Asia Pacific Guide to Lending and Taking Security - Singapore

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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?

Whether a lender, arranger, facility agent or security agent must be licensed, qualified or otherwise entitled to carry on business in Singapore depends on the type of business in which it is involved. Certain business activities are regulated by statute, so an entity must first be licensed under the relevant statute before it may engage in that business activity. Two examples are banking business, for which a license under the Banking Act 1970 ("**Banking Act**") or the Monetary Authority of Singapore Act 1970 is needed, and moneylending, for which a license under the Moneylenders Act 2008 ("**Moneylenders Act**") is needed. These are briefly discussed below.

Generally, where a lender, arranger, facility agent or security agent is not carrying on business or performing any regulated activity in Singapore (or if carried on wholly outside Singapore, and in a manner so as to not bring the activity within the regulatory ambit of the relevant Singapore legislation1), the mere execution, delivery or performance of, or the enforcement of rights under, the finance documents does not require that entity to be licensed to carry on business in Singapore from a regulatory perspective. If, however, the lender, arranger, facility agent or security agent is carrying out a regulated activity under the finance documents, it may be required to obtain the necessary license or approval from the regulator under one of the statutes referred to in the paragraph above, the failure to do so may result in penalties, and the finance documents may become unenforceable because of illegality.

**Bank license**

A person who wishes to carry on banking business in Singapore is required to possess a valid license granted under the Banking Act. "Banking business" is defined to include the business of receiving money on current or deposit account, paying and collecting checks drawn by or paid in by customers, the making of advances to customers. and includes any other business that the central bank of Singapore, the Monetary Authority of Singapore (MAS), may prescribe.

The advantage of a banking license is that a licensed bank falls within the category of "excluded moneylenders" under the Moneylenders Act and is not required to hold a separate license under the Moneylenders Act in respect of its lending activity. A lender that is not licensed as a bank is required to hold a moneylender's license, unless it falls under a different category of "excluded moneylenders" (discussed below).

For completeness, similar licensing requirements apply to deposit-taking businesses, and there is an express prohibition from soliciting deposits from Singapore persons unless the entity (whether in or outside Singapore) has a valid license in Singapore.

**Moneylender's license**

A person who lends a sum of money in consideration of a larger sum being repaid is, until the contrary is proved, presumed to be a moneylender under the Moneylenders Act. Under the Moneylenders Act, no person is permitted to carry on the business of moneylending in Singapore without a moneylender's license unless that person is an "excluded moneylender" or "exempt moneylender."

An "excluded moneylender" includes a lender that lends money solely to corporations, limited liability partnerships, trustees or trustee-managers of business trusts, trustees of real estate investment trusts and/or accredited investors2.

**Other licenses**

Please note that there are other activities, such as product financing3 and providing custodial services for specified products4, that are separately regulated in Singapore under the Securities and Futures Act 2001 (SFA). These are not considered in further detail here but if a lender, arranger, facility agent or security agent carries on business that constitutes those regulated activities, a capital markets services license may be required. Similarly, if a lender, arranger, facility agent or security agent acts as a payments intermediary or otherwise arranges for the transfer of monies from one party to another, a license under the Payment Services Act 2019 (PSA) may be required.

Note that there are extraterritorial provisions in the SFA where a foreign entity may be caught by the licensing regime if it conducts regulated activities partly in Singapore or wholly outside Singapore but where the acts have substantial and reasonably foreseeable effect in Singapore.

The PSA, similar to the Banking Act, has express provisions prohibiting any person (in or outside Singapore) from soliciting persons in Singapore to engage in payment services unless the person has the appropriate license under the PSA.

1 Note that any solicitation from or offer to Singapore persons will more likely than not result in an offshore entity falling within the regulatory ambit of the relevant Singapore legislation, even if the offshore entity conducts its activities wholly outside Singapore.

2 “Excluded moneylender” is defined in section 2 of the Moneylenders Act. “Accredited investors” is defined in Section 4A of the Securities and Futures Act.

3 Credit facility, advance or loan to facilitate subscription, purchase or continued holding of securities, securities- based derivatives (other than futures contracts) and units in collective investment scheme that are listed or to be listed.

4 Defined as securities, securities- based derivatives (other than futures contracts) and units in collective investment schemes

## 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?

**Residence**

Under Singapore law, whether a company is resident in Singapore is relevant for tax purposes. The test for tax residency for a company set out in the Income Tax Act 1947 ("**Income Tax Act**") is whether the "control and management" of its business is exercised in Singapore. Where "control and management" is exercised is a question of fact but is usually exercised through the meetings of the company's board of directors. Being a resident for the purposes of "service of process" is determined by certain rules relating to whether a company is carrying out business (discussed below) and whether it is registered.

Therefore, execution, delivery, performance or enforcement of the company's own finance documents does not result in that company being "resident" in Singapore.

In relation to the service of process on a company, a company's residency status is not strictly relevant. As long as a company is incorporated in Singapore with a registered address with the Accounting and Corporate Regulatory Authority (ACRA), court papers may be served on the company by leaving the papers at, or sending them by post to, the company's registered office.

Similarly, for foreign companies that are incorporated overseas, service of process in Singapore can be effected by: (i) leaving the papers at, or sending them by post to, the company's registered office in Singapore; (ii) addressing the papers to an authorized representative of the company and leaving them at, or sending them by post to, their registered address; or (iii) if the foreign company has ceased to maintain a place of business in Singapore, leaving the papers at, or sending them by post to, its registered office in its place of incorporation.

**Subject to Singapore tax**

Singapore has a territorial system of taxation. Under Singapore domestic laws, income tax is payable on income that is sourced in or derived from Singapore and foreign-sourced income brought into or received in Singapore or deemed received in Singapore (unless an exemption applies).

The question of where the income is sourced depends on the nature of the income and the case's facts and circumstances. Generally, the income is regarded as sourced at the place where the income-producing activities take place. For example, this may be where the operations are conducted or where the contracts are concluded in the case of  trade or business income. As such, in general, if the lender, arranger, facility agent or security agent executes, delivers, performs or enforces finance documents in Singapore, this may potentially give rise to a Singapore income tax risk for the lender, although the level of risk (if any) would depend on the facts and circumstances of the particular case.

There are also rules that provide for certain payments to be deemed sourced in Singapore. For example, the Income Tax Act provides for interest to be deemed sourced in Singapore if it is borne by a person resident in Singapore. As explained in the answer to question 5 of the "When lending to borrowers" section, these payments would trigger withholding tax obligations if they are made to another person not known to be resident in Singapore. The application of these deemed-sourced rules generally does not depend on whether the finance documents are executed, delivered, performed or enforced in Singapore.

