and can be extended for another two years.
- (3) In July 2015, China Steel Corporation (CSC) obtained the participation of two banks, Land Bank of Taiwan and Taiwan Cooperative Bank, in US\$400 million five-year amortisation term loans with the highest loan commitment subscribing for more than US\$1 billion. The leading banks and bookkeepers are Bank of Taiwan and Taipei Fubon Bank. Ten banks have joined in consortium with differentiated lower loan commitment, with unsecured loans adding 30% over-allotment options and choices for extension by two years. The loans will be used for supporting investment in steel plant under Formosa Plastics Group in Ha Tinh, Vietnam, which is a joint venture between Formosa Plastics Group and CSC.
- (4) On September 11, 2015 AU Optronics Corp. signed a NT\$37.5 billion dual-tranche facility with Bank of Taiwan, CTBC Bank, Cathay United Bank, DBS, Land Bank of Taiwan, Mega International Commercial bank, Taipei Fubon Commercial Bank, Taishin International Bank and Taiwan Cooperative Bank as the joint bookkeepers and mandated lead arrangers. The facility is split into a NT\$26.5 billion five-year tranche and a NT\$11 billion three-year tranche.
- (5) On May 19, 2015, Powerchip Technology Corp ("PTC") entered into a NT\$15 billion syndication loan agreement through joint bookkeepers and mandated lead arrangers Chang Hwa Commercial Bank, Land Bank of Taiwan and Taiwan Cooperative Bank, to repay its current outstanding debts. The three-year term loan is equally split into two NT\$7.5 billion tranches. After paying back all of its loans and escaping from the financial distress status, PTC will be back to its normal operation and reapply for listing on Taiwan Stock Exchange.



## 2 Guarantees

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

According to the Company Act, any company cannot act as a guarantor of any nature, unless otherwise permitted by law or by the company's Articles of Incorporation. Thus, if permitted by its Articles of Incorporation, the company may provide guarantees for other members of its corporate group.

If the company is a public company, there will be additional restrictions. Pursuant to the Regulations Governing Loaning, Endorsement or Guarantees of Public Companies ("Guarantee Regulation"), a public company may provide guarantees only for the following companies: (1) a company with which the public company conducts business; (2) a company in which the public company directly and indirectly holds more than 50% of the voting shares; and (3) a company that directly and indirectly holds more than 50% of the voting shares in the public company. In addition, guarantees provided by a public company should comply with the internal rules adopted in accordance with the Guarantee Regulation.

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

Generally, there is no concern about the enforceability under this circumstance so long as all legal requirements are satisfied. However, if a company provides guarantees for others in return for only a disproportionately small benefit or without benefit in return in the absence of a justifiable cause, there may be concern that the directors resolving the guarantees may breach their fiduciary duties. Further, the creditors of the guarantor may apply to the court for revoking the guarantee if, due to the guarantee, the guarantor has no sufficient assets to repay the debts owed to its creditors.

### 2.3 Is lack of corporate power an issue?

Please refer to our answer to question 2.1. If a company's Articles of Incorporation do not permit the company to provide guarantees to others, but the company's responsible person, such as a director, still provides guarantees to others on behalf of the company, the responsible person alone should be liable for the guarantees. The guarantee does not constitute a valid obligation of the company.

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

No governmental approval is required for a company to provide guarantees. As for due authorisation, a board resolution adopted by the board of directors of the company to provide guarantees normally would suffice unless the Articles of Incorporation provide otherwise. In practice, however, it is not common for a company's Articles of Incorporation to require that the provision of guarantees be approved by a shareholders' meeting.

However, where a Taiwanese company provides a guarantee to its overseas affiliate (incorporated in a jurisdiction other than Mainland China) who borrows funds to make investment in Mainland China, the guarantor will require a prior approval of the Investment

Commission ("IC") of the Ministry of Economic Affairs ("MOEA") with respect to the investment in Mainland China.

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

The Guarantee Regulation and a company's internal rules adopted in accordance therewith impose certain limitations on the aggregate amount of the company's guarantees to all counterparties and the amount of the company's guarantees to a single counterparty. If the internal rules are incorporated into the company's Articles of Incorporation, the violation of the internal rules and the Articles of Incorporation by the company in providing a guarantee may affect the enforceability of the guarantee. By contrast, if the company only violates the internal rules in providing the guarantee, it is generally considered that violation of such limitations will only result in an administrative fine imposed by the Financial Supervisory Commission or breach of fiduciary duty by the directors but will not affect the enforceability of the guarantees.

