
THE LENDING AND SECURED FINANCE REVIEW

SECOND EDITION

EDITOR
AZADEH NASSIRI

LAW BUSINESS RESEARCH

THE LENDING AND SECURED FINANCE REVIEW

Second Edition

Editor
AZADEH NASSIRI

LAW BUSINESS RESEARCH LTD

PUBLISHER
Gideon Robertson

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Thomas Lee

SENIOR ACCOUNT MANAGERS
Felicity Bown, Joel Woods

ACCOUNT MANAGERS
Jessica Parsons, Adam Bara-Laskowski, Jesse Rae Farragher

MARKETING COORDINATOR
Rebecca Mogridge

EDITORIAL ASSISTANT
Sophie Arkell

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Robbie Kelly

SUBEDITOR
Gina Mete

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2016 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of August 2016, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-910813-20-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE GAMBLING LAW REVIEW

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALLEN & OVERY

ALTIUS

ANDERSON MÖRI & TOMOTSUNE

BONELLIEREDE

BREDIN PRAT

DE BRAUW BLACKSTONE WESTBROEK

GOODMANS LLP

HENGELER MUELLER, PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

KANNAVA, KITROMILIDOU & CO LLC

KIM & CHANG

KPP LAW FIRM

LEE AND LI, ATTORNEYS-AT-LAW

LENZ & STAEHELIN

MAPLES AND CALDER

PAKSOY

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

PINHEIRO NETO ADVOGADOS

SLAUGHTER AND MAY

URÍA MENÉNDEZ ABOGADOS, SLP

VIEIRA DE ALMEIDA & ASSOCIADOS, SOCIEDADES DE ADVOGADOS, SP, RL

WOLF THEISS RECHTSANWÄLTE/ATTORNEYS-AT-LAW

CONTENTS

| | |
|-------------------------|---|
| Editor's Preface |vii |
| | <i>Azadeh Nassiri</i> |
| Chapter 1 | AUSTRIA 1 |
| | <i>Leopold Höher</i> |
| Chapter 2 | BELGIUM..... 11 |
| | <i>Kasper Van Landeghem</i> |
| Chapter 3 | BRAZIL 22 |
| | <i>Bruno Balduccini and Roberto Panucci Filho</i> |
| Chapter 4 | CANADA 34 |
| | <i>Jean E Anderson, David Nadler, Carrie B E Smit, Melaney Wagner and David Wiseman</i> |
| Chapter 5 | CYPRUS 51 |
| | <i>Kannava, Kitromilidou & Co LLC</i> |
| Chapter 6 | ENGLAND & WALES 63 |
| | <i>Azadeh Nassiri and Kathrine Meloni</i> |
| Chapter 7 | FRANCE 78 |
| | <i>Karine Sultan, Yves Rutschmann, Mathieu Françon, Charlotte Bonsch, Aurélien Jolly and Anaïs Pinton</i> |
| Chapter 8 | GERMANY 91 |
| | <i>Christian Schmies, Nikolaus Vieten and Jens Wenzel</i> |
| Chapter 9 | GREECE 101 |
| | <i>George N Kerameus</i> |

| | |
|-------------------|--|
| Chapter 10 | HONG KONG 113 <i>Peter Lake</i> |
| Chapter 11 | IRELAND..... 126 <i>John Breslin and David Burke</i> |
| Chapter 12 | ITALY 134 <i>Giuseppe Sacchi Lodispoto and Raffaella Riccardi</i> |
| Chapter 13 | JAPAN 147 <i>Kenichi Yamamoto, Taro Awataguchi, Kei Sasaki and Wataru Higuchi</i> |
| Chapter 14 | KOREA..... 157 <i>Chan Moon Park, Seon-Jee Lee and James Geechul Lee</i> |
| Chapter 15 | LUXEMBOURG 167 <i>Henri Wagner and François-Guillaume de Liedekerke</i> |
| Chapter 16 | NETHERLANDS 185 <i>Jean-Marc Rovers and Jan Marten van Dijk</i> |
| Chapter 17 | PORTUGAL..... 195 <i>Pedro Cassiano Santos, Alexandre Norinho Oliveira and Ricardo Seabra Moura</i> |
| Chapter 18 | SPAIN 207 <i>Ángel Pérez López, Pedro Ravina Martín and Blanca Arlabán Gabeiras</i> |
| Chapter 19 | SWITZERLAND 219 <i>Patrick Hünerwadel, David Ledermann and Marcel Tranchet</i> |
| Chapter 20 | TAIWAN 228 <i>Abe Sung and Mark Yu</i> |
| Chapter 21 | TURKEY 236 <i>Sera Somay and Esen Irtem</i> |

| | |
|-------------------|--|
| Chapter 22 | UNITED STATES 251 <i>Monica K Thurmond and Eric J Stoller</i> |
| Appendix 1 | ABOUT THE AUTHORS..... 263 |
| Appendix 2 | CONTRIBUTING LAW FIRMS' CONTACT DETAILS ... 277 |