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

Reporting requirements may vary depending on whether a particular statute regulates the lender, arranger, security agent or facility agent in relation to its business activities in Singapore. For example, in relation to licensed banks in Singapore, while there is no general requirement for banks to report specific loan and credit transactions to the MAS, there may be certain circumstances under which reporting obligations exist. In particular, under the Banking Act, the MAS may issue notices giving directions or imposing requirements on or relating to the operations or activities of banks regulated under the Banking Act. These directions or requirements may include reporting obligations. An example is MAS Notice 757, which requires banks licensed under the Banking Act to provide monthly reports to the MAS in respect of their aggregate outstanding loans of Singapore dollars to nonresident financial institutions.

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

It is not a legal or statutory requirement for a plaintiff or claimant to have established a place of business in Singapore to be able to enforce provisions of a finance document by the commencement of legal proceedings in Singapore. However, before commencing an action, a potential plaintiff or claimant should consider if Singapore is the appropriate forum to commence proceedings or risk having the action stayed, i.e., stopped, on the basis that there is clearly a more appropriate forum elsewhere. A potential plaintiff or claimant with few links to Singapore may also be required by the Singapore courts to provide security for the defendant's costs.

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

Generally, approaching local entities to provide banking services, such as offering loans or carrying out any other regulated activities in Singapore, may trigger licensing issues in Singapore for the foreign bank or financial institution. Please see our answer to question 1 above, including in particular the description of "banking business" activities that would require a valid license granted under the Banking Act and other activities that require a license under the SFA.

If the foreign bank/financial institution has obtained the relevant license/approval in Singapore (e.g., numerous foreign banks have registered branches in Singapore and obtained the relevant licenses and approvals from the MAS in respect of their Singapore branch), they may carry out such activities through the Singapore branch, subject to such conditions and restrictions as may be imposed by the MAS.

However, this does not mean that the head office and/or representatives of the head office of the foreign bank may approach local entities to offer regulated activities or carry out licensable activities. For example, if a foreign bank carries out activities through its head office or representatives of its head office, e.g., offers loans to Singapore persons that would be booked at the head office rather than the Singapore branch, regulatory issues may still arise for the foreign bank, notwithstanding that it has a registered branch in Singapore. Therefore, such foreign banks should ensure that they consult internal guidelines on cross-border dos and don'ts or a legal counsel on whether there are licensing issues and/or any applicable exemptions.

# 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?

Currently, there are no foreign exchange controls restricting the amount of currency that may be imported or exported in relation to the rights and obligations of parties under a loan agreement.

Further, no limitations nor consent requirements exist for a foreign company or bank to provide loans to Singapore persons. However, the making of loans may constitute the carrying on of banking business (as discussed in the answer to question 2 in the "When considering whether to lend" section) and if so, a banking license must be obtained.

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

There is no cap on interest rates that may be charged by banks. However, default interest may be unenforceable if a Singapore court decides that it constitutes a penalty. Further, a term that accelerates interest due under a loan upon an event of default may also constitute an unenforceable penalty: see *Ethoz Capital Ltd v. Im8ex Pte Ltd [2023] SGCA 3.*

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

If a lender is a foreign lender and not regulated (and not required to be regulated) by a regulatory authority in Singapore in relation to its lending activity, there are generally no restrictions under Singapore law on the foreign lender entering into a credit transaction with a borrower in Singapore.

If, however, the lender is based in Singapore or caught by the licensing purviews in Singapore and regulated in Singapore in relation to its lending activity, the restrictions that may be imposed on that lender entering into credit transactions depend on the lender's licensing status and the terms of the applicable license terms. For example, a licensed bank in Singapore is generally not restricted from entering into credit and financing transactions with any borrower in Singapore. However, the MAS may impose restrictions in certain circumstances or in relation to categories of credit transactions, such as the following:

Unsecured credit facilities: There are restrictions in relation to the grant of unsecured non-card credit facilities (except for certain excepted loans made for certain specified purposes) to an individual who is a citizen of Singapore or a permanent resident unless they have an annual income of at least SGD 20,000 at the time of the application for the unsecured credit facility.

Counterparty limits: There are set limits in relation to a bank's permissible exposure to a single counterparty group.

Residential property: There are restrictions on banks intending to grant credit facilities for the purchase of residential property or that are secured by residential property. These restrictions include a limit on the total credit facilities and the tenure of credit facilities that may be granted, prohibitions on interest-only loans and loans involving, or giving effect to, interest absorption schemes, requirements in relation to checks to be conducted with credit bureaus (and the Housing Development Board, if relevant) and a requirement that the borrower also serves as a mortgagor in relation to the residential property used to secure the relevant credit facility.

Debt Service Ratio: There are restrictions in relation to the implementation of the Total Debt Servicing Ratio (TDSR) framework, which requires financial institutions to consider any other outstanding debt obligations when granting property loans to a borrower. Under the TDSR framework, credit facilities that may be granted by financial institutions to individuals (including sole proprietorships and vehicles set up by an individual solely to purchase the property) must not exceed a TDSR threshold of 55%.

Ultimately, the restrictions, if any, that may apply to a particular lender or group of lenders entering into credit transactions depend on the particular circumstances of that transaction. As stated above, the lender's licensing status, the type of transaction being entered into and the type of borrower involved are some of the considerations that may be relevant in determining the restrictions that may apply, but they do not represent an exhaustive list of factors.

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

No, there are currently no exchange controls effective in Singapore. The operation of the Exchange Control Act 1953 has been suspended since June 1978.

## 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?

Under Section 12(6) read with Sections 45/45A of the Income Tax Act, the following payments are subject to Singapore withholding tax if they are made to a non-Singapore resident unless any specific exemptions apply:

Interest, commission, fees or any other payment in connection with any loan or indebtedness or with any arrangement, management, guarantee, or service relating to any loan or indebtedness that is:

Borne, directly or indirectly, by a person resident in Singapore or a permanent establishment in Singapore except in respect of any business carried on outside Singapore through a permanent establishment outside Singapore or any immovable property situated outside Singapore; or

Deductible against any income accruing in or derived from Singapore; or

Any income derived from loans if the funds provided by those loans are brought into, or used, in Singapore.

Notwithstanding the above, as an administrative concession, payments liable to be made to a branch in Singapore of a nonresident company are exempt from withholding tax.

