Asia Pacific Guide to Lending and Taking Security - Taiwan

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# When considering whether to lend

## 1. Is it necessary or advisable for any lender, arranger, facility agent or security agent to be licensed, qualified or otherwise entitled to carry on business in this jurisdiction: (a) by reason only of its execution, delivery or performance of the finance documents; or (b) to enable it to enforce its rights under the finance documents?

Yes. Only a licensed bank, insurance company or other entity with permission from the Financial Supervisory Commission (FSC) is allowed to conduct the business of lending money.

However, if the finance documents are executed and delivered outside Taiwan, a lender, arranger, facility agent or security agent may enforce them in Taiwan without being licensed, qualified or otherwise entitled to carry on business in Taiwan.

## 2. Will any lender, arranger, facility agent or security agent be deemed to be resident, domiciled, carrying on business or subject to tax by reason only of the execution, delivery, performance or enforcement of the finance documents?

If a lender, arranger, facility agent or security agent (being a licensed bank, insurance company or other entity with permission from the FSC, as mentioned in our answer to question 1 of this section) executes, delivers and performs the finance documents in Taiwan, it may be held to be conducting the business of lending money, and be subject to tax, in Taiwan.

In the case of a foreign lender, arranger, facility agent and security agent, if the finance documents are signed offshore and the loan(s) are disbursed to bank account(s) outside Taiwan, and no business activity is conducted in Taiwan, they will not be deemed to be resident, domiciled or carrying on business in Taiwan by reason only of the execution, delivery, performance or enforcement of the finance documents.

## 3. Are there any regulatory reporting requirements that lenders must observe in connection with those transactions?

Yes. If a lender is a public company, it must disclose its lending amount in its financial report in accordance with the relevant guidelines for the preparation of financial reports. If a lender is a financial institution, it must keep all documentation in connection with the transactions, which are subject to the FSCs periodic inspection.

## 4. Is it necessary to establish a place of business in your jurisdiction in order to enforce any provision of the finance documents?

No. According to Supreme Court decisions and the Civil Procedure Act of Taiwan, an unrecognized foreign entity (i.e., a foreign entity that has not obtained registration or other legal recognition in Taiwan or does not have a representative office or branch in Taiwan) is allowed to initiate legal proceedings in Taiwan through its representative (being an individual) in Taiwan.

In relation to the possible difficulties that could be encountered by foreign entities when taking and enforcing security interests over assets in Taiwan, see the answer to question 9 of the "If taking security" section.

## 5. Is a foreign bank/financial institution permitted to approach local entities for business?

No. In Taiwan, business and related activities conducted by financial institutions are highly regulated. A foreign bank/financial institution is not permitted to conduct any business or related activity in Taiwan, such as approaching local entities for business unless it obtains the approval of/permission from the FSC to establish a branch in Taiwan.

# When lending to borrowers

## 1. Are there any restrictions in relation to the type of borrower who may borrow foreign currency or in relation to the term of foreign currency and/or the amount of foreign currency borrowed by local entities?

No.

## 2. Are there any restrictions on the rate of interest or default interest that may be charged?

Yes. The Legislative Yuan of Taiwan passed an amendment to the Civil Code that specifies that if the rate of interest (ROI) exceeds 16% per annum, the portion of interest exceeding 16% is invalid. This latest amendment took effect in July 2021.

## 3. Are there any restrictions on particular lenders or classes of lender entering into credit transactions with borrowers?

Yes. As mentioned in the answer to question 1 of the "When considering whether to lend" section, only limited types of licensed financial institutions with permission from the FSC are allowed to act as a lender (or arranger, facility agent or security agent) in connection with an onshore loan facility.

## 4. Are there any exchange controls that will apply to payments to be made in foreign currencies or to foreign lenders?

Taiwan nationals may convert an aggregate amount of New Taiwan dollars equivalent to no more than USD 50 million (in the case of a legal entity) or USD 5 million (in the case of a natural person) into foreign currencies each year without approval from the Central Bank of the Republic of China (Taiwan) (CBC) (although all remittances (including inbound and outbound) and foreign exchange transactions exceeding the equivalent of TWD 500,000 must be reported to the CBC). If the total conversion amounts in a year exceed USD 50 million (in the case of a legal entity) or USD 5 million (in the case of a natural person), CBC approval is required.