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

A Taiwanese corporate entity or individual has an annual foreign exchange quota of US\$50 million (or its equivalent) or US\$5 million (or its equivalent), respectively. No prior approval from the CBC is required if the Taiwanese onshore guarantor converts New Taiwan Dollars into foreign currency for remittance to the offshore guaranteed and the conversion does not exceed the above quota. The CBC has the sole discretion to grant or withhold its approval on a case-by-case basis if the onshore Taiwanese guarantor's quota would be exceeded for such conversion.

## 3 Collateral Security

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

Among other things, the following types of collateral are commonly seen in secured lending transactions:

- (1) a mortgage over real property, such as land and buildings;
- (2) a chattel mortgage over a movable asset, such as machinery and equipment;
- (3) a pledge over movable assets or securities, or a pledge over the pledgor's property rights which are transferable, such as the pledgor's rights in bank accounts, accounts receivable or patents; and
- (4) an assignment of property rights, which are transferable.

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

As a general rule, the security provider and the security interest holder should enter into an agreement to identify the specific asset subject to the security interest. A general security agreement without identifying such specific asset, such as a floating charge, is not enforceable under Taiwan law. In addition, different types of assets may be subject to different requirements, such as registration or filing with the competent authorities, on the perfection of the security. We will briefly advise on such requirements in our answers to questions 3.3 to 3.7.

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

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Yes. In order to create a valid mortgage over the land, buildings and plants, the mortgagor and the mortgagee should enter into a written agreement, and registration with the competent authority is required.

As for machinery and equipment, the security to be created may be a pledge or a chattel mortgage. The machinery and equipment on which a chattel mortgage can be created are subject to the list promulgated by the authority. Both security interests (pledge and chattel mortgage) give the security interest holder a first priority over the machinery and equipment. To create a pledge, the pledgor and the pledgee have to enter into a written agreement and the pledgor should deliver the possession of the machinery and equipment to the pledgee, but a registration with the competent authority is not required. To create a chattel mortgage, the mortgagor need not deliver the possession thereof to the mortgagee; however a registration with the competent authority would be necessary in order for the mortgagee to claim the chattel mortgage against a *bona fide* third party.

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

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Yes. To create a pledge over receivables, the pledgee and the pledgor must enter into a written agreement. In addition, the receivables must be identifiable according to the content of the pledge agreement. Further, the obligor should be notified of the creation of the pledge in order for the pledgee to be able to claim the pledge against the obligor.

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

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Yes. To create a pledge over cash deposits, the pledgee and the pledgor must enter into a written agreement. The pledge shall not become effective against the account bank taking the cash deposits unless the account bank is notified of the creation of the pledge. Nevertheless, please note that the concept of a floating charge is not recognised under Taiwan law. In other words, the pledge covers only the cash in the bank account when such pledge is created and notified to the account bank. The pledge will not cover the cash deposited in the bank account after the account bank is notified of the pledge. To deal with this issue, the pledgor in practice will be required to periodically confirm with the account bank the amount of cash in the bank account to ensure that the pledge also covers the cash deposited after the creation of the pledge.

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

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Yes. According to the Company Act, a company should issue shares in certificated form if its issued capital reaches a certain amount specified by the competent authority. Currently, the threshold amount is NT\$500,000,000. In addition, a public company may issue shares in scripless form. To create a pledge over shares in certificated forms, a written agreement is required. The certificates of the pledged shares shall be duly endorsed and delivered by the pledgor to the pledgee. Furthermore, the company issuing the shares

shall be notified of the creation of a pledge in order to register such pledge on the shareholders' roster. The creation of a pledge is valid between the pledgee and the pledgor when the certificates of the shares have been endorsed and delivered to the pledgee. However, the creation of the pledge cannot be claimed against the company unless the company is notified of the creation of the pledge.

To create a pledge over listed shares which are traded and transferred through the book-entry system of Taiwan Depository and Clearing Corporation ("TDCC"), the pledgor and the pledgee have to sign a form prescribed by the TDCC and have the pledge registered with the TDCC.

A pledge over shares can also be created based upon the document governed by New York or English law, as long as the creation and perfection of the pledge follow the procedures and requirements described above.

