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The International Comparative Legal Guide to: **Lending & Secured Finance 2018**

6th Edition

A practical cross-border insight into lending and secured finance

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Editorial Chapters:

1	Loan Syndications and Trading: An Overview of the Syndicated Loan Market – Bridget Marsh & Theodore Basta, Loan Syndications and Trading Association	1
2	Loan Market Association – An Overview – Nigel Houghton, Loan Market Association	6
3	Asia Pacific Loan Market Association – An Overview – Katy Chan, Asia Pacific Loan Market Association (APLMA)	11

General Chapters:

4	An Introduction to Legal Risk and Structuring Cross-Border Lending Transactions – Thomas Mellor & Marcus Marsh, Morgan, Lewis & Bockius LLP	15
5	Global Trends in the Leveraged Loan Market in 2017 – Joshua W. Thompson & Caroline Leeds Ruby, Shearman & Sterling LLP	20
6	Avoiding Traps When Documenting Make-Whole Premiums for Term Loans – Meyer C. Dworkin & Samantha Hait, Davis Polk & Wardwell LLP	26
7	Commercial Lending in a Changing Regulatory Environment: 2018 and Beyond – Bill Satchell & Sara Lenet, Allen & Overy LLP	31
8	Acquisition Financing in the United States: 2018... Continued Growth – Geoffrey Peck & Mark Wojciechowski, Morrison & Foerster LLP	38
9	A Comparative Overview of Transatlantic Intercreditor Agreements – Lauren Hanrahan & Suhrod Mehta, Milbank, Tweed, Hadley & McCloy LLP	43
10	A Comparison of Key Provisions in U.S. and European Leveraged Loan Agreements – Sarah M. Ward & Mark L. Darley, Skadden, Arps, Slate, Meagher & Flom LLP	50
11	The Global Subscription Credit Facility and Fund Finance Markets – Key Trends and Forecasts – Michael C. Mascia & Wesley A. Misson, Cadwalader, Wickersham & Taft LLP	61
12	Recent Developments in U.S. Term Loan B – Denise Ryan & David Almroth, Freshfields Bruckhaus Deringer LLP	64
13	The Growth of European Covenant Lite – James Chesterman & Jane Summers, Latham & Watkins LLP	70
14	Yankee Loans and Cross-Border Loans – Recent Developments – Alan Rockwell & Judah Frogel, Allen & Overy LLP	73
15	Debt Retirement in Leveraged Financings – David A. Brittenham & Scott B. Selinger, Debevoise & Plimpton LLP	82
16	Analysis and Update on the Continuing Evolution of Terms in Private Credit Transactions – Sandra Lee Montgomery & Benjamin E. Rubin, Proskauer Rose LLP	88
17	Know Your Client: Adopting a Holistic Approach to Law Firm Representation – Kelli Keenan & Shafiq Perry, HSBC	95
18	Law of Astana International Financial Centre: Key Considerations – Colby Jenkins, Moore & Van Allen PLLC & Saniya Perzadayeva, Unicase Law Firm	99
19	Trade Finance on the Blockchain: 2018 Update – Josias Dewey, Holland & Knight LLP	102
20	Trends in the Expanding Global Private Credit Market: What to Expect for 2018 and Beyond – Jeff Norton & Scott Zimmerman, Dechert LLP	108
21	Replacing LIBOR: the Countdown to 2022 – Alexandra Margolis & Richard Langan, Nixon Peabody LLP	112
22	Investment Grade Acquisition Financing Commitments – Julian S.H. Chung & Stewart A. Kagan, Fried, Frank, Harris, Shriver & Jacobson LLP	119
23	Acquisition Finance in Latin America: Navigating Diverse Legal Complexities in the Region – Sabrena Silver & Carlos Viana, White & Case LLP	124
24	The Mid-Market and Beyond – Mark Fine & Sebastian FitzGerald, Willkie Farr & Gallagher LLP	130

