



Happy Place by Andrea Edwards

TAKING SECURITY IN PRC (MAINLAND CHINA)

WHAT TYPES OF SECURITY INTERESTS CAN BE TAKEN IN THE PRC?

It is common to take the following security in commercial credit transactions:

- **Mortgages:** mortgages can be taken over every form of tangible assets, but are most often granted over land, fittings and fixtures, large equipment, aircraft, ships and motor vehicles. It is impossible to take mortgages over contractual rights and IP rights.

- **Pledges:** can be taken over any movable assets, securities, securitised interest, right to payment under a contract or IP rights. What differentiates pledges from mortgages is that a pledge requires transfer of “possession” or “control” of the secured asset, whilst a mortgage does not.

ARE THERE ANY ASSETS THAT CANNOT BE SECURED?

All assets can be secured, except where expressly prohibited by law. This, for example, would include the instances where the asset is owned by a public school and is used for education purposes.

DO SECURITY INTERESTS NEED TO BE REGISTERED?

Most security documents need to be registered for effectiveness or perfection purposes. The registration regime in the PRC is fragmented, and as result different security documents will need to be registered with different authorities. A pledge of an equity interest in an un-listed company, for example, must be registered with the State Administration for Market Regulation, whereas security granted on listed shares should be registered with China Securities Depository and Clearing Co., Ltd, the clearing house for trading of listed share security. Mortgages of land must be registered with the local land authority, whilst security granted on equipment must be registered with the State Administration for Market Regulation supervises registration of security over equipment. For this reason, PRC law advice should always be sought to ensure that a security interest is registered with the competent authority.

DO SECURITY DOCUMENTS NEED TO BE NOTARISED?

No. Security documents governed by PRC law and covering assets in the PRC do not need to be notarised. Note that in some instances, local authorities may require that certain documents be notarised in order to be registered; this is usually the result of local administrative practice rather than the application of nationwide requirements.

Entities incorporated outside of the PRC may still need to have a security document notarised if required by the law of their place of their incorporation. If a PRC law governed security document covers assets outside of the PRC, the applicable requirements in the place where the assets are located should be confirmed.

DOES IT TAKE LONG TO REGISTER OR PERFECT SECURITY

Registration and perfection generally takes about 2 weeks.

IS STAMP DUTY PAYABLE?

Stamp duty is not generally payable on the creation of security although it may be payable upon enforcement of security (e.g. on the transfer of secured assets). Note that if the underlying credit transaction is a loan, the loan document itself will be subject to stamp duty.

ARE “PARALLEL DEBT” PROVISIONS REQUIRED IN SYNDICATED FINANCINGS?

“Parallel debt” mechanics are sometimes used in the PRC, although their effectiveness is untested.

CAN A FOREIGN LENDER TAKE AND ENFORCE SECURITY IN THE PRC?

Generally yes. Two points to note in this regard:

- if the secured transaction is loan granted by a foreign creditor to a foreign debtor, and if security for such loan is granted by a person in the PRC, this is commonly known as a “NeiBaoWaiDai” security and the relevant security documents must be registered with the State Administration of Foreign Exchange (the regulator of foreign exchange transactions in the PRC, commonly referred to as SAFE), within 15 working days of the signing of the security document; and
- parties may sometimes encounter issues with local authorities when registering security in favour of a foreign creditor. To ensure the local authorities’ requirements are well understood and can be complied with, parties are encouraged to seek advice from PRC counsel prior to structuring, documenting and registering PRC security.

CAN A FOREIGN SECURITY GRANTOR WAIVE ITS SOVEREIGN IMMUNITY?

Although there is no comprehensive status dealing with this, it is generally accepted that the PRC applies the doctrine of absolute foreign sovereign immunity. This extends immunity to all transactions of foreign sovereign entities, including commercial transactions.

The general view is that a waiver agreed by a foreign sovereign entity in a contract prior to any dispute may not be effective under the laws of the PRC and for such a waiver to be valid it may need to be effected “in the face of the court” (i.e. before the jurisdiction of the PRC court).



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