Asia Pacific Guide to Lending and Taking Security - India

If taking security

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# 1. Are there any classes of unsecured and unsubordinated creditor whose claims against a debtor would rank equally with or above those of the debtor’s secured creditors?

See the answer to question 1 of the "If things go wrong" section, where the priority waterfall for distribution if liquidation proceeds is discussed.

# 2. May security given by a company rank in a specified order so as to secure liabilities owed to different creditors of the company in that order and, if that is not possible, is it viable for parties to enter into a contractual arrangement for the purposes of moderating this order?

Yes. An agreement between the borrower and the secured creditors prescribes the order of ranking. The lenders can also enter into an intercreditor agreement for moderating the order of priority of common security.

# 3. Does this jurisdiction recognise the concept of floating security or similar equivalent (i.e., security over a changing pool of assets that the company giving the security is free to buy, sell and generally deal with)?

Yes. Indian law recognizes the concept of a floating charge. A floating charge may be created over movable assets, receivables and current assets.

# 4. If so, are there any practical reasons why floating security is difficult to take, maintain or enforce?

If appropriate safeguards and monitoring mechanisms are implemented in the finance documents, it is not difficult to maintain and enforce a floating charge over movable assets.

# 5. May security be granted to a trustee to be held on trust for the lenders from time to time, in such a way that a change of lenders does not require new security to be taken?

Yes. These arrangements are possible as Indian law recognizes the concept of a trust. The relevant legislation is the Indian Trusts Act, 1882.

# 6. If not, are there any techniques that can be used to achieve substantially the same effect (e.g., parallel debt structures)?

Not applicable.

# 7. If an agent holds security for the lenders rather than a trustee, is it necessary to take new security on a change of lenders? If no, why not? If yes, are there ways to structure the transaction to avoid such a requirement?

Although the concept of agency is recognized in India, security is usually held by a trustee to avoid any difficulties regarding creation of security pursuant to a change of lenders.

# 8. Under the laws of this jurisdiction, is there any class of asset over which it is difficult or impossible to grant effective and perfected security, or in relation to which any security granted will be of limited effect?

The security created over assets of a project for which a concession is granted by the government (i.e., because the government owns the relevant land or has commissioned the project) may be subject to governmental approvals and terms and conditions imposed by the relevant governmental authority.

# 9. Under the laws of this jurisdiction, are there any restrictions on offshore lenders taking security over any class of asset?

The ECB Guidelines permit an ECB to be secured by immovable assets, movable assets and financial securities of an Indian company subject to obtaining the no-objection certificate of the authorized dealer bank in India. However, if any such asset constitutes a cross-border asset (such as shares of an overseas company), additional conditions may apply.

# 10. Must a company receive a corporate benefit in return for giving a guarantee or security? In particular, are there restrictions on the grant of upstream and cross-stream guarantees and security? If yes, briefly what is the effect of these laws?

The Indian Contract Act, 1872 provides that anything done for the benefit of the principal debtor is sufficient consideration for the guarantor or provider of security. However, the guarantor or security provider must be empowered under its constitutional documents to enter into a guarantee or grant security (as the case may be).

Where a third-party Indian company provides the guarantee or security, shareholders' approval of that company (by way of a special resolution) is required if certain prescribed thresholds (in terms of paid-up capital and free reserves) are exceeded. However, the approval is not required if the guarantee or security is provided in respect of financing made available to its wholly owned subsidiary company or joint venture company.

Please note that under the Companies Act, a company ("**lending company**") cannot grant a loan, provide security or extend a guarantee to, or on behalf of, any other company that has common directors with the lending company if certain conditions are met, unless the loan, guarantee or security has been approved by the lending company's shareholders and such loan is used for the  principal business activities of the borrower. This is subject to certain exceptions, such as the following:

Any guarantee given or security provided by a holding company in respect of a loan made to its wholly owned subsidiary if that loan is used by the wholly owned subsidiary for its principal business activities.

Any guarantee given or security provided by a holding company in respect of a loan made by any bank or financial institution to its subsidiary company if that loan is used by the subsidiary for its principal business activities.