EDITOR'S PREFACE

This second edition of *The Lending and Secured Finance Review* comes on the heels of a period of volatility and the result of the United Kingdom's referendum on EU membership – a topic that, unsurprisingly, dominated headlines and impacted deal volumes in the months leading up to the referendum.

During 2014 and 2015, the loan markets grew against a backdrop of greater economic stability and the return of M&A activity in Europe and globally, and 2015 was in fact the busiest year for the EMEA region since the credit crisis. Between January and June 2016, however, the market contracted quite significantly – a combination of factors, including the collapse in oil prices, the slowdown in China and the prospect of Brexit all contributed to chilling the global market for event-driven financings. Refinancing activity also fell in volume terms compared with previous years, many borrowers having sourced their needs for at least the next few years during the protracted period of favourable market conditions in 2014 and 2015.

In the aftermath of the referendum vote to leave the EU, corporate groups and other businesses (both domestic and overseas) face new risks and challenges that will need to be addressed, and the legal, regulatory and market outlook has been significantly altered, at least for the United Kingdom. At the time of writing, the shape of the United Kingdom's future relationship with the EU remains unclear, and the immediate challenge for debt market participants is how best to weather the uncertain market conditions exacerbated by the prospect of Brexit.

Much of the legal and regulatory regime that underpins activities in the English-law financial markets is derived from EU directives and regulations. Over the longer term, there will be legal and regulatory changes affecting lending and secured finance activities and documentation, but the extent of those changes is debatable. The United Kingdom has supported most of the EU regulatory framework, many of its EU commitments are reflected in domestic law and many of the important aspects of EU regulation stem from G20 or other international commitments, which may limit the scope of any changes the government wishes to make in the longer term. Many EU provisions also apply on an EEA-wide basis, and would therefore continue to apply to the United Kingdom if its exit arrangements include remaining part of the EEA. The current expectation of many is that, upon Brexit, the United

Kingdom, at least at first, will try to achieve equivalence with pre-existing EU rules in many areas, but this is a topic that will continue to require attention as the post-referendum regime develops.

The impact of Brexit on the availability of finance and the products on offer over the longer term is difficult to anticipate. There are no current indications that banks' liquidity or funding positions have altered significantly, but it seems prudent to anticipate that lending criteria may tighten and banks will look closely at the impact of Brexit on their customers when approving new loans. Treasurers may focus again on alternative sources of finance. Pre-referendum, the involvement of direct lending funds, private placements and other alternatives to traditional bank finance was growing, supported by industry and government, but it remains to be seen whether this growth will continue.

This edition of *The Lending and Secured Finance Review* contains contributions from leading practitioners in 22 different countries and I would like to thank each of the contributors for taking the time to share their expertise on the developments in the corporate lending and secured finance markets in their respective jurisdictions, and on the challenges and opportunities facing market participants. I would also like to thank our publishers, without whom this *Review* would not have been possible.

I hope that the commentary that follows will serve as a useful source for practitioners and other readers.

Azadeh Nassiri

Slaughter and May

London

August 2016

Chapter 20

TAIWAN

*Abe Sung and Mark Yu*¹

I OVERVIEW

Banks play a fundamental role as intermediary in the financial market by taking deposits and providing lending to utilise the funds from the general public to finance valuable production and other investment activities. According to the statistics of the Financial Supervisory Commission (FSC), the banking industry regulator in Taiwan, as of March 2016, the total amount of loans provided by financial institutions was approximately NT\$25.88 trillion (approximately US\$808.75 billion), an increase of 2.59 per cent from 2015. As to the Taiwan syndicated loan market, the total amount of Taiwan syndicated loans in 2015 was around US\$46.54 billion, consisting of 212 syndicated loans, an increase of 9 per cent from 2014. In 2015, government-owned banks still dominated the local syndicated loan market. The Bank of Taiwan, Taiwan Cooperative Bank, Land Bank of Taiwan, MEGA International Commercial Bank and Chang Hwa Commercial Bank are the top five banks providing syndicated loans in Taiwan.