Continued Overleaf →

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Country Question and Answer Chapters:

25	Andorra	Montel&Manciet Advocats: Maïtena Manciet Fouchier & Liliana Ranaldi González	134
26	Angola	Gabinete Legal Angola Advogados / PLMJ: Bruno Xavier de Pina & João Bravo da Costa	140
27	Argentina	Marval, O'Farrell & Mairal: Juan M. Diehl Moreno & Diego A. Chighizola	147
28	Australia	King & Wood Mallesons: Yuen-Yee Cho & Elizabeth Hundt Russell	156
29	Austria	Fellner Wratzfeld & Partners: Markus Fellner & Florian Kranebitter	165
30	Belgium	Laga: Werner Van Lembergen & Laurent Godts	175
31	Bermuda	Wakefield Quin Limited: Erik L. Gotfredsen & Jemima Fearnside	181
32	Bolivia	Criales & Urcullo: Andrea Mariah Urcullo Pereira & Daniel Mariaca Alvarez	189
33	Brazil	Pinheiro Neto Advogados: Ricardo Simões Russo & Leonardo Baptista Rodrigues Cruz	196
34	British Virgin Islands	Maples and Calder: Michael Gagie & Matthew Gilbert	205
35	Canada	McMillan LLP: Jeff Rogers & Don Waters	212
36	Cayman Islands	Maples and Calder: Tina Meigh	222
37	Chile	Carey: Diego Peralta	229
38	China	King & Wood Mallesons: Jack Wang & Stanley Zhou	236
39	Colombia	Lloreda Camacho & Co.: Santiago Gutiérrez & Juan Sebastián Peredo	243
40	Costa Rica	Cordero & Cordero Abogados: Hernán Cordero Maduro & Ricardo Cordero B.	250
41	Croatia	Macesic & Partners LLC: Ivana Manovelo & Anja Grbes	258
42	Cyprus	E & G Economides LLC: Marinella Kilikitas & George Economides	266
43	Denmark	Nielsen Nørager Law Firm LLP: Thomas Melchior Fischer & Brian Jørgensen	274
44	England	Allen & Overy LLP: David Campbell & Oleg Khomenko	281
45	Finland	White & Case LLP: Tanja Törnkvist & Krista Rekola	290
46	France	Orrick Herrington & Sutcliffe LLP: Emmanuel Ringeval & Cristina Radu	298
47	Germany	SZA Schilling, Zutt & Anschutz Rechtsanwaltsgesellschaft mbH: Dr. Dietrich F. R. Stiller & Dr. Andreas Herr	309
48	Greece	Sardelas Liarikos Petsa Law Firm: Panagiotis (Notis) Sardelas & Konstantina (Nantia) Kalogiannidi	318
49	Hong Kong	King & Wood Mallesons: Richard Mazzochi & David Lam	326
50	Hungary	BPSS Attorneys at Law: Eszter Dávid & Gergely Stanka	333
51	India	HSA Advocates: Anjan Dasgupta & Harsh Arora	342
52	Indonesia	Ali Budiardjo, Nugroho, Reksodiputro: Theodoor Bakker & Ayik Candrawulan Gunadi	353
53	Ireland	Dillon Eustace: Conor Houlihan & Richard Lacken	361
54	Italy	Allen & Overy Studio Legale Associato: Stefano Sennhauser & Gian Luca Coggiola	370
55	Ivory Coast	IKT Law Firm: Annick Imboua-Niava & Osther Henri Tella	378
56	Japan	Anderson Mori & Tomotsune: Taro Awataguchi & Yuki Kohmaru	384
57	Jersey	Carey Olsen: Robin Smith & Laura McConnell	392
58	Luxembourg	Wildgen: Michel Bulach & Giuseppe Cafiero	402
59	Mexico	Gonzalez Calvillo, S.C.: José Ignacio Rivero Andere	410
60	Mozambique	TTA – Sociedade de Advogados / PLMJ: Nuno Morgado Pereira & Gonçalo dos Reis Martins	417
61	Norway	Advokatfirmaet CLP DA: Ragnhild Steigberg	425
62	Pakistan	Kabraji & Talibuddin: Maheen Faruqui & Zara Tariq	433
63	Portugal	PLMJ: Gonçalo dos Reis Martins	440
64	Puerto Rico	Ferraiuoli LLC: José Fernando Rovira-Rullán	447
65	Romania	Trofin & Asociații: Valentin Trofin & Mihaela Spiridon	454