Under the Income Tax Act, a "resident of Singapore," in relation to a company or body of persons, is defined as a company or body of persons the control and management of whose business is exercised in Singapore.

The domestic withholding tax rate for interest payments that are neither derived from any trade or business carried on in Singapore nor effectively connected with any permanent establishment in Singapore is 15%. This may be reduced under the applicable tax treaties, subject to the requisite conditions for treaty benefits being met.

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

There are no thin capitalization rules for Singapore tax purposes. The Income Tax Act provides for a tax deduction for interest expenses incurred in relation to any money borrowed by such taxpayer where the Comptroller of Income Tax is satisfied that such interest is payable on capital employed in acquiring income. Further, transactions between related parties should be on an arm's length basis and will generally need to be supported by contemporaneous transfer pricing documentation unless specific exemptions apply.

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

There are no registration, notarization or reporting requirements in relation to loan agreements.

## 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?

The following documents (among others) are chargeable with stamp duty under the Stamp Duties Act 1929:

Loan agreements that contain security trust provisions in respect of trust property that includes immovable property situated in Singapore and/or shares.

Security documents that create security over immovable property situated in Singapore and/or shares and are not signed under hand only.

This is subject to the general rule that instruments relating exclusively to things to be done outside Singapore are exempt from stamp duty.

A nominal stamp duty of SGD 10 would apply to a loan agreement containing a security trust provision that is chargeable with stamp duty.

Ad valorem duty subject to a maximum of SGD 500 would apply to a security document chargeable with stamp duty, at the following rates:

For a security (other than an equitable mortgage) for the payment or repayment of money, 0.4% of the amount of said money.

For an equitable mortgage for the payment or repayment of money, 0.2% of the amount of said money.

Stamp duty has to be paid within 14 days of execution if it is executed in Singapore or within 30 days after it is received in Singapore if it is executed only outside Singapore. Please note that specific rules as to when an instrument is executed or received may apply if the instrument is an electronic instrument for stamp duty purposes, and this will depend on the relevant facts and circumstances.

## 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, Singapore law recognizes the subordination of debts.

Generally, subordination of debts is effected by way of contract.

There is no legislation in Singapore in relation to the validity of contractual subordination in the event of the insolvency of the debtor company. Therefore, case law will determine the position in Singapore in relation to this question.

In the 2006 English case of *Re SSSL Realisations (2002) Ltd (in liquidation) and another company* [2006] EWCA Civ 7, the English Court of Appeal gave weight to the commercial expectation of the parties and held that if group companies enter into subordination agreements of this nature with their creditors while solvent, they and their creditors should be held to the bargain when the event for which the agreement was intended to provide (insolvency) occurs.

The court held that a subordination agreement is valid and binding. It is likely that the Singapore courts would adopt the same position.

## 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 order of payment of those claims is set out in the answer to question 1 of the "If things go wrong" section.

## 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?

Singapore's consumer protection regime is made up of generic consumer laws supplemented by industry-specific requirements. The relevant governing legislation for consumer protection is set out in the Sale of Goods Act 1979, the Unfair Contract Terms Act 1977 and the Consumer Protection (Fair Trading) Act 2003.

The Consumer Protection (Fair Trading) Act was amended in 2009 to govern unfair practices in relation to all financial products and financial services regulated by the MAS and also all commodity trading under the Commodity Trading Act 1992. The ambit of the Consumer Protection (Fair Trading) Act covers the following:

All banking activities under the Banking Act.

Financial products provided by a financial adviser under the Financial Advisers Act.

Activities relating to dealing in securities, fund management, marketing collective investment schemes and trading in futures and leveraged foreign exchange under the SFA.

The MAS, as the central bank, also maintains tight supervision on consumer products offered in the financial market. Certain more complex products such as structured deposits, structured notes and unit trusts are categorized as Specified Investment Products (SIPs). Customers will have to pass certain knowledge assessments before they are allowed to trade in SIPs.

Consumers who have disputes with financial institutions may also approach the Financial Industry Disputes Resolution Centre Ltd (FIDReC), which facilitates the mediation and adjudication of consumer disputes.

Finally, in practice, regulated banks also adhere to industry codes established by the Association of Banks in Singapore, such as the Code of Consumer Banking Practice.

## 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?

**Private companies**

As of 1 July 2015, there is no prohibition in relation to financial assistance being given by private companies (other than private companies that are subsidiaries of public companies).

**Public companies**

The Companies Act 1967 ("**Companies Ac**t") prohibits a public company (or its subsidiary) from providing financial assistance for the acquisition of its own shares and the shares of its holding company.

There is, however, an exception in the Companies Act and the giving of financial assistance is not prohibited if:

Giving the financial assistance does not materially prejudice the following:

The interests of the company or its shareholders

The company's ability to pay its creditors

The company's board of directors passes a resolution ordering the following:

That the company should give the financial assistance

That the terms and conditions under which the financial assistance is proposed to be given are fair and reasonable to the company

The directors' resolution sets out, in full, the grounds for the directors' conclusions and resolutions are lodged by the company with the Accounting and Corporate Regulatory Authority known as ACRA.

The Companies Act also contains a further list of transactions that are expressly carved out from the financial assistance prohibition.

If the above exception and carve-outs do not apply, prohibited financial assistance may still be allowed if it is "whitewashed" under the prescribed "whitewash" procedures. There are generally three "whitewash" methods, which are as follows:

Director-approved financial assistance

Shareholder-approved financial assistance

A court-sanctioned whitewash procedure

If there is a breach of the prohibition in relation to financial assistance in the Companies Act, each officer of the company in default is guilty of an offense and liable on conviction to a fine not exceeding SGD 20,000 and/or to imprisonment for a term not exceeding three years.

# 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?

Yes. The order of payment of those claims is set out in the answer to question 1 of the "If things go wrong" section.

## 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. Creditors may enter into contractual arrangements (usually an intercreditor agreement or deed of priority) to regulate the order of priority of their security interests and the respective rights that they will have in relation to their respective debts.

## 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. Security may be granted by way of a floating charge, typically by way of a debenture  (i.e., a security document that is usually entered into when creating a fixed and floating charge), and is generally created over a class of assets, present and future, belonging to a chargor.

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

**Creation**

While an individual, a company or another type of entity is permitted to create a fixed charge, an individual is not permitted to create a floating charge.