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

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A floating charge over the inventory is not enforceable under Taiwan law. Please refer to our answer to question 3.2.

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

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- (i) Yes, it can.
- (ii) This issue is whether a company may provide guarantees for others. Please refer to our answer to question 2.1.

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

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No notarisation or stamp duty is required for the creation of security over different types of assets, mentioned in our answer to question 3.1. The registration fee for creating a chattel mortgage over a movable asset is NT\$900. The registration fee for creating a mortgage over real property is equivalent to 1/1,000 of the total amount secured by the mortgage.

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

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Regarding the registration fee, please refer to our answer to question 3.9. The authority in charge of the registration will only conduct a formality review and it is not expected that the registration will take a significant amount of time.

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

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In addition to the requirement of registration for certain types of security interests as mentioned above, generally the creation of the security interests does not require a regulatory or similar consent.

However, it is worth noting that, according to the interpretation of the MOEA, a foreign company having no branch office in Taiwan,

the Republic of China is not allowed to be registered as a security interest holder. In local practice, the competent authorities will not permit such a foreign company to be registered as a mortgagee of real property or a chattel mortgagee of a movable asset.

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

Take a real property mortgage, for example. The mortgage can be divided into a general mortgage and a maximum amount secured mortgage. As for a general mortgage, the obligations to be secured should exist upon the creation of the mortgage. Otherwise, the mortgage will be held unenforceable. By contrast, a maximum amount secured mortgage is to secure the obligations created and owed to the mortgagee for a period of time. So long as the secured obligations exist at the end of the mortgage period, the mortgagee may foreclose the real property. Since the obligations under a revolving credit facility may arise and be satisfied from time-to-time according to the borrower's drawdown and repayment, the mortgage to secure such obligations should be a maximum amount secured mortgage instead of a general mortgage. The above also applies to a chattel mortgage and a pledge.

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

No, there are not.

## 4 Financial Assistance

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

Regarding the prohibitions and restrictions on the provision of guarantees by a company, please refer to our answers to question 2.1. The provision of security other than a guarantee generally will be deemed as providing a guarantee as well, and is subject to the same prohibitions and restrictions.

In addition, according to the Company Act, a company cannot redeem or buy back any of its outstanding shares unless permitted by law. For instance, a company may purchase up to 5% of its outstanding shares and transfer the same to its employees. To give another example, a listed company may buy back its outstanding shares in the circumstances permitted under the Securities and Exchange Act. The restriction on a company's ability to buy back its outstanding shares extends to the company's controlled company; in addition, the violation of such restriction may cause the buy-back to be void. A subsidiary of the parent company cannot purchase the shares of the parent company. Nevertheless, the Company Act does not prohibit a sister subsidiary from purchasing the shares of another sister subsidiary.

## 5 Syndicated Lending/Agency/Trustee/Transfers

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

As a general practice for a syndicated loan, syndicated banks will appoint an agent bank to act for and on behalf of the syndicated banks, including registering the agent bank as, for instance, a mortgagee and foreclosing the mortgaged property. In addition, there will be a clause in the syndicated loan agreement to the effect that the syndicated banks' claims against the borrower under the syndicated loan agreement are joint and several. Given this, the agent bank may claim the whole amount of the loan from the borrower and distribute the proceeds obtained therefrom to the syndicated banks in accordance with their proportion of participation in the loan.

Nevertheless, under Taiwan law, it is questionable whether or not a third party, who is not a creditor/lender, could validly hold the collateral as a trustee or a security agent for other creditors/lenders. Pursuant to the Civil Code, a mortgage/pledge would not be validly created in favour of the creditor/mortgagee/pledgee if there is no underlying credit owned by the mortgagee/pledgee against the debtor.

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

As advised in question 5.1 above, in practice, if the lenders' claims against the borrowers are joint and several, one of the lenders may be appointed as the agent bank by syndicated banks to act for and on behalf of all the syndicated banks, including registering the agent bank as, for instance, a mortgagee and foreclosing the mortgaged property.

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

The transfer of the loan from Lender A to Lender B will not be effective against the borrower and the guarantor until either Lender A or Lender B has notified the borrower and the guarantor of such transfer.