Country Question and Answer Chapters:

66	Russia	Morgan, Lewis & Bockius LLP: Grigory Marinichev & Alexey Chertov	464
67	Serbia	JPM Jankovic Popovic Mitic: Nenad Popovic & Janko Nikolic	472
68	Singapore	Drew & Napier LLC: Blossom Hing & Renu Menon	479
69	Slovakia	Škubla & Partneri s.r.o.: Marián Šulík & Zuzana Moravčíková Kolenová	489
70	Slovenia	Jadek & Pensa: Andraž Jadek & Žiga Urankar	496
71	South Africa	Allen & Overy LLP: Lionel Shawe & Lisa Botha	505
72	Spain	Cuatrecasas: Manuel Follía & María Lérica	515
73	Sweden	White & Case LLP: Carl Hugo Parment & Tobias Johansson	525
74	Switzerland	Pestalozzi Attorneys at Law Ltd: Oliver Widmer & Urs Klöti	532
75	Taiwan	Lee and Li, Attorneys-at-Law: Hsin-Lan Hsu & Cyun-Ren Jhou	541
76	United Arab Emirates	Morgan, Lewis & Bockius LLP: Ayman A. Khaleq & Amanjit K. Fagura	550
77	USA	Morgan, Lewis & Bockius LLP: Thomas Mellor & Rick Eisenbiegler	563
78	Venezuela	Rodner, Martínez & Asociados: Jaime Martínez Estévez	574

EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Lending & Secured Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of lending and secured finance.

It is divided into three main sections:

Three editorial chapters. These are overview chapters and have been contributed by the LSTA, the LMA and the APLMA.

Twenty one general chapters. These chapters are designed to provide readers with an overview of key issues affecting lending and secured finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in lending and secured finance laws and regulations in 54 jurisdictions.

All chapters are written by leading lending and secured finance lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Thomas Mellor of Morgan, Lewis & Bockius LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Overview

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

Given that the global economy is recovering steadily, Taiwanese enterprises seemed more optimistic in 2017 than in 2016. The total loan amount in 2017 increased by around 1,000 billion New Taiwan dollars compared to the total loan amount in 2016. However, since the interest rate is still low, right now many Taiwanese companies look for loan funding from individual banks, commercial paper and bond offerings instead of syndication loans, which has made the syndication loan market relatively inactive in 2017. The size of syndication loan transactions are also small.

Regarding loan by industry, for private enterprises, manufacturing, wholesale and retail trade and real estate are the top three industries which have the most loans outstanding in 2017 and this trend should remain the same in 2018. Further, in order to stimulate economic growth and drive industrial transformation, the Taiwanese government approved the Special Act for Forward-Looking Infrastructure in July 2017. The Forward-Looking Infrastructure Development Program (2017–2024) will expand investments in major infrastructure (including railways, aquatic environments, green energy, digital technology, and urban and rural facilities). The government investment in this large-scale infrastructure programme will total NT\$882.49 billion (US\$28.56 billion), and is expected to spur public and private enterprise investment of NT\$1.78 trillion (US\$57.53 billion). Among the infrastructure projects, green energy is being invested in the most, especially wind-powered energy plans. The Ministry of Economic Affairs (“MOEA”) has formulated a Four-year Wind Power Promotion Plan for 2017 to 2020. The plan contains short-term goals to solidify industry foundations and increase installed wind power capacity to 1.334 GW within four years, as well as medium and long-term measures to improve the installation environment and increase total installed capacity to 4.2 GW (1.2 GW land-based, 3 GW offshore) by 2025.