**Maintaining assets**

The class of assets subject to a floating charge changes or fluctuates from time to time in the ordinary course of the chargor's business. Therefore, when a floating charge is taken, the arrangement is that, until some future step is taken by, or on behalf of, the chargee (for example, crystallizing the floating charge into a fixed charge), the chargor will carry on its business in the ordinary way in relation to that class of assets (including disposing of those assets) without the chargee's prior consent.

The chargor's freedom to deal with its assets before a floating charge is crystallized into a fixed charge is highly advantageous to a chargor as it gives the chargor flexibility in relation to how it chooses to deal with its assets. At the same time, however, this presents the lender/chargee with the problem of how to prevent the chargor from disposing of all the assets secured by the floating charge. Therefore, a lender usually prefers to take a fixed charge over specific assets of significant credit value and a floating charge over the chargor's other assets.

**Priority and enforcement**

The holder of a floating charge has several disadvantages compared to a fixed-charge holder, particularly on insolvency, such as the following:

A floating charge is more susceptible to being avoided on insolvency.

A floating-charge holder is only paid out of asset realizations after fixed-charge holders, expenses of the insolvent estate and any preferential creditors have been paid in full.

## 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, trustee structures are recognized in Singapore, and a security trustee may hold security on trust for the benefit of a class of potentially fluctuating lenders. There is no need to execute new security documents each time the composition of the group of lenders changes.

## 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?

Yes, if an agent holds security for the lenders, it will be necessary to enter into new security documents. Under an agency structure, the original lender transfers its security interests to the new lender by way of novation. The existing agreement between the original lender and the borrower is dissolved and replaced by a new agreement each time a novation takes place. Therefore, the security is discharged each time a novation is executed, and parties need to enter into fresh security documents.

A trust structure is usually adopted to avoid this requirement.

## 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?

In general, there are no restrictions on most types of assets that may be provided as security. The type of security interests, and the relevant formalities required to create and perfect the security, vary depending on the type of asset being provided. Please note, however, the following restrictions when creating security:

An individual will generally not be able to create a floating charge over their property.

Security over contractual rights can only be created when there is no contractual prohibition or limitation against assignment or when such prohibition or limitation has been waived by the counterparty. In addition, rights under a contract that are "personal" to the contractual parties are not assignable. Examples of such contracts include employment contracts and motor insurance policies.

Security created over a bare right to litigate, such as a right of action in tort or in restitution, is generally void since such a right is not assignable as a matter of public policy.

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

No, but see the responses to question 8 of this section (which would apply equally to an offshore lender wishing to take security).

## 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?

In Singapore, directors of a company must act in the interests of the company. The Companies Act provides that a director must at all times act honestly and use reasonable diligence in the discharge of the duties of his/her office. The phrase "act honestly" has been interpreted to mean "acting bona fide in the interests of the company in the performance of the functions attaching to the office of director." Directors in Singapore also owe fiduciary duties to act in the interests of the company at common law.

When considering the grant of an upstream or cross-stream guarantee or security, directors must continue to act in the best interests of the company. If a guarantee is given by a subsidiary to secure obligations of its holding company or another subsidiary of the same holding company, directors must be able to show that valid consideration was provided, generally by way of a corporate benefit. A director may take into account factors such as corporate benefit in the form of intercompany loans or by way of other indirect benefits that may flow to the guarantor. These may include a reduced cost of funding or stronger or maintained financial capabilities of the parent or other subsidiary.

Further, a corporate benefit must accrue to the company and not just to another company in the group. What is considered a "corporate benefit" depends on the facts of each case. If the matter is brought to court, this is ultimately a question for the court.

If, at the time of entering into a guarantee, there is any uncertainty in relation to whether there is a corporate benefit, it would be prudent for the directors' resolution to set out the corporate benefit which would accrue to the guarantor and a unanimous shareholders' resolution ought to be obtained. However, even if a shareholders' resolution is obtained, a liquidator may still challenge this because, when the company is insolvent, directors owe their duties to creditors as well as to shareholders.

## 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.

**Creation**

The main forms of security interest that can be created under Singapore law are a mortgage, a charge, a pledge and a lien.

**Mortgage**

A mortgage involves the transfer of title to an asset by way of security for particular obligations, on the express or implied condition that it will be retransferred when the secured obligations are discharged. A mortgage can generally be applied to tangible and intangible assets. A mortgage over land is created by deed. If the subject matter of the mortgage is not land, a mortgage does not need to be executed by deed.

**Charge**

A charge is essentially a security interest evidenced by way of an agreement between a creditor and a debtor by which a particular asset is appropriated by the chargor to the satisfaction of a debt owed to the creditor. The chargor does not transfer the legal or beneficial interest in the asset to the chargee but gives the chargee the right to have recourse to the charged asset to realize it towards payment of the debt. In addition, unlike possessory securities such as a pledge and lien, the effectiveness of a charge is not dependent on the chargee obtaining and retaining possession of the charged property. A charge can be either fixed or floating.

**Pledge**

A pledge is created with the actual or constructive delivery of an asset by the pledgor to the pledgee by way of security, but with ownership of the asset remaining with the pledgor. The pledgee retains possession of the pledged asset until the secured debt is satisfied. If the pledgor does not repay the debt, the pledgee is entitled to sell the pledged asset and use the proceeds to satisfy the debt.

**Lien**

A lien is a creditor's right to retain possession of a debtor's property until the debt has been repaid, while a contractual lien normally extends by way of contract between the parties. A lien may be created by common law, by contract or by statute.

**Perfection**

Perfection refers to the requirement to give public notice of a security interest to enable the creditor to enforce its security right against third parties. The main methods by which a security interest can be perfected include registration of the security interest in a public register, taking possession of the asset subject to security or giving actual notice to relevant parties. The perfection requirements in relation to a mortgage, charge, pledge and lien are set out below.

**Mortgage**

A mortgage over assets created by a Singapore company must be lodged with ACRA (please refer to the answer to question 12 of this section for more information). Additional documents must be lodged in relation to particular classes of assets. For example, in relation to land, a caveat, a mortgage and a memorandum of mortgage must be lodged with the Singapore Land Authority.

**Charge**

A charge that is created by a company incorporated in Singapore (or the branch of a foreign corporation registered in Singapore) and to which Section 131 of the Companies Act applies must be registered with ACRA (please refer to the answer to question 12 of this section for more information). Non-registration results in the security interest intended to be created by the charge being invalid and unenforceable against the liquidator and other creditors of the company in the event of the company's insolvency or liquidation.