## 5. Is there any requirement to deduct or withhold tax from any amounts to be paid or repaid to a lender (whether domestic or foreign)? If so, at what rate must tax be deducted and from what kinds of payment?

A 5% gross business receipts tax applies to interest and fees paid to a Taiwanese financial institution. In practice, borrowers generally agree to pay the gross business receipts tax.

Interest and fees paid to a foreign bank or lender (regardless of whether it is a bank or not) and an arranger, facility agent and security agent without a branch office in Taiwan are subject to a 20% withholding tax. However, as of 30 June 2023, Taiwan has double taxation agreements with 34 countries, most of which offer a preferential withholding rate of 10% that applies to interest. The following countries have entered into double taxation agreements with Taiwan: Australia, Belgium, Denmark, France, Germany, Malaysia, New Zealand, the Netherlands, Sweden, Switzerland, the UK, Singapore, Indonesia, South Africa, Vietnam, Gambia, Eswatini, North Macedonia, Senegal, Israel, Paraguay, Hungry, India, Slovakia, Thailand, Kiribati, Luxembourg, Austria, Japan, Italy, Canada, Poland, the Czech Republic and Saudi Arabia.

## 6. Are there any “thin capitalization” or other rules that may limit the extent to which interest payments may be deducted for tax purposes?

The "thin capitalization rule" under the Taiwan Income Tax Act only applies to loans and interest payments between related parties. Excess interest payments are not considered an expense or loss if the proportion of related party debt to equity of a profit-seeking enterprise exceeds a specified ratio (currently, the ratio is 300%).

However, this "thin capitalization rule" does not apply to interest payments to banks, credit cooperatives, financial holding companies, bills finance companies, insurance companies and securities firms.

## 7. Are there any registration, notarization, translation or reporting requirements in relation to the loan documents?

No. In relation to the registration of mortgages over real property and chattels, see the answer to question 11 of the "If taking security" section. Furthermore, if a foreign institution is going to lend to a Taiwanese borrower, the Taiwanese borrower may opt to report that "foreign debt" to the CBC for its records, which will facilitate the outward payment and repayment of the loan (see the answer to question 4 of this section in relation to foreign exchange control mechanisms).

## 8. Are there any stamp, documentary, registration, notarization or other taxes, duties or fees chargeable in relation to the loan documents? If yes, what are the amounts and when are they payable?

No. In relation to duties and fees chargeable in respect of security, guarantees, subordination or intercreditor documents, see the answer to question 12 of the "If taking security" section.

## 9. Does the law recognize the subordination of the debt that a debtor owes to one creditor to that which the debtor owes to another creditor? If yes, how is this usually effected?

Yes. A debtor may agree with a creditor ("**first creditor**") that it will not pay down the debt owed to another creditor ("**second creditor**") before the full repayment of the debt owed to the first creditor. The debtor, the first creditor and the second creditor may enter into a subordination agreement to record their agreement or the second creditor may enter into a subordination undertaking in favor of the first creditor.

## 10. 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 other unsecured and unsubordinated creditors (e.g., the claims of employees and tax authorities or the claims of creditors under particular kinds of instrument)? If yes, what classes of creditors are preferred?

Yes. The claims of all unsecured and unsubordinated creditors rank equally, except for the following, which — together with the claims referred to in paragraph 1 of the "If taking security" section — rank above the claims of the other unsecured creditors and in the following order:

The fees and expenses of the enforcement proceedings.

Land value increment tax, land value tax, house tax and/or business tax levied on the property/goods auctioned by a court or an administrative enforcement agency.

Unpaid wages owed to the employees (up to six months' wages) of the debtor under their labor contracts, retirement pensions that the debtor has failed to disburse and severance payments.

Other unpaid taxes.

## 11. Are there any consumer protection or similar laws that apply if credit is made available to individuals or other classes of debtor? If yes, what laws are applicable?

Yes. There are protection mechanisms in the Financial Consumer Protection Act that apply to agreements between a financial institution and a "financial consumer," such as requirements imposed on a financial institution to conduct a mandatory risk tolerance assessment in relation to each financial consumer and to give reasonable disclosure of the standard bank forms adopted by a financial institution when that financial institution provides any product or service to a financial consumer. A financial institution that fails to comply with these requirements and causes harm to a financial consumer is liable for damages to the financial consumer.

