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The International Comparative Legal Guide to: **Lending & Secured Finance 2018**

6th Edition

A practical cross-border insight into lending and secured finance

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Ali Budiardjo, Nugroho, Reksodiputro
Allen & Overy LLP
Anderson Mori & Tomotsune
Asia Pacific Loan Market Association (APLMA)
BPSS Attorneys at Law
Cadwalader, Wickersham & Taft LLP
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Account Director
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Sales Support Manager
Toni Hayward

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Caroline Collingwood,
Suzie Levy

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

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Global Legal Group Ltd.
59 Tanner Street
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EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Lending & Secured Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of lending and secured finance.

It is divided into three main sections:

Three editorial chapters. These are overview chapters and have been contributed by the LSTA, the LMA and the APLMA.

Twenty one general chapters. These chapters are designed to provide readers with an overview of key issues affecting lending and secured finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in lending and secured finance laws and regulations in 54 jurisdictions.

All chapters are written by leading lending and secured finance lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Thomas Mellor of Morgan, Lewis & Bockius LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Hong Kong

Richard Mazzochi



David Lam



King & Wood Mallesons

1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

According to Thomson Reuters, syndicated loan volumes across Asia Pacific as a whole in 2017 declined 4.8% from 2016 to US\$445.3 billion, continuing a slide from previous years. However, syndicated lending in Hong Kong remained strong, particularly in the area of acquisition financings. Acquisition financing volumes in Hong Kong were around US\$4.9 billion, a significant increase on the US\$625 million recorded in 2016. Overall loan volumes in Hong Kong reached US\$116 billion, with substantial contributions coming from the Chinese technology sector. Of particular note was the US\$13 billion borrowed by the Chinese internet giant, Tencent. Chinese M&A generally was down from the previous year, in large part caused by restrictions on outbound investment imposed by the PRC authorities. Notably, Chinese conglomerates that had been on aggressive acquisition sprees in recent years have been reined in, and in some cases have begun to dispose of their offshore investments. That said, Hong Kong has continued to position itself as a hub for One Belt One Road (“OBOR”) financing, with market participants looking to benefit from Hong Kong’s geographical proximity to the PRC and the territory’s language skills and financing pedigree. The OBOR initiative is still in its growth stage and could have a marked impact on Hong Kong lending volumes going forward.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

One of the largest loans completed in Hong Kong was the US\$3.6 billion loan for the privatisation of the shoe retailer, Belle International Holdings Limited. Ten banks (including the bookrunner) participated in this loan.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

A company can give a guarantee or grant security over its assets in respect of the borrowings of another member of its corporate group.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

A director has a fiduciary duty towards the company and must act in its best interests. This applies when considering the giving of a guarantee or other security. If a director breaches its duty, then it may be personally liable towards the company.

The directors of the company will have to consider whether the giving of the guarantee will be in the best interests of the company and whether the company will benefit from the giving of such guarantee. It is important that the company itself, not only the group as a whole, will derive benefit from the giving of the guarantee. It is generally easier to establish that there is corporate benefit for a guarantor giving a downstream guarantee than a guarantor giving an upstream guarantee or a cross-stream guarantee.

2.3 Is lack of corporate power an issue?

Section 115 of the Companies Ordinance provides that a company has the capacity, rights, powers and privileges of a natural person of full age. If, however, the objects of a company are stated in its articles of association, the company must not do any act that it is not authorised to do by its articles of association. Also, if any power of a company is expressly modified or excluded by its articles of association, the company must not exercise any power contrary to such modification or exclusion.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental approval, consent or registration is required.

In view of the issues raised in question 2.2 above, it is recommended that shareholder resolutions approving the giving of the guarantee are obtained where it secures the obligations of a parent or sister company.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

These matters would not affect any limit on the amount of a guarantee. However, if a company is experiencing solvency issues, the matters referred to in question 8.2 should be borne in mind.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, there are not.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

It is possible to take security over almost any type of asset in Hong Kong, whether tangible or intangible. This includes real estate, contractual rights and other receivables, securities, bank accounts, intellectual property, ships, aircraft and inventory.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

A company can execute a debenture (i.e. a single document containing a range of security provisions covering all assets). However, it is also possible to have individual security documents covering particular assets. Generally, the procedure would involve the due execution of the relevant document by the security provider, registration of the document where applicable, and other perfection steps that may be required depending on the type of security. For example, for an assignment of a contract, it is required to provide notice to the assignor's counterparty to perfect the security.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

It is possible to take security over land, and this is most commonly done by taking a legal charge over the property (commonly referred to as a mortgage). The mortgage should be in written form, executed as a deed and specified to be a statutory legal charge. On or before the execution of the mortgage, the mortgagor would have provided title deeds of the property to the mortgagee to facilitate the title investigation. Original title deeds will be retained by the mortgagee until the mortgage is released.