II LEGAL AND REGULATORY DEVELOPMENTS

Although banks still have a dominant role in the loan market, developments in technology have seen the peer-to-peer (P2P) lending platform – which provides an online platform for bridging direct lending from non-professional lenders to borrowers of individuals or small businesses – develop as an innovative financial broker. P2P lending, also known as marketplace lending, has become a well-developed or known lending practice in other jurisdictions but is still new to the Taiwan market.

In the face of this new development, the FSC still has concerns. In April 2016, the FSC issued a press release pointing out that the P2P lending platform may (1) become

¹ Abe Sung is a partner and Mark Yu is an associate partner of banking and capital market department at Lee and Li, Attorneys-at-Law.

involved in the deposit-taking business, which is regulated by the Banking Act; (2) engage in usury, which would violate the Criminal Law; (3) violate the Fair Trade Act if the platform makes false or misleading statements to potential lenders and borrowers, such as ‘high profit, low cost and low risk’, which may be deemed as misleading advertising; and (4) breach the Multi-Level Marketing Supervision Act if the P2P lending platform establishes a multilevel mechanism to offer borrowers rewards for recruiting new participants. In addition, personal information leakage may be another key issue in P2P lending. The FSC is contemplating enacting a law to govern P2P lending in the near future.

III TAX CONSIDERATIONS

i Gross business receipt tax

Gross business receipts tax rates for entities in the financial industry (banks, insurance companies, investment trusts, securities firms, futures and commercial paper enterprises, etc.) are as follows:

- a* 2 per cent on the revenues generated from the regulated businesses (such as a bank’s deposit-taking business and a securities firm’s underwriting income), except for banks and insurance companies, whose revenues generated from their core businesses from 1 July 2014 onward will apply the rate of 5 per cent;
- b* 5 per cent on the revenues generated from non-regulated businesses (such as a bank’s rental income from office leases); and
- c* 1 per cent on an insurance company’s reinsurance premium income.

ii Withholding tax

For a foreign lender that 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 per cent, but for interest earned on short-term commercial papers, securitised instruments, government, corporate or financial institution bonds, or conditional transactions, the withholding tax rate is 15 per cent. Moreover, most tax treaties provide a reduced income tax withholding rate of 10 per cent. Taiwan has signed tax treaties with 29 jurisdictions, namely, Australia, Austria, Belgium, Denmark, France, Gambia, Germany, Hungary, Indonesia, India, Israel, Italy, Kiribati, Luxembourg, Macedonia, Malaysia, New Zealand, the Netherlands, Paraguay, Senegal, Singapore, Slovakia, South Africa, Swaziland, Sweden, Switzerland, Thailand, the United Kingdom and Vietnam.

iii Income tax

Under the Income Tax Act, any interest income that is deemed Taiwan-sourced income is subject to Taiwan income tax in general. In general, the interest paid by a local borrower to a foreign lender will be deemed Taiwan-sourced income. The following types of income are exempted from income tax:

- a* Interest on loans offered to Taiwanese government or legal entities within the territory of Taiwan by foreign governments or international financial institutions for economic development, and interest on the financing facilities offered to their branch offices and domestic financial institutions within the territory of Taiwan by foreign financial institutions.

- b* Interest on loans extended to legal entities within the territory of Taiwan by foreign financial institutions for financing fundamental infrastructure projects under the approval of the Ministry of Finance.
- c* Interest on export loans at favourable interest rates offered to or guaranteed for legal entities within the territory of Taiwan by foreign governmental institutions or foreign financial institutions that specialise in offering export loans or guarantees.

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

iv Documentary tax

No notarisation or stamp duty is required for the creation of a security interest over different types of assets such as (1) a mortgage over real properties; (2) a chattel mortgage over a moveable asset, such as machinery and equipment; (3) a pledge over moveable assets or securities, or a pledge over the pledgor's rights that are transferable, such as the pledgor's rights to bank accounts, accounts receivable or patents; and (4) a secured assignment of property rights.

v Foreign Account Tax Compliance Act (FATCA)

To prevent US taxpayers who hold financial assets in non-US financial institutions and other offshore accounts from avoiding their tax payment obligations, FATCA generally requires foreign financial institutions to enter into agreements with the Internal Revenue Service (IRS) to identify US accounts and report certain information about those accounts and investments held by US taxpayers to the IRS on an annual basis. If they fail to enter into such agreements to report US accounts, they will face a 30 per cent withholding charge. In 2014, the FSC announced that Taiwan is recognised by the United States as a jurisdiction having Agreement in Substance status in respect of FATCA. This status allows Taiwanese financial institutions to be exempted from the 30 per cent withholding tax on incomes from the United States.