The term "financial consumer" means a person that receives financial products or services provided by a financial institution, but it does not include the following:

A qualified institutional investor

An individual or legal entity with a prescribed level of financial capacity or professional expertise

## 12. Are there any prohibitions or limitations on the extent to which a company can give financial assistance for the purchase of: (a) its own shares or those of any affiliated company; or (b) assets owned by it or any affiliated company?

Under the Taiwan Company Act and the Regulations Governing Lending of Funds and Making of Endorsements or Guarantees by Public Companies ("**Lending or Guarantees Regulations**"), a Taiwanese company is prohibited from lending to any of its shareholders or any other person except in the following circumstances:

Where an intercompany or interfirm business transaction calls for the lending arrangement.

Where an intercompany or interfirm short-term financing facility (not more than one year) is necessary.

If the lending entity is a public company and the ground for the lending is item (a) above, the amount of the loans under exception (a) must be equivalent to the value of the intercompany transaction (such as the supply, sale or distribution transaction) between the lending company and the borrower. The amount of the short-term financing facility under exception (b) must not exceed 40% of the net worth of the lending company. Any responsible persons of a lending company (such as the directors, supervisors and managers) who violate these regulatory restrictions will be liable, jointly and severally, with the borrower for the repayment of the loan and any damage suffered by the lending company because of any violations.

In relation to financial assistance in the form of providing guarantees, see the answer to question 9 of the "If taking security" section.

# If taking security

## 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?

The enforcement fees incurred and paid to the court in accordance with the applicable laws and the following preferential rights to payment provided by law have priority over secured claims as described below:

Land value increment tax, land value tax, house tax and business tax levied on property/goods auctioned by a court or administrative enforcement agency have priority over all other claims and mortgages.

Fines, costs and payments for pollution remediation under the Soil and Groundwater Pollution Remediation Act take priority over all creditor and mortgagee rights.

The following preferential secured claims rank ahead of other secured claims:

When a contract is for work on the construction of a building or other works on land or for vital repairs in relation to that building or those works, an unsecured contractor may demand that the proprietor register a mortgage in favor of the contractor over the building or the land, or the building to be constructed, to secure the remuneration and payments to be made to the contractor. The mortgage would rank above any mortgage registered earlier to the extent of the value of the work.

If an act of a mortgagor is likely to cause a reduction in the value of the mortgaged property, the mortgagee may demand the cessation of the act and take any necessary action to safeguard the mortgaged property. The mortgagor bears the costs incurred for a demand or specified disposition and the claims for those costs have priority over claims secured by any mortgage on the property.

When a lien holder takes possession of or retrieves the relevant property of a chattel secured transaction (such as a chattel mortgage) in accordance with the Chattel Secured Transaction Act, a bona fide lien holder's expenditure for the repair or addition of work to the relevant property of the chattel secured transaction, which increases the value of the chattel, is given priority of satisfaction, to the extent of the increase in value, over any chattel secured rights that were previously established in accordance with the Chattel Secured Transaction Act.

Further, when an employer has suspended or liquidated its business or has been declared bankrupt, the following rights of the employees rank equally and pro rata with those of the holders of any first priority security interests:

Unpaid wages for less than six months.

Pensions that the employer has failed to disburse in accordance with the Labor Standards Act.

Severance pay that the employer has failed to disburse in accordance with the Labor Standards Act or the Labor Pension Act.

## 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, but this is only applicable to a mortgage of real property and chattels (such as machinery, equipment, tools, raw materials, semi-finished products, finished products, vehicles, forestry, fishery, agricultural and livestock products, livestock and vessels), in respect of which registration with the relevant authority or authorities would cause it to:

Become effective in the case of a mortgage of real property.

Be effective against a bona fide third party in the case of a mortgage of chattels.

In these cases, the mortgagor and the mortgagee may determine and designate the priority of multiple mortgages in relation to the same property.

## 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)?

No. Under the laws of Taiwan, there is no floating charge concept, and a charge over a changing pool of assets is not possible. Each time there is a change of assets in the pool, the changed pool of assets must be repledged or remortgaged and (if required) reregistered.

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

Not applicable.

## 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?

No, this type of trust regime is not recognized. However, a trust in relation to a mortgage or pledge is permissible for securitization purposes only, in which case the security interest concerned may be held by a trustee, as provided under the Financial Asset Securitization Act.