After the mortgage deed is executed, it should be registered with the Land Registry within one month of its execution in order to preserve the priority of the mortgagee against any interests in the land that may arise thereafter.

If the mortgagor/chargor is a Hong Kong incorporated company, or if it is a foreign company registered with the Companies Registry, then it would also be necessary to register the mortgage deed with the Companies Registry within one month of its execution in order to perfect the security.

It is possible to take security over plant, machinery and equipment in Hong Kong, and this would typically be done by a chargor granting a fixed or floating charge over those assets. A charge is a security interest over an asset that does not involve the transfer of ownership to the chargee. Generally speaking, a creditor will prefer to have a fixed charge because this will have a higher priority in the insolvency of the chargor as compared with a floating charge.

However, the nature of a fixed charge requires that the creditor maintain a high degree of control, and the courts may, regardless of whether the deed of charge describes a charge as a fixed charge,

recharacterise such charge as a floating charge if it considers that this degree of control is not maintained.

Where a floating charge is used, the chargor is free to deal with the assets. If the chargor parts with ownership, then it will no longer be subject to the charge. The floating charge can crystallise and become a fixed charge if a specified crystallisation event (which would normally include an event of default) occurs.

For an effective charge over plant, machinery or equipment, there is no need to obtain any title documents, or notify any third party of the charge. Where the chargor is a company, it may be necessary to register the deed of charge with the Companies Registry, as in the case of a mortgage deed (please see above).

It is also possible to take a pledge or a lien over plant, machinery or equipment, but because these require physical possession, this is rarely done in a syndicated loan context.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security can be taken over receivables, and this is usually done by way of an assignment. A charge can also be used, in which case the same considerations referred to in question 3.3 above apply.

Where an assignment is taken, to be a legal assignment, it must comply with the requirements of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23), including that the assignment is absolute and over the assignor's entire legal interest, the assignment is in writing, the assignment is of a legal debt, and notice of the assignment is given to the contract counterparty. Where one or more of the above criteria is not met, the assignment may be an equitable assignment. This can still be effective security, and could be desirable where it is not practical to serve notice on each of the counterparties (which may be the case where there is a large number). On enforcement of the security, the creditor may wish to perfect the assignment by giving the notice, which will facilitate the collection of any claim, or the enforcement of the assigned rights by the creditor.

It is prudent for the creditor to have the underlying contract giving rise to the receivables reviewed to ensure that there is no prohibition on the assignment of the receivables. If so, then the assignment may not be effective, and it could cause the assignor to be in breach of its obligations under the contract, which could in turn create liabilities for the assignor or render the contract voidable. If an assignment is prohibited, then it may be possible to take security with a charge instead.

If the assignor is a company, the deed of assignment may be registrable with the Companies Registry (see question 3.3).

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A creditor will normally take an assignment or a fixed charge over a bank account in Hong Kong. To enhance the chances of having a fixed charge instead of a floating one, it is common to require that withdrawals from the account may only be made with the chargee's consent.

Typically, a notice of assignment or charge to the relevant bank is given at the outset, and the account bank is required to acknowledge the notice. In addition to perfecting the security, this would enhance the control of the creditor. For example, the notice may require the account bank to waive any rights of set-off that it may have, or instruct the account bank that after it is served with an enforcement notice, it should only follow the instructions of the creditor and not those of the assigning debtor.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

It is possible to take security over shares. Where the shares are certificated, it is common to take a fixed charge over the shares. The chargee would normally require the delivery of the original share certificates, as well as various ancillary documents (such as share transfer forms, directors' resignation letters and written resolutions) to be executed in blank to facilitate enforcement. Otherwise, the procedural requirements are similar to those of other fixed charges.

It is possible for a creditor to take a legal mortgage. This would involve the shares being transferred to the creditor, who is then registered as the owner of the shares. This can be considered the strongest form of share security as it would be very difficult for the mortgagor to arrange to sell the shares to a third party without the consent of the creditor. However, this is not a common form of security as the creditor may not want to deal with any consolidation issues that arise if the company whose shares are charged becomes a subsidiary, and there may be stamping costs involved in the transfer.

For scripless shares, these are generally held in the clearing system, CCASS. In addition to taking a fixed charge over those shares, it would be possible to take an assignment in respect of the account at the broker in which such shares are held. The procedural requirements are substantially similar to those of taking security over a normal bank account. Where a significant proportion of shares in a listed company are the subject of the security, it may be necessary to make a notification to the stock exchange.