As to the lending market in Taiwan, lenders recognise that in practice they need to be FATCA compliant to participate in the lending market. To prevent the residual risk of FATCA withholding being imposed on lenders, the standard FATCA provisions, such as excluding FATCA from the tax gross-up and tax indemnity provisions, are normally provided in the loan agreement. The lending market has typically accepted such provisions, which have become a standard part of the loan agreement.

IV CREDIT SUPPORT AND SUBORDINATION

i Security

Under Taiwan law, different types of assets are subject to different formal requirements for perfection of a security interest created over them. Below is a brief introduction to the formal requirements on the most commonly seen security interests. Taiwan law does not permit the taking of security over 'all assets' of an entity by way of floating charge. 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 that does not identify the specific asset, such as a floating charge, is not enforceable under Taiwan law.

Chattels

The security to be created over machinery and equipment may be a pledge or a chattel mortgage. Both security interests give the security interest holder 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 will be necessary for the mortgagee to claim the chattel mortgage against a bona fide third party.

Real properties

A security interest over real properties is taken by way of a mortgage registered with the relevant land registration offices. A security interest over real properties will not be validly created if registration is not duly completed. To create a valid mortgage over land, a building or a plant, the mortgagor and the mortgagee should enter into a written agreement and complete the registration.

Bank accounts

The deposit in a bank account can be pledged by way of a written agreement executed by the depositor and the lender and a notice of the creation of the pledge served on the account bank. The pledge will only be perfected when a notice has been served on the account bank. Nevertheless, as described above, 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 the 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 creation of the pledge. To deal with this issue, the pledgor in practice will be required to periodically confirm with the account bank and agree on the creation of a pledge over the most current balance in the bank account to ensure that the pledge also covers the cash deposited after the creation of the pledge.

Receivables

When a receivable or a contractual right is transferable, security over the receivables or contractual rights is taken normally by way of secured assignment in favour of the lender. A service of notice of the assignment to the obligor of the receivable or the contractual right is required for perfection. 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 for the pledgee to be able to claim the pledge against the obligor.

Shares

According to the Company Act, a company limited by shares should issue shares in certificated form if its issued capital reaches the threshold amount specified by the competent authority (currently, NT\$500 million or approximately US\$15,625,000). 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 to register the 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. Without a notice to the issuing company, the creation of the pledge cannot be claimed against the company.

To create a pledge over listed shares in scripless form that are traded and transferred through the book-entry system of the Taiwan Depository and Clearing Corporation, the pledgor and the pledgee have to sign a form prescribed by the Taiwan Depository and Clearing Corporation and have the pledge registered with it.

ii Guarantees and other forms of credit support

Guarantor

Under Taiwan law, a guarantor may refuse to perform the guaranteed obligations until the compulsory execution against the property of the borrower proves to be futile (i.e., the lender must seek payment from the principal debtor first); provided, however, that the guarantor may waive (and in practice must waive as required by a lender) this defence (i.e., *beneficium ordinis*) in advance. In practice, a guarantor is normally required to act as a joint guarantor (i.e., jointly and severally liable with the borrower for the loan), so the lender may commence concurrent legal action against both the borrower and the guarantor.

In the circumstance under which the guarantor is not a joint guarantor nor waives the defence of *beneficium ordinis*, the lender must seek payment from the borrower first and the guarantor later. The legal proceeding for the lender to seek payment from the borrower may take months or years. Therefore, there is a risk that before the lender seeks payment from the guarantor, the guarantor may attempt to transfer its assets to others to avoid enforcement by the lender.

Negative pledge

In addition to general negative pledge in the loan agreement, the lender may seek a specific negative pledge from the borrower as provided under the Banking Act. When no collateral is provided to a lender under a financing transaction, the lender may require the board of directors of the borrower to pass a resolution providing a negative pledge undertaking that the borrower will pledge or mortgage its assets in favour of the lender and, before that is done, the borrower shall not pledge or mortgage the same to any third party. If the borrower breaches the undertaking, the borrower's directors or officers who make the decision to breach the negative pledge shall be jointly and severally liable for compensating the lender, and shall be subject to imprisonment for not more than three years, detention or a criminal fine of not more than NT\$1,800,000 (or both).