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

The lenders may appoint an agent that is also a lender and that has joint and several rights with the lenders to act for and on behalf of the lenders to hold the security interest and may be registered as the mortgagee or possess the pledged property and any documents evidencing it.

## 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?

No. When an agent is appointed by the lenders to hold the security on behalf of the lenders, the security agreement (e.g., a mortgage agreement or pledge agreement) is signed by the security provider and by the agent (being the mortgagee or pledgee) only. In the case of a mortgage that must be registered, only the agent is registered as the mortgagee. Therefore, a change to a lender (or lenders) that is not the agent does not require the creation of new security.

The legal relationship between the lender or lenders (that is/are not the agent) and the security provider is via the agent. If any lender (that is not the agent) changes by way of assignment and transfer, the new lender will assume the rights and benefits of the original lender. Therefore, the rights against the obligors remain unchanged and the security documents will not need to be amended.

If, however, there is a change to a lender that is also the agent, the amendment of the security documents or new security will be required.

## 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?

It is difficult to grant an effective and perfected security interest over a changing pool of assets, such as inventories to be sold and deposits in a bank account. See the answer to question 3 of this section.

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

Previously, foreign companies had to obtain recognition pursuant to the Company Act of Taiwan to become eligible to take a security interest over assets located in Taiwan. After the abolishment of the concept of recognition of foreign companies under the Company Act, a foreign company without a local presence is still unable to be registered as a secured party for chattel mortgages. For chattel mortgages, registration is not required for a chattel mortgage to be valid but it is necessary for the chattel mortgage to be enforceable against a bona fide third party. Furthermore, foreign entities may only acquire rights over land in Taiwan if their countries of incorporation, pursuant to treaties or their domestic laws, allow Taiwanese nationals and entities to the same rights. Under Taiwanese law, a real estate mortgagee agreement has to be registered to be valid. Hence, to allow a foreign company to take security interest over real estate located in Taiwan, the country of incorporation of such entity must allow Taiwanese entities to enjoy the same right. Furthermore, a foreign company without a local presence is still unable to be registered as a secured party for real mortgages. In addition, if a foreign lender would like to take security over scripless shares, they may encounter difficulties as the scripless shares would have to be deposited into a securities account opened by the foreign lender with a securities firm and some Taiwanese securities firms would refuse to allow foreign lenders to use their securities accounts for such purpose.

## 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?

Neither the Regulations Governing Lending of Funds and Making of Endorsements or Guarantees by Public Companies ("**Lending or Guarantees Regulations**") nor any other legislation requires a company to receive a corporate benefit in return for giving a guarantee or security. However, directors and managers of a Taiwanese company have a duty to act in good faith for the benefit of the company when considering giving a guarantee or security.

Under the Taiwan Company Act, a Taiwanese company must not act as a guarantor of any type (including giving security to secure a third party's indebtedness) unless otherwise permitted by other laws or by the Articles of Incorporation (AOI) of the company. A responsible person who violates this restriction is personally liable under the guarantee or security and for any damage to the company that results from it.

A Taiwanese public company that is permitted to give guarantees or security to secure a third party's indebtedness under its AOI must also comply with the Lending or Guarantees Regulations and establish internal rules accordingly. The Lending or Guarantees Regulations provide that a Taiwanese public company may provide a guarantee, an endorsement of a payment instrument or security for a third party's indebtedness for the following companies:

A company with which it does business.

A company in which it directly or indirectly holds more than 50% of the voting shares.

A company that directly or indirectly holds more than 50% of the voting shares in the Taiwanese public company.

A Taiwanese public company, and any company in which it holds, directly or indirectly, 90% or more of the voting shares, may provide an endorsement/a guarantee/security for a third party's indebtedness to each other, but the amount of the endorsement/guarantee must not exceed 10% of the net worth of the Taiwanese public company. However, this restriction does not apply to an endorsement/guarantee/security for a third party's indebtedness made between companies in which the public company holds, directly or indirectly, 100% of the voting shares.

## 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.

There are four major types of security interest:

A mortgage over real property

A mortgage over chattels

A pledge over personal property

A pledge over rights

The formalities for each type of security interest are set out below.

**Mortgage over real property**

The mortgagor and the mortgagee enter into a mortgage agreement and file for registration of the mortgage with the land office where the mortgaged real property is located.

