Asia Pacific Guide to Lending and Taking Security - Singapore

If taking security

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

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.

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