It is possible in principle to take security over shares with a New York or English law-governed document, but where the shares are located in Hong Kong, it is generally advisable to use a Hong Kong law-governed security document.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

The forms of security that are available for the taking of security over inventory are broadly the same as those for taking security over plant, machinery and equipment as set out in question 3.3 above. Generally, a floating charge would be most appropriate as the chargor would expect to be able to freely sell the inventory without first having to obtain the consent of the chargee.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Generally speaking, a Hong Kong company can do all of the above.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notarisation is not required for the creation of security.

A registration fee of HK\$340 is payable for each security agreement registered in the Companies Registry. Other registrations may be

required against particular assets. Security over land should be registered in the Land Registry (which normally costs HK\$210 to HK\$450). Security over IP may be registrable in certain IP registers (for example, patents (costing HK\$325) and registered trademarks (costing HK\$800)).

Stamp duty is generally not payable on the creation of security, though it may be payable on the enforcement of such security. For example, on the transfer of land, and on the transfer of shares, stamp duty may be payable, with the rate depending on the amount of consideration provided.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The above matters are not normally onerous, and should be straightforward provided they are commenced in good time. Notification requirements in respect of an assignment of contracts can be onerous when there are a large number of contracts being assigned.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No governmental approvals or consents are required.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, though it is common practice for security documents to contain clauses to clarify that the security applies to any further advances granted under a loan facility.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Security over certain asset types are required to be documented in writing (see the above questions with respect to assignments, and mortgages over land). Furthermore, documents containing a power of attorney should also be executed by deed.

As a matter of common practice, security documents are executed as deeds to prevent the document from being invalid due to lack of consideration.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

If a person is acquiring or proposing to acquire shares in a company incorporated in Hong Kong, the company and any Hong Kong incorporated subsidiaries must not give any financial assistance directly or indirectly for the purpose of the acquisition before or at the same time as the acquisition

takes place. Also, if a person has acquired shares in a company incorporated in Hong Kong, and any person has incurred a liability for the purpose of the acquisition, the company or any of its subsidiaries must not give financial assistance directly or indirectly for the purpose of reducing or discharging the liability. In other words, refinancing of loans made available for financing the acquisition is likely to be caught by this prohibition as well.

“Financial assistance” may take many forms and section 274 of the Companies Ordinance (Cap. 622) provides that it includes financial assistance given by way of “guarantee, security or indemnity”. This usually prohibits the target company and its Hong Kong incorporated subsidiaries in an acquisition financing from giving guarantees and/or security to secure the facility financing the acquisition that is made available to the purchaser. Certain exceptions apply to this prohibition. This prohibition may also not apply if the company follows one of the three sets of relaxation procedures. The choice of which one to follow depends on the structure of the relevant transaction and timing requirements.

If a company unlawfully gives financial assistance, the validity of the financial assistance and of any transaction connected with it is not affected solely by reason of the contravention of the prohibition on the giving of the financial assistance. However, the company and its responsible persons may be the subject of criminal sanctions if it is found that the restrictions have been breached.

- (b) Shares of any company which directly or indirectly owns shares in the company
Please see above.
- (c) Shares in a sister subsidiary
The financial assistance prohibition does not apply where the shares acquired are only of a sister company.

5 Syndicated Lending/Agency/Trustee/Transfers

- 5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?**

Security agency and trust arrangements are recognised. In syndicated lending, security will typically be granted in favour of a bank acting as security trustee on behalf of all syndicate members from time to time. The existence of the trust means there is no need to grant separate security to each lender or to grant new security or make new security registrations each time there is a change in syndicate membership. The security trust provisions will provide that the security trustee (or a receiver appointed by it) is the only party entitled to enforce the security (acting on the instructions of the lenders).

- 5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

This is not applicable in Hong Kong.

- 5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?**

The use of a security trustee to hold the benefit of the security and guarantee package on behalf of the syndicate (as described above) means that there are no notification or perfection requirements if membership of the syndicate changes from time to time. The security and guarantee package will continue to benefit the lenders, including new lenders joining the syndicate.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

- 6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

These are not applicable in Hong Kong.

- 6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

No tax incentives exist that provide preferential treatment to foreign lenders, and no special taxes apply to foreign lenders in relation to the effectiveness or registration of security documents.

- 6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to or guarantee and/or grant of security from a company in your jurisdiction?**

A foreign lender would not be subject to Hong Kong tax solely due to a single loan made to a Hong Kong company. However, if such lender is required to pay profits tax in Hong Kong by reason of its business generally, then it may be taxed on the profit made on the loan. Likewise, a foreign lender would not be subject to Hong Kong tax solely because it benefits from a guarantee or security from a Hong Kong grantor.

- 6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?**

Please see section 3 above.