**Pledge and lien**

Some security interests, such as pledges and liens, are not registrable. In these cases, the usual practice is to give notice to, and obtain acknowledgment from, the applicable third party. A lender also often requires the security provider to represent and warrant that there is no existing security interest over the asset. The possession by the security interest holder of the assets subject to the security interest can also constitute perfection.

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

Under Singapore law, there are registration requirements in relation to certain security documents (as listed below). However, notarization is not required for security documents that are executed in Singapore.

**Registration requirements**

If a charge to which Section 131 of the Companies Act applies (listed below) is created by a Singapore-incorporated company, the charge must be registered with ACRA.

Under Section 131 of the Companies Act, the following charges must be registered:

A charge to secure any issue of debentures.

A charge on uncalled share capital of a company.

A charge on shares of a subsidiary of a company which are owned by the company.

A charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale.

A charge on land wherever situated or any interest in the land but not including any charge for any rent or other periodical sum issuing out of land.

A charge on book debts of the company.

A floating charge on the undertaking or property of a company.

A charge on calls made but not paid.

A charge on a ship or aircraft or any share in a ship or aircraft.

A charge on goodwill, on a patent or license under a patent, on a trademark, or on a copyright or a license under a copyright, or on a registered design or a license to use a registered design.

In addition, certain assets (particularly assets such as land, ships, aircraft and scripless shares where title to that asset is entered into a register) have specific registration requirements depending on the form of security being created.

**Timeline**

The company must lodge a statement of particulars of charge with ACRA within (a) 30 calendar days (if executed in Singapore); or (b) 37 calendar days (if executed outside Singapore), of the creation of the charge.

If the charge is not registered, the charge will be void against the liquidator and any creditor of the company in the event of the company’s insolvency or liquidation.

## 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?

**Stamp duty**

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

**Registration**

ACRA fees for registration of a charge are currently SGD 60. Registration fees vary across other registers (such as those registers relating to land, ships, aircraft and scripless shares) depending on the registration.

# 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?

In Singapore, the usual process by which a company is dissolved is known as a winding-up. Other insolvency-related processes in Singapore include judicial management, a scheme of arrangement and receivership. The Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018) (IRDA) is the main piece of insolvency legislation in Singapore.

Winding-up

When a company is wound up, its assets or the proceeds of its assets are used to pay off creditors, after which the balance, if any, is distributed pro rata among shareholders. Companies may be wound up voluntarily or compulsorily. A company may initiate a members’ or creditors’ voluntary winding-up (the former only when the company is insolvent at the time of the winding-up). A compulsory winding-up may take place by order of the court. The IRDA specifies certain persons and classes of stakeholders who may apply to the court to wind up the company. The court may order the winding-up of the company in certain circumstances. The usual ground is when the company is unable to pay its debts. The most common method of establishing the company's inability to pay its debts is to serve on the company a statutory demand for an undisputed debt exceeding SGD 15,000. A company is deemed unable to pay its debts if, among others, it fails to pay or secure or compound the amount within three weeks after the demand is served. In both types of winding-up, a liquidator will be appointed to realize and distribute the company's assets in accordance with the IRDA.

Ranking of debts

Subject to the bankruptcy/insolvency laws discussed below, generally speaking, to the extent that the loan is unsecured, a lender’s claim against the borrower would rank pari passu with other unsecured claims. If the loan is secured by security over an asset of any security provider, then to the extent of the value of the asset subject to the security that may be realized through the enforcement of that security, the lender's claims against the security provider will generally have priority over the claims of other creditors of that security provider.

The IRDA sets out certain exceptions to the general pari passu principle and provides for preferential debts to be paid in priority to all other unsecured debts. These are (in the following order and priority):

Costs and expenses of the winding-up, including the following:

Those incurred by the official receiver as the liquidator of the company, including the costs, expenses and remuneration of a licensed. insolvency practitioner to act as liquidator in the place of the official receiver.

The liquidator's remuneration and the costs of any audit carried out under the IRDA.

The applicant's costs for the winding-up order payable under the IRDA.

All wages or salary (whether earned wholly or in part by way of commission), including any amount payable by way of allowance or reimbursement under any contract of employment, award or agreement regulating conditions of employment of any employee up to a limit as prescribed by the minister by order published in the Singapore Gazette (presently prescribed as SGD 13,000 as at the date of this publication).

The amount due to an employee as a retrenchment benefit or ex gratia payment under any contract of employment, award or agreement that regulates conditions of employment, whether that amount becomes payable before, on or after the commencement of the winding-up to a limit as prescribed by the minister by order published in the Singapore Gazette (presently prescribed as SGD 13,000 as at the date of this publication).

All amounts due in relation to work injury compensation under the Work Injury Compensation Act 2019 accrued before, on or after the commencement of the winding-up.

All amounts due in relation to contributions payable during the 12 consecutive months before, on or after the commencement of the winding-up by the company as the employer of any person under any written law relating to employees' superannuation or provident funds or under any scheme of superannuation that is an approved scheme under the law relating to income tax.

All remuneration payable to any employee in respect of vacation leave or, in the case of their death, to any other person in their right, accrued in respect of any period before, on or after the commencement of the winding-up to a limit as prescribed by the minister by order published in the Singapore Gazette (presently prescribed as SGD 13,000 as at the date of this publication).

The amount of all tax assessed and all goods and services tax due under any written law before the commencement of the winding-up or assessed at any time before the time fixed for the proving of debts has expired.

The above preferential debts (except the amounts due in relation to workers' injury compensation under the Work Injury Compensation Act 2019 and taxes) must be paid out of the proceeds of any property subject to any floating charge created on the company's property, in priority to the claims of the holder of the floating charge, if the company's assets available for payment of general creditors are insufficient to meet any of these preferential debts.

The IRDA also provides that where any winding-up assets have been recovered under an indemnity for costs of litigation given by certain creditors, protected or preserved by the payment of moneys or the giving of an indemnity by creditors, or where expenses in relation to which a creditor has indemnified a liquidator have been recovered, a Singapore court may make any order that it thinks just in relation to the distribution of those assets and the amount of the expenses recovered with a view to giving those creditors an advantage over others in consideration of the risks run by them in taking that action.

Further, rescue financing may be extended to the debtor company during a scheme of arrangement or judicial management. If such arrangements preceded winding-up, it would rank as the costs and expenses of the winding-up above all preferential debts. Such rescue financing may also be secured by the debtor company's assets. In such cases, it may rank below, equally or even above existing security interests, depending on whether the financing could have been obtained without such security and on whether there is adequate protection for existing security holders.