Due to such green energy policy, the Financial Supervisory Commission (“FSC”) has positioned green finance as one of the most important policies and encouraged domestic funds to invest in the green energy industry. The implemented measures of green finance include: (1) assisting the green energy industry in obtaining financing; (2) guiding insurance industry capital to be channelled into investment in domestic public construction, including the green energy industry; (3) providing diverse channels for fund raising and obtaining financing; and (4) enhancing green finance talent

nurturing. The FSC has also publicly pledged to support facilitating private sector investments in offshore wind farms.

Based on such policy-oriented support and assistance, several significant syndicated loan cases in relation to investments in offshore wind farms have taken place or are currently under discussion. For example, it was reported that Dong Energy (whose company name was changed to Ørsted in October 2017), with its joint venture partner Macquarie Capital, plans to seek syndicated financing, of about NTD60 million, from local banks in relation to its offshore wind sites in the Changhua area.

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

- (1) On January 24, 2017, Taiwan High Speed Rail Corporation (“THSR”) signed a joint underwriting agreement with an underwriting syndicate comprising 10 financial institutions, including the arranger, The International Bills Finance Corporation. Within the two-year period, THSR may issue an unsecured commercial paper with a maturity period ranging from 90 days to one year. The total amount of the revolving underwriting facility is NT\$20 billion (US\$666.67 million).
- (2) On March 27, 2017, General Energy Solutions Inc. (“GES”) secured a three-year NT\$800 million (US\$26.67 million) revolving syndicated loan led by Yuanta Commercial Bank as the facility agent. The loan is to be used for development and construction of GES’s global solar system project. The syndicated loan shows that the Taiwan banking industry foresees the downstream solar industry with a promising future.
- (3) On July 12, 2017, Swancor Holding Co. Ltd. (“Swancor”), a resin manufacturer and wind farm developer, secured a NT\$1.72 billion (US\$57.33 million) syndicated loan from eight domestic banks led by First Commercial Bank, to refinance its debt and bolster its operating capital. According to Swancor, its offshore wind farm in Miaoli County is expected to deliver 128MW when fully commissioned by the end of 2019. Swancor’s wind power subsidiary, Formosa I Wind Power Co., in April 2017 obtained a commercial operating licence for a wind farm from the Ministry of Economic Affairs.
- (4) On July 17, 2017, AU Optronics Corp. (“AUO”) secured a total of NT\$23 billion (US\$766.67 million) five-year facility from a banking consortium led by Bank of Taiwan. According to local news release, AUO originally planned to raise only NT\$20 billion through the new financing project, but increased the amount to NT\$23 billion due to enthusiastic participation of local and foreign banks. AUO will use the new funds to finance the second-phase expansion project of

its 8.5 GW plant in Houli, central Taiwan. The company aims to ramp up the production capacity at the plant to 100,000 panels a month when the new facilities come online in the second half of 2018.

- (5) On August 23, 2017, Yieh United Steel Corporation (“YUSC”), focusing on production and sales of stainless steel products in Southeast Asia, entered into a five-year NT\$12.65 billion (US\$421.67 million) syndicated loan agreement with Mega International Commercial Bank as the facility agent. It was reported that YUSC was initially targeting NT\$11 billion, while such fundraising attracted more than NT\$15.6 billion from other local banks.
- (6) On October 30, 2017, Grand River Development Ltd. (“Grand River”) entered into a NT\$20.55 billion (US\$685 million) syndicated loan agreement with Yuanta Commercial Bank as facility agent. According to Yuanta Commercial Bank, the syndicated loan closed 195 percent oversubscribed, attracting NT\$40.05 billion (US\$1.326 billion) in total from nine other local lenders and financial institutions, exceeding the original target of NT\$20.55 billion. This syndicated loan is to finance the construction project to be built on the site of CTBC Financial Holding Co.’s former headquarters in its premium location, and the new landmark building is named Taipei Sky Tower.