If the lending company, in the ordinary course of its business, provides loans, guarantees or security for the due repayment of a loan and, in respect of that loan, interest is charged at a rate no less than the rate of the prevailing yield of 1 year, 3 years, 5 years or 10 years government security closest to the tenor of the loan.

# 11. What type of security interests does your jurisdiction recognise, e.g., pledge, charge, mortgage, hypothecation? In relation to each type of security interest, please state the formalities required to create and perfect that security.

**Modes of security creation**

**Immovable property**

Security over immovable property, such as land and buildings, is taken in the form of a mortgage. The Transfer of Property Act, 1882 ("**TOP Act**") primarily governs the creation of mortgages. The most common forms of mortgage are an English mortgage (a registered mortgage), a simple mortgage (a registered mortgage) and an equitable mortgage (a mortgage created by depositing the title deeds with the lender or security trustee).

Under the TOP Act, a mortgage (other than an equitable mortgage) for repayment of money exceeding Indian rupees 100 must be created by way of a registered instrument. The instrument must be signed by the mortgagor, attested by two witnesses and registered with the land registry where the mortgaged immovable property is situated.

In the case of an equitable mortgage, the mortgagor or its authorized representative deposits the title deeds in relation to the immovable property with the lender or security trustee and provides a declaration, at the time of the deposit, that records that the title deeds were deposited by that person with the lender or security trustee with the intention of creating a mortgage. The lender or security trustee records the deposit of title deeds by way of a memorandum of entry.

**Shares and other securities**

Security over shares and other securities is typically created by way of a pledge. There is no prescribed form under Indian law for the creation of a pledge of shares. However, a pledge agreement or deed is usually entered into between the pledgor and the pledgee to create and record the pledge. The pledgor also usually issues a separate power of attorney to the pledgee that allows the pledgee to deal with the pledged shares/securities in case of an event of default and take other actions on behalf of the pledgor.

**Movable property**

Movable property, such as cash deposits, bank accounts, receivables, plant and machinery and stock, is usually secured by way of hypothecation. Under Indian law, hypothecation generally means a charge over any movable property, existing or future, created by a borrower in favor of a creditor without the delivery of possession of the movable property to that creditor. The charge created by way of hypothecation may be a fixed charge over identifiable assets or fixed assets and is usually a floating charge over current assets and stock-in-trade.

The security provider executes a deed of hypothecation in favor of the lender or security trustee. The deed of hypothecation is usually a standalone document and covers all terms and conditions, powers and provisions to safeguard the interests of the lender/creditor. The security provider also usually issues a separate power of attorney to the lender or security trustee that allows the lender or security trustee to deal with the hypothecated assets in case of an event of default and take other actions on behalf of the security provider.

**Corporate authorizations**

If the security provider is a corporate entity, its constitutional documents must permit the creation of a mortgage over its immovable property. If the security provider is a company, it may need to obtain board and shareholder resolutions to approve the creation of the security, which must be in accordance with the requirements of the Companies Act.

**Perfection requirements**

In India, the perfection of a security occurs through registration. The type of security and the type of property determine where a security must be registered. While some securities do not require registration, others must be registered at more than one registry.

**Registration under the Indian Registration Act, 1908**

Any mortgage of immovable property, other than an equitable mortgage created by way of deposit of title deeds of the mortgaged property, must be registered in accordance with the Indian Registration Act, 1908 ("**Registration Act**") within four months of the execution of the mortgage deed. All Indian states require this type of mortgage to be registered. If the mortgage is not registered, it is invalid. However, where the mortgage is an equitable mortgage of immovable property created by way of deposit of title deeds of the mortgaged property, the document recording the deposit of title deeds is only required to be registered under the Registration Act in some Indian states.

No registration is required for any instrument creating any title or interest in, or right to, movable property under the Registration Act. Deeds of hypothecation and share pledge agreements are not required to be registered under the Registration Act.

**Registration with CERSAI**

A mortgage (by way of deposit of title deeds or otherwise), hypothecation (of plant and machinery, stocks, a debt (including book debt or receivables) and a security interest (in intangible assets, i.e., know-how, a patent, copyright, a trademark, a license, a franchise or any other business or commercial right of a similar nature, or on an under-construction residential or commercial building or its part by an agreement or instrument other than by mortgage) are also registered with CERSAI. This registration must be done by the lender or the security trustee with CERSAI.