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

There are two corporate rescue mechanisms in Singapore that allow for a moratorium to be obtained before the commencement of any winding-up proceedings namely judicial management and schemes of arrangement.

Under the judicial management regime, an interim moratorium will be effective from the date an application is made for a judicial management order. However, an application for judicial management ought only to be made if, among other things, the applicant considers that the company is or is likely to be unable to pay its debts. This, therefore, means that a company may make an application to the court for itself to be placed under the judicial management of a judicial manager even if it is not technically insolvent, as long as it is facing impending insolvency.

Conversely, the scheme of arrangement regime does not require there to be insolvency or impending insolvency. There are two routes by which a company may apply for a moratorium in support of a scheme or proposed scheme.

The first is under Section 64 of the IRDA ("**Section 64 Stay**"), where the company may apply for a moratorium when it proposes or intends to propose a scheme, as long as it, among others, undertakes to make a scheme application as soon as practicable. A Section 64 Stay may (subject to the court's order) apply to acts outside of Singapore. An automatic 30-day moratorium arises once an application for a Section 64 Stay is made. Related companies, i.e., subsidiaries, holding and ultimate holding companies, of the scheme company may also apply for a moratorium if, among other requirements, they play a necessary and integral role in the scheme and the scheme will be frustrated if such a moratorium is not granted.

The second is under Section 210(10) of the Companies Act. This is a more limited form of moratorium that does not come with the automatic stay (but a company can apply for one), the worldwide effect or the possibility of related companies moratoriums available under the Section 64 Stay. However, unlike the Section 64 Stay, the application under Section 210(1) of the Companies Act may be made in a summary way by any member, creditor or holder of units of shares of the company, and is not expressly subject to the same extensive disclosure requirements (both on application and post-application) or the carve-outs for netting and other arrangements. However, an application under Section 210(10) of the Companies Act may only be made after a scheme is proposed, with the scheme being of sufficient particularity for the court to make a broad assessment that there is a reasonable prospect of the scheme working and being acceptable to the general run of creditors. However, this scheme need not be of the same degree of particularity or of the same terms as the plan that is to be presented to the creditors for voting.

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

Briefly, under Singapore insolvency laws, if a Singapore company enters into a winding-up, certain transactions (including the granting of security or guarantees) may be set aside by order of court on application of the liquidator or judicial manager. There are several grounds for setting aside transactions and they are discussed below.

Transactions at an undervalue

A transaction entered into by the company at any time within three years prior to the commencement of its winding-up or judicial management may be set aside if it was at an undervalue and if, at the time the transaction was entered into, the company was insolvent or became insolvent as a consequence of the transaction. A transaction is deemed to be entered into at an undervalue if it was entered into with a person on terms that meant that the company receives either no consideration or a consideration worth significantly less than the value of the consideration provided by the company to the person. The company's insolvency at the time of the transaction is presumed unless proven otherwise if the person who entered into the transaction is connected (otherwise than by reason only of being the company’s employee) to the insolvent company. However, a transaction at an undervalue will not be set aside if the court is satisfied that the company entered into the transaction in good faith and for the purpose of carrying on its business and that at the time the company did so, there were reasonable grounds for believing that the transaction would benefit the company.

Unfair preferences

Any act of the company carried out within one year prior to the commencement of the winding-up or judicial management of the company (or within two years prior to the commencement of the winding-up or judicial management of the company for transactions involving associates of the company) may be set aside if classified as an unfair preference. The requirement is satisfied if, at the time the act was done, the company was insolvent or became insolvent as a consequence of the act, and that act has the effect of putting the person preferred in a better position than that person would have been in if the act had not been carried out. However, a Singapore court would not make an order setting aside the act as an unfair preference if it was satisfied that the company, when giving the preference, was not influenced by a desire to put that person in a better position.

Extortionate credit transactions

Where a company is in judicial management or is being wound up, any transaction involving the provision of credit to the company within three years prior to the commencement of the winding-up or judicial management of the company that is extortionate may be set aside by order of court on application by the liquidator or judicial manager. Unless proved to the contrary, a transaction is presumed to be extortionate if, with regard to the risk accepted by the person providing the credit, the terms require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in relation to the provision of the credit or if the terms are harsh and unconscionable or substantially unfair.

Registrable but unregistered charges

Any security created by a registrable but unregistered charge is void against the liquidator of the company or any creditor of the company. This applies to a company incorporated in Singapore and the branch of a foreign company registered in Singapore.

Floating charges for past value

A floating charge in relation to the undertaking or property of the company created within one year of the commencement of the winding-up or judicial management (or within two years for transactions involving person connected with the company) or on or after the commencement of judicial management of the company up to the date the company enters into judicial management is invalid except in relation to the amount of any money received or reduction in its debts, or a reduction of an interest owing to the chargee at the time of, or after, the creation of, and in consideration for, the charge. Where the chargee is not connected with the company, the floating charge will not be invalidated unless the company is insolvent at the time the charge is created or becomes insolvent in consequence of the transaction under which the charge is created.

The IRDA now expressly empowers liquidators and judicial managers to assign proceeds of actions relating to, among others, transactions at an undervalue, unfair preferences and extortionate credit transactions. This provides the option for liquidators to obtain third-party funding to pursue claims related to the categories above, which would otherwise not have been pursued.

## 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?

Generally, when and how a lender can enforce its security depends on the contractual agreement between the lender and the borrower. A lender can generally enforce its security without court involvement. The security document will typically provide when the security is enforceable. For instance, on the occurrence of an event of default such as failure to pay, breach of certain obligations and insolvency and/or if the lender has accelerated the loans. The type of security interest that the lender holds also affects how the security can be enforced. A well-drafted security document would usually expressly provide for the right to possession, a power of sale or the option to appoint a receiver, which the lender can enforce out of court based on the terms of the agreement, usually on default (or a continuing default) by the borrower. These remedies can be cumulative and not mutually exclusive. Enforcement powers may also be implied by statute and common law if not expressly provided.

There may be overriding restrictions or limitations on the lender's enforcement power. If there is a Section 64 Stay, a moratorium pursuant to Section 210 (10) of the Companies Act, or a moratorium following a judicial management application, then enforcement of any security over the debtor company may not be possible except with leave of court. Further, Section 440 of the IRDA also renders void any contractual provisions that purport to:

(a) terminate or amend, or claim an accelerated payment or forfeiture of the term under any agreement with the company; or

(b) terminate or modify any right or obligation under any agreement with the company

at any time after the commencement of judicial management or scheme of arrangement proceedings by reasons only that the proceeds are commenced or that the company is insolvent.