**Mortgage over chattels**

The mortgagor and the mortgagee enter into a mortgage agreement and file it with the competent authority to ensure it will be effective against a third party.

**Pledge over personal property**

The creation of a pledge becomes effective by the transfer of possession of the pledged personal property from the pledgor to the pledgee. In practice, it is advisable for the pledgor and pledgee to enter into a pledge agreement to record their respective rights and obligations.

**Pledge over rights**

The pledge is created in writing. If there is any document evidencing the pledged rights, the pledgor must deliver it to the pledgee.

The pledgor and the pledgee must notify the debtor of the pledge.

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

Yes, registration is necessary for mortgages over real property and chattels. A real estate mortgage agreement has to be registered to be valid. A chattel mortgage agreement has to registered to be enforceable against a bona fide third party. Real estate mortgage agreements and chattel mortgage agreements need to be made in a bilingual version or accompanied by a Chinese translation for registration purposes.

## 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?

A registration fee must be paid when applying for a mortgage registration, as set out below.

Registration of a mortgage over real property

A fee equal to one-tenth of 1% (0.1%) of the amount of the secured indebtedness is payable.

Registration for a mortgage over chattels

The fees are as follows:

Registration fee (including certificate fee): TWD 900

Amendment registration fee (including certificate fee): TWD 450

Registration cancellation fee: free of charge

If the amount of the secured claim in relation to a mortgage over chattels is TWD 90,000 or less, the administrative fees set out above are reduced by 50%.

No other fees are payable.

# If things go wrong

## 1. Please provide a brief description of the insolvency regime. In particular what rights and duties do unsecured and secured lenders have on the insolvency of a debtor? Are there any other matters of concern?

There are three distinct statutory corporate insolvency regimes:

Liquidation/winding up

Bankruptcy

In the case of a public company, reorganization

Secured lenders rank above unsecured lenders

If an event of default occurs, a lender usually first applies to the court with jurisdiction for a provisional seizure order in respect of the debtor's assets and then initiates enforcement proceedings.

**Liquidation/Winding Up**

A creditor may not institute liquidation proceedings against an insolvent Taiwanese company. Those proceedings may only be instituted by the company itself through a shareholder's resolution or by a Taiwan governmental agency. On the appointment of liquidator(s) to the company, the liquidator(s) issue public notices requesting the creditors to declare their claims unless a creditor is known to the liquidator. The liquidator must notify individually creditors that are known to the liquidator. The liquidator will then repay all creditors on behalf of the company after liquidating the assets of the company.

**Bankruptcy**

Where the value of the assets of a company is less than the value of its debts, then (unless reorganization proceedings are in progress) the board of directors of the company must file for bankruptcy, or the creditors of the company may petition for a declaration of bankruptcy against the company. Each secured creditor that had a security interest over the company's assets prior to the declaration of bankruptcy is entitled to a right of exclusion. In that case, it is not required to participate in the bankruptcy proceedings and may enforce its claims outside those proceedings. The secured creditor may file a claim in accordance with the bankruptcy proceeding for any portion of the debts due to it that remain unsettled after the exercise of the right of exclusion. A moratorium on the enforcement of the claims of all unsecured creditors comes into effect during bankruptcy, and unsecured creditors may only seek satisfaction of their claims, on a pro-rata basis, by participating in the bankruptcy proceedings.

**Reorganization**

When a company that publicly issues shares or corporate bonds suspends its business due to financial difficulties or when there is a concern that it may do so but there remains a possibility of the company being rehabilitated or restructured, the company or its interested parties (which/who are shareholders who have continuously held shares representing 10% or more of the total number of issued shares for a period of six months or longer or creditors of the company who have claims equivalent to 10% or more of the capital from the total number of issued shares) may apply to the court for reorganization. In these circumstances, the enforcement of security and the realization of collateral are suspended after the grant of a reorganization order by the court and during a period of emergency stay, and are subject to a reorganization plan approved by the creditors and the court. Subject to the preferential claims set out in the answer to question 1 of the "If taking security" section, secured creditors enjoy priority in the order of repayment. However, the claims of all creditors must be exercised in accordance with the reorganization plan and the reorganization procedures.