## 6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

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

- (a) For a domestic non-bank lender, who is a Taiwan resident or a profit-seeking enterprise with a fixed place of business in Taiwan, the withholding tax rate for interest is 10% but such

withholding tax is applicable to corporate borrowers only. Individual borrowers are not required to withhold tax on interest.

For a foreign lender, who is a non-Taiwan resident or a profit-seeking enterprise without a fixed place of business in Taiwan, the withholding tax rate for interest applicable to a corporate borrower is 20%, but if the interest derives from short-term commercial papers, securitised instruments, government/corporate/financial institution bonds, or conditional transactions, the withholding tax is 15%. Moreover, most of the tax treaties provide a reduced income tax withholding rate of 10%. Taiwan has signed tax treaties with 28 jurisdictions, namely, Australia, Austria, Belgium, Denmark, France, Gambia, Germany, Hungary, India, Indonesia, Israel, Kiribati, Luxembourg, Macedonia, Malaysia, the Netherlands, New Zealand, Paraguay, Senegal, Singapore, Slovakia, South Africa, Swaziland, Sweden, Switzerland, Thailand, the United Kingdom and Vietnam.

- (b) Where the portion of the proceeds is to indemnify the principal of the loan made by the lender, it will not be subject to income tax. If the portion of the proceeds is to indemnify the default interest sustained by the lender, it may be subject to income tax as mentioned above. Moreover, in the event that the proceeds include a penalty pursuant to an agreement between the lender and the borrower, such penalty will be subject to income tax unless the lender may prove that the penalty is to indemnify losses suffered by the lender.

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

- (1) Income tax on the following categories of income shall be exempted:
- Interest derived from loans offered to the Taiwanese government or legal entities within the territory of Taiwan by foreign governments or international financial institutions for economic development, and interest derived from the financing facilities offered to their branch offices and other financial institutions within the territory of Taiwan by foreign financial institutions.
  - Interest derived from loans extended to legal entities within the territory of Taiwan by foreign financial institutions for financing important economic construction projects under the approval of the Ministry of Finance.
  - Interest derived from favourable-interest export loans offered to or guaranteed for the legal entities within the territory of Taiwan by foreign governmental institutions and foreign financial institutions which specialise in offering export loans or guarantees.

Moreover, some of the tax treaties provide an exemption from income tax withholding for interest payment. For example, the Netherlands-Taiwan Tax Treaty provides that the interest which is paid in respect of a bond, debenture or other similar obligations of a Taiwanese public entity, or of a subdivision or local authority of Taiwan, should be taxed only in Netherlands.

- (2) For the purposes of effectiveness or registration, there is no tax applicable to foreign investments, loans, mortgages or other security documents.

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

No; a foreign lender (except for a foreign entity's Taiwan branch) will not be subject to Taiwan income taxes solely because of a loan to or guarantee and/or grant of security from a Taiwanese company.

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

Please refer to our answer to question 3.9.

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

A thin capitalisation rule was incorporated into the Income Tax Act effective from January 28, 2011. That is, retroactively from January 1, 2011, if the ratio of a company's debts (to its related party) to its equity exceeds a certain ratio, the interest expense arising out of the portion of the debts exceeding said ratio is not deductible, except for financial institutions (including banks, cooperatives, financial holding companies, bills finance companies, insurance companies, and securities firms). The Ministry of Finance, by referring to international practices, has set a safe harbour debt-equity ratio of 3:1.

The same treatment in respect of the thin capitalisation rule applies to both domestic and foreign lenders.

## 7 Judicial Enforcement

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

Generally, the choice of a foreign governing law to govern a contract would be recognised as a valid choice of law and given effect by the courts of Taiwan, provided that the relevant provisions of the foreign governing law would not be applied to the extent such courts hold that: (i) the application of such provisions would be contrary to the public order or good morals of Taiwan; or (ii) such provisions would have the effect of circumventing mandatory and/or prohibitive provisions of Taiwan law. However, where the contract is about the creation/perfection of a security interest, such as a pledge and mortgage, the choice of law will be subject to the conflicts of law of Taiwan.

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

Any final judgment rendered by a foreign court shall be recognised and enforceable in Taiwan without review of the merits, provided that the court of Taiwan in which the enforcement is sought is satisfied that:

- (i) the foreign court rendering the judgment has jurisdiction over the subject matter according to Taiwan law;
- (ii) the judgment and the court procedures resulting in the judgment are not contrary to the public order and good morals of Taiwan;
- (iii) if a default judgment was entered into against the losing party, the losing party was (a) duly served within a reasonable period of time within the jurisdiction of such court in accordance with the laws and regulations of such jurisdiction, or (b) process was served upon the losing party with the judicial assistance of Taiwan; and



- (iv) judgments of the Taiwan court are recognised by the foreign court on a reciprocal basis.