iii Priorities and subordination

General principle

Security interests, such as a pledge and a mortgage, will have priority over other claims or rights of the borrower's creditor unless otherwise provided by mandatory provisions of laws. The sale proceeds of the mortgaged or pledged property in a court compulsory execution proceeding will be allocated and distributed in accordance with the following order: (1) expenses paid by the pledgee or the mortgagee for the compulsory execution proceedings;

(2) applicable taxes having priority over the security interest under mandatory provisions of laws; (3) statutory security interest; (4) the mortgagee or pledgee of the property; (5) certain labour claims in the event that the employer winds up or liquidates its business or has been adjudicated bankrupt; (6) applicable taxes, if any, having no priority over the security interest; and (7) unsecured creditors.

Subordination agreement

In the case of unsecured financing, the lender in practice would require that the borrower enter into a subordination agreement with the borrower's shareholders or affiliates so that the unsecured loans provided by these persons to the borrower will be subordinate to the loan provided by the lender. Unlike a security interest having priority over unsecured debts of the borrower, the subordination agreement is merely a contractual undertaking from the borrower and its shareholder or affiliate and does not have the effect of priority preferred by law.

V LEGAL RESERVATIONS AND OPINIONS PRACTICE

i Limitations for foreign companies on taking security

Article 12 of the Law Governing the Application of the General Principles of the Civil Code provides that a foreign legal person, upon being recognised, will have, to the extent as provided by laws and regulations, the same capacity to enjoy rights as a legal person in Taiwan of the same type. To the extent that it is not recognised in Taiwan, the foreign legal person might not enjoy the same rights as a legal person in Taiwan of the same type. In addition, according to a letter issued by the Ministry of Economic Affairs dated 1 September 1997, a foreign company that does not have a branch in Taiwan is not entitled to the rights of a pledge or mortgage.

Notwithstanding the above, in connection with aircraft financing, the Civil Aeronautics Administration (CAA) has been of the opinion for decades that aircraft can be validly mortgaged to a foreign legal entity without having a branch office in Taiwan. Moreover, the Harbour Bureau customarily will permit a foreign lender without a branch in Taiwan to be registered as a mortgagee in connection with ship financing. The opinions of the CAA and Harbour Bureau are, however, subject to test in court because of lack of precedents.

ii Limitations on lending and making of guarantees

Private company

According to the Company Act, a company shall not lend to any shareholder of the company or any other person except: (1) where an inter-company or inter-firm business transaction calls for such a lending arrangement; or (2) where an inter-company or inter-firm short-term financing facility is necessary, provided that the amount of the financing facility shall not exceed 40 per cent of the amount of the net value of the lending company. In addition, a company shall not act as a guarantor of any nature, unless otherwise permitted by any law or by the articles of incorporation of the company.

Public company

In addition to the restriction provided in the Company Act, a public company should adopt internal rules in accordance with the Regulations Governing Loaning of Funds and Making of Endorsements or Guarantees by Public Companies. The internal rules must set forth the

rules and guidelines a company should follow in making loans or providing guarantees. For example, a public company may not make endorsements or guarantees for other companies except for (1) a company with which it does business; (2) a company in which the public company directly and indirectly holds more than 50 per cent of the voting shares; or (3) a company that directly and indirectly holds more than 50 per cent of the voting shares in the public company. Moreover, companies in which the public company holds, directly or indirectly, 90 per cent or more of the voting shares may make endorsements or guarantees for each other, and the amount of endorsements or guarantees may not exceed 10 per cent of the net worth of the public company, provided that this restriction shall not apply to endorsements or guarantees made between companies in which the public company holds, directly or indirectly, 100 per cent of the voting shares.

iii Financial assistance

Financial assistance generally refers to assistance provided by a target for the acquisition by a third party of shares in the target, by advancing funds, making loans or providing security. Generally speaking, the provision by the company of financial assistance in this context is subject to restrictions under Taiwan law. As mentioned above, there are prohibitions and restrictions regarding the loans or guarantees provided by a company. The provision of security other than a guarantee generally will be deemed as providing a guarantee as well and is subject to the same restrictions.

iv Choice of a foreign governing law

Generally, the choice of a foreign governing law to govern a contract (e.g., the loan agreement) 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 the courts hold that: (1) the application of the provisions would be contrary to the public order or good morals of Taiwan; or (2) the provisions would have the effect of circumventing mandatory or prohibitive provisions of Taiwan law. However, where the contract is about the creation or perfection of a security interest, such as a pledge and mortgage, the choice of law will be subject to the law of Taiwan regarding conflicts of law. As a general rule, if the property is located in Taiwan or if the rights subject to the security interest arise from Taiwan law, such as the shares in a Taiwan company, the law of Taiwan on conflicts of law will refer to Taiwan law as the governing law.