## 2. Is it possible to obtain a moratorium before insolvency?

It is only possible to obtain a moratorium before insolvency in the case of reorganization proceedings of a public company. In that case, and as mentioned above, the enforcement of security and the realization of collateral are suspended after the grant of a reorganization order by the court and during a period of emergency stay and are subject to a reorganization plan approved by the creditors and the court. However, the debtor, the creditor and/or any interested third party may seek modification of the plan.

If a petition for a bankruptcy order is filed with the court against a debtor, the court may, at the request of a creditor or ex officio, issue a preservation order to restrict the right of creditors to take enforcement action against the debtor.

## 3. When a company is the subject of a formal insolvency procedure, can the company’s pre-insolvency transactions be set aside?

Certain pre-insolvency transactions can be set aside in relation to a bankruptcy procedure. In a bankruptcy procedure, the bankruptcy administrator may revoke the following pre-insolvency transactions if made by a bankrupt person or entity within six months before the declaration of bankruptcy:

The creation of a security interest to secure any existing indebtedness

The prepayment of any indebtedness that has not yet matured

The setting aside of pre-insolvency transactions does not apply to a liquidation/winding-up.

## 4. When can a lender enforce its security? Can security be enforced out of court following an event of default (or other contractual trigger event), or is a court order required? Are there any restrictions that apply before a lender may enforce its security?

A lender may enforce its security when there is an event of default by the borrower or the security provider, as the case may be. An enforcement clause may be included in the finance documents (i.e., a clause about the consequences of an event of default), giving the lender the right to enforce its rights against the borrower or the mortgaged/pledged assets once an event of default occurs. At the time a security interest is created, the parties may agree to enforce the security interest out of court and choose an agreed method of enforcement. However, in the case of reorganization proceedings (see the answer to question 1 of this section), the enforcement of collateral is suspended during an emergency stay and after the grant of the reorganization order as the collateral is subject to the reorganization plan. If there are liquidation/winding-up or bankruptcy proceedings, the enforcement of security may be excluded from them and the lender may continue with enforcement.

## 5. Do any limitation periods apply in relation to bringing an action to enforce security?

Yes. The limitation period (also known as the prescription period) for the claim of a loan repayment is 15 years. For a claim secured by a mortgage, however, if the claim for the repayment of a loan is extinguished due to the lapse of the prescription period, the mortgagee has an additional five-year period, which commences on the last date of the prescription period, during which the mortgage must be claimed and enforced.

## 6. Is there any particular way in which secured assets must be liquidated on enforcement (e.g., by auction or court sale)?

A sale of a secured asset can occur through a public or private auction, and the manner of that auction may be agreed upon in the mortgage or pledge agreement. A mortgagee or pledgee that has not received payment by the maturity of a claim may enter into a contract to acquire the ownership of the mortgaged/pledged property or dispose of it by any means other than an auction unless doing so would be prejudicial to the interests of the other mortgagees/pledgees.

## 7. Are there any particular legal or practical difficulties or delays in enforcing security?

The enforcement of security may be delayed when a debtor, or any third party or interested party, files for bankruptcy or reorganization against the debtor.

## 8. In relation to enforcement, are there any specific requirements to be borne in mind if the lender is a foreign entity?

A foreign entity that does not have a local presence but that has a representative in Taiwan may file a petition with a court in Taiwan or initiate legal proceedings in Taiwan. A foreign company without a local presence cannot be registered as a secured party for chattel mortgages and real estate mortgages. Under Taiwanese law, a real estate mortgagee agreement has to be registered to be valid. For chattel mortgages, registration is not required for a chattel mortgage to be valid, but it is necessary for the chattel mortgage to be enforceable against a bona fide third party.

Given the above, specific legal advice should be taken regarding the enforceability of security interests in Taiwan in favor of a foreign lender or security agent.

## 9. Is there any reason why you think that arbitration rather than litigation might be advantageous in resolving disputes under the finance documents, and if so, why? Please outline the relative merits of arbitration and litigation, including the ease of enforcement of foreign judgments and foreign awards from different jurisdictions. Is it possible to rely on a hybrid enforcement provision that allows the lenders to opt for either arbitration or litigation as they see fit?

**Cause of action and costs**

Litigation may be more advantageous when the cause of action is clear and the documentary evidence is sufficient. In some cases, arbitration may be more time-consuming than litigation and the cost may be higher.

**Application for recognition**

After the court has granted an application for recognition, foreign court judgments and foreign arbitral awards are binding on the parties and have the same force as a final judgment of a Taiwanese court. The criteria for a court to review an application for recognition are set out below.