To our knowledge, there is reciprocity for enforcement of judgments between Taiwan and New York/England.

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

- (a) Depending on the complexity of the case in dispute, it could take half a year to one year or longer for each of the district court, the high court and the Supreme Court to render a judgment. Regarding the enforcement of the final judgment against the assets of the company, it also depends on the value and types of the company's assets. For example, to foreclose a mortgaged real property, it may take from several months to one year or longer to conduct the auctions for the real property if there is no bidder or if the bid price is below the set auction price.
- (b) Depending on whether the Taiwan court or the counterparty has raised any objections to the elements set forth in our answer to question 7.2, it may take months or one year or longer for the Taiwan court to render a judgment recognising the foreign judgment. In addition, as mentioned in our answer to question 7.3 above, the enforcement of a final judgment against the assets of the company depends on the value and types of the company's assets.

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

- (a) Depending on the types of collateral security, foreclosure of collateral security through a court proceeding may require a public auction. For instance, if the real property is foreclosed through a court proceeding, the court will designate an expert to assess the value of the real property and hold a public auction to sell it. If the real property has not been sold due to the fact that no bidder has attended the auction or the bidding price is below the auction price set by the court, the court will have to reduce the auction price and repeat similar exercises to sell the real property in accordance with the Mandatory Execution Act. Accordingly, foreclosing the real property may take longer through a public auction than by other means of enforcement such as a private agreement between the mortgagor and the mortgagee to settle debts by transferring ownership of the real property to the mortgagee.
- (b) Generally, no regulatory consent is required in order for the security interest holder to enforce the collateral interest.

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

- (a) Generally, no. However, according to the Code of Civil Procedure, if a plaintiff has no domicile, office, or place of business in Taiwan, the court shall, by a ruling on motion filed by the defendant, order the plaintiff to provide a security

for the litigation expenses. Such requirement will not apply in the case where either the portion of the plaintiff's claim is not disputed by defendant or the plaintiff's assets in Taiwan are sufficient to compensate the litigation expenses.

- (b) Please refer to our answer to question 3.11.

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

Regarding bankruptcy, all enforcement actions against the debtor will be stayed by the bankruptcy of the debtor and all unsecured creditors must follow the bankruptcy proceeding administered by the court to file their claims against the debtor. Nevertheless, if a creditor, such as a lender, has a mortgage, pledge or right of retention over the debtor's assets, the lender may enforce such collateral security without going through the bankruptcy proceeding.

As for reorganisation, all enforcement actions against the debtor subject to reorganisation will be stayed no matter whether the lender is a secured (such as a mortgagee or a pledgee) or unsecured creditor. The lender may not foreclose the collateral security regardless of other stakeholders and should follow the reorganisation proceeding administered by the court.

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

According to the Arbitration Law, a foreign arbitration award would be recognised and enforceable by the courts of Taiwan without reviewing the merits, provided that none of the followings exists:

- (i) where the recognition or enforcement of the arbitral award is contrary to the public order or good morals of Taiwan; or
- (ii) where the dispute is not arbitrable under the laws of Taiwan.

In addition, if there is no reciprocity in the recognition and enforcement of an arbitral award between Taiwan and the country in which the arbitral award is made or the country whose arbitration rules are applicable, the Taiwanese court may dismiss the petition for the recognition of a foreign arbitral award.

## 8 Bankruptcy Proceedings

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

Please refer to our answer to question 7.6 regarding foreclosure of the collateral interest by a lender. In addition, if a lender's claims cannot be fully satisfied by foreclosing the collateral security, the lender may still participate in the bankruptcy proceeding as an unsecured creditor to seek possible repayment.