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, no company can 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, the guarantee 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 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 to revoke the guarantee if, due to the guarantee, the guarantor does not have 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”), the MOEA with respect to 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 creditor 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 Taiwanese 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.

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

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 a 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 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 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, registration with the competent authority is necessary in order for the mortgagee to claim the chattel mortgage against a *bona fide* third party.

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

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.

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

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 Taiwanese law. In other words, the pledge covers only the cash in the bank account when such pledge is created and notified to the bank at which the account was opened. 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.

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?

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 million. 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.

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

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

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)?

- (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.

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?

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.

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?

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.

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

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 answer 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 if the other sister company, together with its parent company, does not directly or indirectly hold more than 50% of the sister company.

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 32 jurisdictions; namely, Australia, Austria, Belgium, Canada, Denmark, France, Gambia, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, Kiribati, Luxembourg, Macedonia, Malaysia, the Netherlands, New Zealand, Paraguay, Poland, 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 point (a) 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 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 cases 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 following exist:

- (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?

There are no preference periods with respect to the security. The bankruptcy administrator may, within six months of the bankruptcy adjudication, apply to the court for the invalidation of the following acts of the debtor: (1) provision of security for outstanding debts within six months prior to the bankruptcy adjudication; and (2) repay the debts not yet due. In addition, the bankruptcy shall, within two years after declaration of the bankruptcy proceeding, file with the court to rescind the transaction which the bankrupt conducted with or without consideration before the bankruptcy proceeding if such transaction is deemed detrimental to the rights of the bankrupt's creditor and is revocable under the Civil Code.

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) the following labour claims will rank prior to unsecured creditors: (a) labour wages due and payable by the employer but overdue for a period of fewer than six months; (b) retirement payments payable by the employer pursuant to the Labour Standards Act but not yet paid; and (c) severance payable by the employer pursuant to the Labour Standards Act or Labour Pension Act but not yet paid; 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?

The following may apply for bankruptcy adjudication: (1) natural persons; (2) juristic persons; and (3) partnerships and any other incorporated association with a representative or an administrator. An unincorporated association without a representative or administrator is excluded from a bankruptcy proceeding, and there is no special legislation applicable to such entity. Banks and insurance companies are excluded from bankruptcy proceedings and will be subject to the proceedings provided under the Banking Act, Deposit Insurance Act and Insurance Act.

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. A creditor and the security provider may sign an agreement whereby the ownership of the mortgaged or pledged security will be transferred to the mortgagee or pledgee automatically when the debtor defaults. However, in the case of a mortgaged security, such agreement to transfer cannot be enforced against a *bona fide* third party, unless the mortgage is registered with the competent authorities.

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 Taiwanese 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? Are these licensing and eligibility requirements different for a “foreign” lender (i.e. a lender that is not located in your jurisdiction)? 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 licensing 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/finance companies. Accordingly, currently it is not possible to set up a company to operate a lending business in Taiwan.

Since there is no particular licensing 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 particular licensing or other eligibility requirement or 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, a foreign company is not allowed to operate any business in Taiwan without being recognised and setting up a branch in Taiwan. Thus, if lending is the foreign company’s business, making a loan to Taiwanese borrowers by the foreign company may violate the Company Act. Furthermore, as advised in our answer to question 2.6, in the case of a foreign loan to a Taiwanese borrower, the foreign exchange control 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. However, in practice, an agent is normally a member of the syndication and the credit rights of the syndicate members are joint and several in order to allow the agent to claim the repayment/payment and the collateral on behalf of the other syndicate members.

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 a 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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