VI LOAN TRADING

i Performing loans

According to a ruling issued by the FSC, a bank generally shall not transfer its performing loans to others unless meeting any of the following exceptions: (1) the bank obtains consent from the borrower; (2) the bank transfers its loan to other financial institutions pursuant to the Financial Institutions Merger Act or the Financial Asset Securitisation Act; or (3) the bank has a special need to do so, such as for refinancing purposes. If the bank violates the above restrictions, it may be deemed as violating the principle of good faith and according to Subparagraph 2 of Paragraph 1 of Article 294 of the Civil Code, the transfer may be invalid. Furthermore, the bank may be deemed as violating its confidentiality obligations under the Banking Act.

ii Non-performing loans

According to the Directions Governing the Sale of Non-Performing Loans by the Financial Institutions, in general the financial institutions shall collect the debts themselves; provided however, that a financial institution may sell its non-performing loans when the ratio of the non-performing loans of the financial institution exceeds a certain percentage (currently 3 per cent); or, if less than 3 per cent, the non-performing loans are syndicated loans; loans extended by offshore branches or offshore banking units of the financial institution; or loans extended to construction companies.

VII OUTLOOK AND CONCLUSIONS

In 2015, the total amount of syndicated loans in the Asia-Pacific market (excluding Japan) was US\$471.3 billion, down 10 per cent from 2014. The syndicated loan market in Hong Kong, Australia and South East Asia also declined. In spite of this weak economic performance, Taiwan was the sole bright spot in a shrinking Asian loan market, as easier funding conditions for the lenders in Taiwan helped prevent a decline in deal volumes.

Against the above background, because the P2P lending platform provides a more convenient and efficient channel for lending money and investing, and allows different kinds of borrowers to utilise more flexible lending amounts, it has been going strongly recently. Furthermore, as the regulator remains open-minded about this emerging channel, it may have an impact on the traditional financial industry, especially the banks.

Appendix 1

ABOUT THE AUTHORS

ABE SUNG

Lee and Li, Attorneys-at-Law

Abe Sung is a partner in the banking and capital markets department. His main practice areas are banking and structured finance and he advises many domestic and foreign financial institutions on a regular basis. He has been actively involved in many securitisation deals in Taiwan, leading his colleagues in several pioneering cases, including the first cross-border securitisation deal ever done by a Taiwanese issuer. He also contributed to the enactment of Taiwan's Real Properties Securitisation Law and participated in a number of REITs issuances. According to *Chambers Asia-Pacific's* survey, clients commend him for combining 'commercial sense with an open mind' and consider him 'the first choice' for structured finance.

In 2002, Abe Sung advised First Commercial Bank in an open bid for sale of non-performing loans, which marked the inception of the NPL market in Taiwan, and since then has advised in more than 30 distressed-asset deals. He also advised Taiwan's Central Depository Insurance Corporation to dispose of the banks in crisis, again setting milestones – in this case, for the smooth transfer of bank assets and for operations to resolve insolvent banks as sound ones.

MARK YU

Lee and Li, Attorneys-at-Law

Mark Yu is an associate partner at Lee and Li. He is a graduate of the National Taiwan University law school and has also completed two LLM programmes, at Soochow University (Taiwan) and Northwestern University (United States) respectively. Currently, he is studying on the SJD programme at the law school of Soochow University. He is admitted to practise law in New York State (United States) and Taiwan. Before joining Lee and Li, he was an associate in the tax and legal department of PricewaterhouseCoopers Taiwan.

He focuses his practice on mergers and acquisitions, corporate financing and foreign investment and capital markets. Recently, he worked on the acquisition of RBS NV by ANZ,

the tender offer of Galaxy Far East Corp, the syndicated loan to Taiwan High Speed Rail Corporation, the IPOs of Kino Biotech and Sino Horizon and aircraft leasing and financing transactions involving CAL and EVA.

LEE AND LI, ATTORNEYS-AT-LAW

7F, 201 Tun Hua N Road

Taipei 10508

Taiwan

Tel: +886 2 2715 3300 ext 2232

+886 2 2715 3300 ext 2374

Fax: +886 2 2514 9841

abesung@leeandli.com

markyu@leeandli.com

www.leeandli.com