Enforcement powers might also be contractually limited, such as when there are intercreditor arrangements governing enforcement and standstill agreements that restrict enforcement over specified periods of time. Additionally, foreclosure as a remedy can only be effected by an order of the court.

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

No action is permitted to be brought to enforce a mortgage or charge after the expiration of 12 years from the date when the right to receive the money secured by the mortgage or charge has accrued. Additionally, no foreclosure action in relation to mortgaged personal property is permitted to be brought after the expiration of 12 years from the date on which the right to foreclose accrued. However, the right to foreclose on the property subject to the mortgage or charge is not deemed to accrue as long as that property comprises any future interests or any life insurance policy that has not matured or been determined.

Further, no action to recover arrears of interest payable in relation to any sum of money secured by a mortgage or other charge or payable in respect of the proceeds of the sale of land (or to recover damages in respect of those arrears) is permitted to be brought after the expiration of six years from the date on which the interest became due.

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

A lender is under a duty to act in good faith and to take reasonable steps to obtain a fair price when exercising a power of sale. The lender would be entitled to choose when to sell the secured property and need not wait until the potential sale price improves before selling it. However, the lender has a duty to obtain the best price that can be reasonably obtained at the time of sale. In addition, the lender would have to act with reasonable care and skill and to act fairly in exercising its power of sale.

Most sales by secured parties are carried out without the need to obtain a court order to effect the sale. A court is unlikely to interfere in the sale as long as the lender complies with its duties as mentioned above. However, these duties mean that the lender would not be permitted to sell the assets to itself, unless it does so through a court sale. A common and reasonable way of ensuring that a lender properly discharges its duties is by having the secured assets sold through a public auction.

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

Enforcement of security is usually the last resort for a lender because enforcement can have very serious and far-reaching consequences for the borrower. These include cross-default by the borrower under any other security agreements that it has entered into and the eventual winding-up of the borrower. Therefore, in practice, a lender would usually explore and exhaust other options in relation to a borrower's default before exercising its right of enforcement.

If the lender decides to enforce its security, the borrower or third-party creditors may also challenge the validity of that security. This may cause delays in the enforcement process. It is therefore common for a lender to seek a security review by its lawyers, which would examine the effectiveness and enforceability of its security, before proceeding with enforcement.

As mentioned in the answer to question 4 of this section, if there are intercreditor arrangements, standstill agreements and statutory restrictions, these may cause difficulties in relation to the enforcement of security. In addition, if winding-up proceedings have already commenced or if the borrower is under judicial management, or steps are taken to enter into a scheme of arrangement, the company may be protected by a moratorium which prohibits enforcement against the secured assets by lenders except with permission from the court.

Another difficulty that arises in relation to the enforcement of security is if the debtor's assets either cannot be located or have been removed from Singapore. With respect to locating the debtor's assets, if the lender has obtained a judgment or an order for payment against the debtor, it may apply to the court for an order that the debtor or the debtor's officers attend before a registrar of the court and be orally examined in relation to where the property is situated. In relation to the risk of the debtor removing assets out of Singapore, the lender may seek a Mareva injunction to restrain the debtor from doing so, pending the outcome of any legal action commenced against the debtor.

Note that the remedy of possession is rarely used in commercial transactions. One reason for this is the possibility of the lender being exposed to liabilities while in possession of the asset, e.g., the possibility of becoming liable for environmental damage if the asset in possession is land. Another reason is the additional burden placed on the lender in possession to account to the borrower for any income and profit received. Further, if the lender takes possession of a profit-yielding asset, it is under a duty to ensure that reasonable profits are continually collected in relation to that asset. If profits (in excess of the sum due to the lender) that would have been received were not received due to the willful neglect of the lender (e.g., if the lender did not lease out the property when it could have done so), it could be liable to the borrower for the loss of those profits that are in excess of the sum owing to the lender. Because of these concerns, a receiver's appointment is generally preferred over a lender taking possession of the secured assets by itself.

For personal and corporate guarantees, the enforcement is typically through the commencement of legal proceedings. Usually, a claim under a guarantee should be fairly straightforward and therefore capable of being summarily disposed of without the need for discovery or trial. However, in practice, these summary disposals of enforcement actions are sometimes not possible if the guarantor or primary debtor raises issues such as duress, undue influence or misrepresentation in relation to the execution of the guarantee. In these situations, the lender may find that it has to incur the substantial time and expense to enforce the guarantee.

Finally, in most security documents involving international parties, it is fairly common for parties to provide for arbitration (or other alternative dispute resolution mechanisms, e.g., mediation or expert determination) as the mode of dispute resolution as opposed to having recourse to national courts. In such cases, there may be a risk that enforcement may be met by arguments by the debtor alleging that its liability is disputed and ought to be determined by way of arbitration before enforcement can be resorted to. This presents a risk of delay in enforcing the security — particularly if recourse to national courts is required as part of the enforcement process (e.g., court-ordered receivers, foreclosure, etc.).

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

There are generally no specific requirements in relation to enforcement actions by a foreign entity. However, if a foreign lender commences court proceedings in Singapore against a defaulting borrower, the foreign lender may, on the application of the defendant borrower, be ordered to pay security for the defendant's costs in the proceedings if it appears that the foreign lender will be unable to pay the defendant's costs if the defendant is successful. In such cases, the legal proceedings may be stayed until that security is provided.

A foreign entity could be classified as a moneylender under the Moneylenders Act. If so, a loan granted by an unlicensed moneylender, together with the security given under that loan, will be unenforceable. Therefore, it is advisable to check if the lender falls into the classification of a moneylender under the Moneylenders Act (as discussed in the answer to question 1 of the "When considering whether to lend" section) and for the lender to be licensed if it does not qualify for an exemption or fall under a category of excluded moneylender.

## 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?

Enforcement

The main advantage of arbitration is the general ease of enforcement of an arbitral award in more than 150 countries under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, to which Singapore is a signatory. The convention lays down a system for the mutual recognition and enforcement of arbitral awards among countries that are parties to the convention without reviewing the merits of the arbitral award. The result is that arbitral awards receive greater recognition internationally than most national court judgments.

Flexibility

Flexibility is another key advantage of arbitration because an arbitral tribunal must conduct the arbitration according to the parties' agreement and their reasonable requirements. The parties are free to choose their arbitration rules or select their own procedures in their arbitration agreements. Parties can select a neutral forum. They can also decide on the arbitrators with subject matters expertise in the areas of dispute. Conversely, in litigation, rules of court dictate the procedures and these are often more rigid than arbitration rules.