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

Regarding the preference period/clawback right, according to the Bankruptcy Law, the bankruptcy administrator shall, within two years after the declaration of the bankrupt's bankruptcy, file with the court to rescind the transaction which the bankrupt conducted with

or without consideration before the declaration of the bankrupt's bankruptcy if such transaction is deemed to be detrimental to the rights of the bankrupt's creditor and is revocable under the Civil Code. In addition, the bankruptcy administrator may cancel the collateral security which is created by the bankrupt within six months before the declaration of the bankrupt's bankruptcy (i) to secure the bankrupt outstanding debts except that the bankrupt has committed to create collateral security before the foregoing six-month period; and (ii) to secure debts which have not yet become due and payable.

As for preferential creditors' rights, below are certain examples:

- (i) land value increment tax, land value tax and house tax levied on the sale of the real property which will rank prior to the mortgagee and the unsecured creditors;
- (ii) labour wages due and payable by the employer but overdue for a period up to six months which will rank prior to unsecured creditors; and
- (iii) fees and debts incurred for the benefit of the bankruptcy estate which will rank prior to unsecured creditors.

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

According to the Deposit Insurance Act, the Central Deposit Insurance Corporation may set up a bridge bank as a vehicle to take over a distressed bank. The bridge bank may assume the businesses, assets and liabilities of a distressed bank and the Bankruptcy Law will not apply to the bridge bank during its existence.

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

According to the Civil Code, the creditor may initiate certain self-help remedies to seize the debtor's property and will not be liable therefor, provided that: (i) the assistance of the court or of other relevant authorities is not accessible in time and the satisfaction of the creditor's claim will be impossible or manifestly difficult without the self-help remedy; and (ii) the creditor shall apply for the court's assistance immediately after the self-help remedy is exercised.

## 9 Jurisdiction and Waiver of Immunity

### 9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

The Judicial Yuan of Taiwan has held an internal conference and reached a conclusion that a submission to jurisdiction clause will be valid in the absence of any of the following circumstances: (1) it would be unfair for the subject matter to be adjudicated by the chosen jurisdiction; (2) the consent of a party to submit to the chosen jurisdiction was obtained by fraud, duress or other unlawful means; (3) the parties were not equal-footed when they entered into the submission to jurisdiction agreement; (4) it would be inappropriate or inconvenient for the chosen jurisdiction to adjudicate the subject matter; and (5) the country of the chosen jurisdiction does not recognise and enforce judgments of Taiwan courts on a reciprocal basis. The conclusion made by the Judicial Yuan is, however, subject to test in court.

### 9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

Yes, it is. It will be binding upon that party under Taiwan law unless (i) the waiver would be contrary to the public order or good morals of Taiwan, or (ii) the waiver would have the effect of circumventing mandatory and/or prohibitive provisions of Taiwan law.

## 10 Licensing

### 10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank versus a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

There is no particular licence or other eligibility requirement to lend money to a company in Taiwan. However, the Company Act provides that the capital of a Taiwanese company shall not be lent to any person unless the lending arrangement is due to business transaction or is necessary for short-term financing and the aggregate amount of such short-term financing should not exceed 40% of the company's net value. As a result, in local practice, no company in Taiwan except banks, securities firms, insurance companies or pawn shops may engage in lending as an ordinary business. Taiwan has not opened the establishment and operation of lending companies. Accordingly, currently it is not possible to set up a company to operate a lending business in Taiwan.

Since there is no particular licence or eligibility requirement, the main distinction under the laws of Taiwan between a lender that is a bank versus a lender that is a non-bank, would be the application of the above lending restriction under the Company Act to a non-bank lender.

There is no restriction on a foreign lender for making a loan to Taiwanese borrowers outside of Taiwan regardless of whether the foreign lender is licensed or not. Nevertheless, in the case of a foreign loan to a Taiwanese borrower, the foreign exchange control, as advised in our answer to question 2.6, would apply unless such foreign debts have been registered with the CBC by the Taiwanese borrower.

There are no licensing and other eligibility requirements in Taiwan for an agent under a syndicated facility for lending to a company in Taiwan.

## 11 Other Matters

### 11.1 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

For foreign lenders who will participate in financing in Taiwan, please refer to our answer to question 3.11 regarding the MOEA's ruling on the ability of a foreign entity without a local presence to take collateral security.

If a foreign lender provides a loan with the term of more than one year to a Taiwanese company in which it owns shares or capital or a Taiwanese partnership in which it is one of the partners or a Taiwanese business of which it is the sole proprietor or a branch

created by it, please note that a prior approval from the Investment Commission of the MOEA is required.

As to foreign exchange control, please refer to our answer to question 2.6.



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