**Filing with the ROC**

A mortgage, lien, charge, pledge, hypothecation or any other security interest created by an Indian company over its assets located in India or abroad must be registered with the relevant ROC within 30 days from the creation of the security interest. The ROC issues a certificate of charge. A charge created by an Indian company will not be taken into account by the liquidator or any creditor of the company unless it is registered with the ROC and a certificate of registration of the charge is issued by the ROC. The security provider company is also required to maintain a register of charges recording the details of the charge.

**Intellectual property, ships and aircraft**

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

**Registration and filing fees**

Registration and filing fees vary according to the type of security and are payable at the time of registration. Some Indian states have a fixed registration fee, while others have a percentage-based fee. The amount of the registration fee for registering a mortgage of land with the land registry depends on the Indian state in which the property is located.

Registration fees for registering security documents with the ROC are nominal.

**Regulatory approvals**

**Approvals from tax authorities**

Creating a charge over certain types of assets (land, buildings, machinery, plant, shares, securities and fixed deposits in banks), to the extent to which those assets do not form part of the stock-in-trade of the taxpayer's business, may also need the income tax authorities' permission. If any proceedings are pending against the security provider under the Income Tax Act, 1961 where the amount of tax or other sum payable or likely to be payable exceeds Indian rupees 5,000, any mortgage or charge over assets of that type that are valued at more than Indian rupees 10,000 would be held to be void to the extent of any claims of the income tax authorities arising out of those proceedings. Further, as per the provisions of the Central Goods and Services Act, 2017 ("**CGST Act**"), if a company creates a charge over its assets after amounts under the CGST Act are due from such company and with an intention to defraud the government revenue, such charge will be void against any claim in respect of any tax or any other sum payable by the company. It is therefore, advisable for a lender to require that the security provider obtains the permission of the assessing officer under the Income Tax Act, 1961 and the proper officer under the CGST Act before creating any mortgage or charge in the lender's or security trustee's favor. However, this may delay the completion of the financing, as obtaining permissions from the income tax authorities and authorities under the CGST Act may be time-consuming.

**Consents of the authorized dealers for ECBs**

In the case of ECBs, the RBI has permitted authorized dealers (i.e., banks in India that have been given special licenses to deal with foreign exchange) to grant permission in relation to the creation of security over movable property, immovable property and financial securities in accordance with the ECB Guidelines.

**Other formalities**

**Immovable property**

As a matter of practice, a title search is conducted in relation to immovable property to ensure that the mortgagor is the legal owner and entitled to mortgage the property and to check whether any prior charge or mortgage exists over the property. The title search is conducted at the land registries in whose jurisdiction the immovable property is situated. Note that an equitable mortgage does not appear in the land registry's records unless registered with the relevant land registry. Therefore, it is advisable to also initiate a search with the ROC to check whether any equitable mortgage has been registered there.

**Movable property such as bank accounts and contracts**

In the case of a hypothecation over bank accounts or contracts, notices should be issued to the banks or the counterparties to the contracts informing them of the charge created. Often the bank will be the chargee and therefore know about the hypothecation. If the bank is not the chargee, however, and the notice is not issued, the chargee may find that the money in the relevant bank account is withdrawn and the charge is worthless.

**Shares or other securities**

Where the shares are in dematerialized form, certain forms have to be filed with the depository participant to mark a pledge over these shares in the shareholder's beneficial account.

# 12. Are there any registration, translation or notarization requirements in relation to security, guarantees, subordination or intercreditor documents?

In relation to registration requirements for security documents, please see the answer to question 11 of this section. Guarantees, subordination deeds and intercreditor documents are not required to be registered under Indian law.

There are no specific translation requirements that apply if the documents are in English.

# 13. Are there any stamp, documentary, registration, notarization or other taxes, duties or fees chargeable in respect of security, guarantees, subordination or intercreditor documents? If yes, what are the amounts and when are they payable?

Please see the answer to question 8 of the “When lending to borrowers” section.

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