Confidentiality

Confidentiality is another compelling advantage of arbitration if the parties want to avoid publicity or if the dispute involves commercially sensitive matters. Furthermore, the private and less formal settings in arbitration tend to be more collegial than traditional courtroom litigation, therefore better for preserving business relationships between the parties.

Time

Time could also be a reason for preferring arbitration to litigation. On the one hand, arbitration is generally regarded as the more efficient dispute resolution mechanism when compared to litigation. However, with the greater flexibility in arbitration rules, the length of arbitrations could also greatly depend on the parties' conduct. For example, the parties may attempt to  delay arbitration for tactical reasons by repeatedly seeking for extensions of arbitration timelines. On the other hand, Singapore's courts are widely perceived to be efficient and reliable. Therefore, it is arguable that there is no clear advantage in efficiency when preferring arbitration to litigation in Singapore.

Costs

Costs are traditionally considered to be lower for arbitration than for litigation. However, this may not necessarily be the case; instead, increasingly, the opposite might be true. The cost of commencing arbitration is generally more expensive than filing a claim in court. The fees of a three-arbitrator tribunal are also likely to be high, depending on the choice of arbitrators. Comparatively, the cost of litigation is relatively standard but can also be high if, for example, the process involves extensive discovery and protracted interlocutory applications.

Right of appeal

A disadvantage of arbitration is the possibility of inconsistent outcomes as compared to litigation in common law jurisdictions, including Singapore, which follow the principle of stare decisis, i.e., where precedents from higher courts are binding on the lower courts. Arbitral awards are also usually final with limited scope for appeal on the merits. Conversely, litigants generally have a right to appeal on the merits against a court judgment. However, the finality of arbitral awards could be an advantage for parties seeking to move on quickly from the dispute rather than having disputes drag on for years due to the possibility of an appeal.

**Election of the dispute resolution mechanism**

Asymmetric arbitration clauses (i.e., allowing only one party to elect between arbitration and litigation) are generally enforceable in Singapore.

## 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).

An asymmetric jurisdiction clause freely entered into between the parties will generally be enforced by the Singapore courts. Similarly, asymmetric arbitration clauses are also enforceable in Singapore.

# 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?

Yes, the electronic execution of a document (including the insertion of a digital signature and digital signing using e-signing platforms) is valid under Singapore law for most contractual documents, as recognized by the Electronic Transactions Act 2010 (ETA).

However, there are various documents and transactions, which are set out in the First Schedule to the ETA, that are excluded from the scope of operation of the provisions in the ETA that enable electronic signatures to satisfy legal requirements for wet ink signature. The excluded documents include (1) documents for the creation, performance or enforcement of an indenture (i.e. a legal document that sets out rights and obligations of lenders and borrowers, or mortgagees and mortgagors); (2) documents that create a declaration of trust or power of attorney; and (3) the transfer of any interest in immovable property.

Declarations of trusts or powers of attorney are typically not executed as standalone documents in a financing transaction, but are embedded as provisions in financing documents such as security documents, which should be executed as deeds.

Under common law, the requirements for the formation of a deed are that the deed must be: (i) in writing; (ii) signed; (iii) sealed; (iv) attested; and (v) delivered. For borrowers who are Singapore companies, deeds may be executed by: (a) affixation of the company's common seal of the company in accordance with the terms of its constitution;1 or (b) without its common seal by signature of prescribed officials of the company.2 Attestation requires physical attestation, and witnessing over virtual means is not advisable. Given the requirement of physical attestation for execution of deeds by borrowers who are individuals and execution of deeds by borrowers who are Singapore companies (executing the deed by way of section 41B(1)(c) of the Companies Act or by way of affixing the common seal)3 and the inability to rely on the ETA for such deeds, "wet ink" signatures are thus required for such financing documents that are executed as a deed.

Mortgage over land

As a mortgage over land is a security document that involves the transfer of interest over immovable property, it is thus excluded from the scope of the ETA. Therefore, electronic signatures cannot be used as an alternative to wet ink execution of a mortgage over land. Further, mortgages over land require registration in Singapore, and the Land Titles Registry requires an original hardcopy of the mortgage instrument and original title deeds (if applicable) to be submitted for registration. Due to this requirement, the mortgage cannot be signed electronically.

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1. The constitution of most Singapore companies would provide that every instrument to which the common seal is affixed shall be signed autographically by a director and the secretary or a second director or some other person appointed by the directors.

2. Under section 41B of the Companies Act, a Singapore-incorporated company may execute a document described or expressed as a deed without affixing a common seal onto the document by signature:

on behalf of the company by a director of the company and a secretary of the company;

on behalf of the company by at least two directors of the company; or

on behalf of the company by a director of the company in the presence of a witness who attests the signature.

3. If the Borrower executes the deed by way of section 41B(1)(c) of the Companies Act with one director signing in the presence of an attesting witness, physical attestation would be required. In addition, if the Borrower executes the deed by way of affixation of the common seal, a physical copy of the document would be required to affix the common seal thereon.

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

It is not clear if virtual witnessing (i.e., witnessing a signing over a live video call) is valid under Singapore law. The present view is that witnessing requires physical presence in order to satisfy legal execution formalities. Witnessing over virtual means is not advisable.

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

As mentioned in our answer to question 11 of the "If taking security" section, perfection refers to the requirement to give public notice of a security interest to enable the creditor to enforce its security right against third parties. The validity of perfection of security electronically in relation to a mortgage, charge, pledge and lien is set out below:

Mortgage

In general, a mortgage over assets created by a Singapore company must be lodged with ACRA and this can be done electronically without wet ink signatures. However, additional documents may need to be lodged in relation to particular classes of assets that cannot be signed electronically. For example, in relation to land, the Land Titles Registry requires an original hard copy of the mortgage instrument and original title deeds (if applicable) to be submitted for registration. Due to this requirement, the mortgage cannot be signed electronically.

Charge

A charge that is created by a Singapore company incorporated in Singapore (or the branch of a foreign corporation registered in Singapore) and to which Section 131 of the Companies Act applies must be registered with ACRA. This can be done electronically without wet ink signatures.

Pledge and lien

With regard to the perfection of certain pledges and liens, giving notice to and obtaining acknowledgement forms from the applicable third party can be done electronically without wet ink signatures.

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

Please refer to our answers to questions 1 to 3 of this section above.

# Contributors

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