**Foreign court judgments**

In the case of an application to a Taiwanese court for recognition and enforcement of a foreign judgment, the judgment will be enforced by the Taiwanese court if:

In the case of a default judgment, the relevant process was served on the defendant in the foreign court's jurisdiction or on the defendant with Taiwanese judicial assistance.

The judgment is not contrary to the public order or good morals of Taiwan.

According to Taiwanese laws, the foreign court had jurisdiction over the case.

Judgments of Taiwanese courts are reciprocally recognized by the foreign courts.

**Foreign arbitral awards**

The court will dismiss an application for recognition of a foreign arbitral award in one or both of the following cases:

Where the recognition or enforcement of the arbitral award is contrary to the public order or good morals of Taiwan

Where the dispute cannot be resolved by arbitration under the laws of Taiwan

The court may (but is not bound to) also dismiss an application for recognition of a foreign arbitral award if the country where the arbitral award is made or whose laws govern arbitral awards does not recognize the arbitral awards of Taiwan.

**“Reciprocal recognition” principle**

In light of the criteria in the Civil Procedural Laws and the Arbitration Law respectively, the main difference between the requirements for recognition of foreign judgments and foreign arbitral awards is the "reciprocal recognition" principle. The "reciprocal recognition" principle is a "must" for the recognition of foreign court judgments but a "may" for the recognition of foreign arbitral awards. Therefore, it is relatively easier to obtain a court order that recognizes a foreign arbitral award than a foreign judgment.

**Hybrid enforcement provision**

There are court precedents where the Supreme Court held that a provision in the contract giving the parties the right to opt for either arbitration or litigation as they see fit is valid. Therefore, it is possible to rely on a hybrid enforcement provision that allows lenders to opt for either arbitration or litigation as they see fit.

## 10. Are asymmetrical jurisdiction clauses enforceable? (By this we mean clauses that allow the lenders, but not the borrowers, to make certain choices in relation to choice of jurisdiction and how to litigate. These types of clauses allow the lenders, but not the borrowers, to commence proceedings in any court they choose, but restrict the borrowers to commencing proceedings in one jurisdiction only. This may also allow the lenders, but not the borrowers, to choose whether to litigate the finance documents before a court or to submit to arbitration in relation to them, but restrict the borrowers to either litigation or arbitration, as specified in the agreement).

No. The choice of court or arbitration forum must be fair to both parties. The court that has jurisdiction must be specified or ascertainable by reference to information available to the parties (e.g., the jurisdiction would be the court where the lender's registered office is located).

# Working digitally

## 1. Is it possible for documents to be executed electronically (whether by the manual insertion of a digital signature or the use of an e-signing platform) under the laws of this jurisdiction? If so, is this limited to only particular types of finance documents?

Pursuant to the Electronic Signatures Act of Taiwan (ESA), it is permissible to sign documents using electronic signatures with the counterparty's consent. In addition, where a digital signature meets the requirements listed in the ESA (e.g., being supported by a certificate issued by an approved certification service provider and being valid and within the purposes of use), it can be employed in an electronic document. Although the ESA provides no statutory limitation on the types of documents that can be executed by electronic signatures, it provides flexibility for the government authorities to make exceptions regarding the use of electronic signatures by stipulating laws or regulations. For example, the FSC, the competent authority for the financial services industry in Taiwan, imposes a restriction on the application of electronic signatures to a negative pledge undertaking as mentioned in Article 30 of the Banking Act, being a written document where a borrower, mandator or the party on behalf of which the guarantee is issued makes an undertaking not to provide its assets as collateral for obligations owed to a third party.

## 2. Where the witnessing of a signing is contemplated, is it possible for the witness to verify the signature over a live video call?

Under Taiwanese law, there is no witness requirement when signing a finance document. Therefore, whether a document is required to be signed under witness is subject to the agreement of the parties. It is therefore possible for the witness to verify the signature over a live video call if the financial institution that is a party to a financing transaction is willing to accept such an approach.

## 3. Is it possible to register/perfect security electronically without wet ink signatures?

No. The relevant authorities/state agencies still require wet ink signatures.

## 4. Are there any other legal restrictions that may prevent the parties from executing a finance transaction electronically?

No.

# Contributors

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