- 6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.**

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a “foreign governing law”)? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

Generally speaking, the Hong Kong courts will recognise a foreign governing law provided this would not be contrary to public policy in Hong Kong. The courts may apply Hong Kong law mandatorily in some circumstances, such as where the subject matter of the dispute relates to real property located in Hong Kong.

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a “foreign judgment”) without re-examination of the merits of the case?

The Hong Kong courts will generally enforce a final and conclusive foreign judgment without re-examination of the merits, subject to certain exceptions. These include where it would be contrary to public policy, where the foreign judgment was obtained by fraud, and where the judgment relates to foreign penal or revenue laws.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

This will depend on the relative complexity of the facts of the case. If it is straightforward and the defendant does not mount a defence, then the creditor may be able to get default judgment within one month of the initiation of proceedings. If the defendant does mount a defence, then the creditor may be able to get summary judgment within three to nine months. Failing this, the time to get a judgment will depend very much on the facts of the case.

The time to complete an enforcement procedure depends on the procedure chosen, but it can be done in under two months. For foreign judgments, the enforcement process can be completed within four to six months, but it can be considerably longer depending on the circumstances.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

In general, there are no strict requirements with respect to the timing or value of the enforcement procedure. Public auctions and (except for in the case of very limited classes of assets) regulatory consents would not be required. However, the creditor does have certain duties towards the provider of the security to obtain a reasonable price. In an enforcement situation, the creditor would generally appoint a receiver, have the asset valued independently, and consider holding an auction if appropriate.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

No, they do not.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

In a compulsory winding-up of the security provider, once a liquidator is appointed, no proceeding may be commenced against the company or its assets without the leave of the court. However, a creditor may appoint a receiver over the relevant assets, and the court would be expected to grant leave for such receiver to take possession of the assets.

Although rarely seen, where a scheme of arrangement in respect of a company has been agreed by the relevant classes of creditors, and been sanctioned by the court, a moratorium may be put into place in respect of such company’s debts in accordance with the terms of the scheme of arrangement. Generally though, no moratorium will come into place until the scheme is effective.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

As Hong Kong is considered a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (through accession by China), the Hong Kong courts would enforce an arbitral award without re-examination of the merits, assuming that the award was made in a country that was also party to the New York Convention. In such a case, the defendant would not be able to challenge the award on its merits.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

See question 7.6 above, and question 8.2 below.

8.2 Are there any preference periods, clawback rights or other preferential creditors’ rights (e.g., tax debts, employees’ claims) with respect to the security?

A transaction may be challenged under Section 265D of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (the “CWMO”) where a company which goes into liquidation had at a relevant time entered into a transaction with a person at an undervalue. Transactions at an undervalue can include transactions where the company received no consideration (e.g. gifts) or consideration of a value which is significantly less than the value of the consideration provided by the company. The relevant time is any time during the period of five years ending on the day on which the winding up of the company commences (“**Winding-Up Commencement Date**”), and where the company was unable to pay its debts or became unable to pay its debts as a result of that transaction.

Sections 266 of the CWMO may invalidate transactions relating to a company's property made at a relevant time if they are deemed to be "unfair preferences" and if the company is ultimately wound up. A company will be regarded as having given an unfair preference if (a) the company does anything or suffers anything to be done which has the effect of putting a person into a position which is better than the position such person would have been in if that thing had not been done, and (b) the company was unable to pay its debts or became unable to pay its debts as a result of giving that unfair preference.

The relevant time for an unfair preference means any time during the six-month period ending on the Winding-Up Commencement Day (or two years if the preference is given to a person connected with the company).

Unless an exception applies, section 267 of the CWMO will invalidate any floating charge given by a company at a relevant time if the company was unable to pay its debts at the time of the creation of the floating charge or became unable to pay its debts in consequence of the creation of the floating charge. The relevant time for this purpose means any time during the 12-month period ending on the Winding-Up Commencement Day (or two years if the floating charge is created in favour of person(s) connected with the company).

Upon insolvency, generally, the payment waterfall for creditors is as follows: first, creditors having the benefit of fixed charges and mortgages; second, the payment of liquidation costs (including realisation costs); and third, payments owed to preferential creditors. Payments to preferential creditors include wages, contributions to a mandatory provident fund, the return of deposits where the insolvent company is a bank and payments on insurance claims where the insolvent company is an insurance company. Any surplus remaining after all of these payments have been discharged will be paid to creditors secured by floating charges.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Unregistered companies (which includes foreign companies registered with the Companies Registry) may not be the subject of a voluntary liquidation procedure.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

This can be possible, but only in very limited circumstances. A creditor or receiver would not generally be able to take possession of an asset without a court procedure, especially where the asset is a physical one. However, there may be circumstances where the security arrangement was established in such a way that the involvement of a court is not required. For example, where a creditor has the benefit of the assignment of a bank account, the creditor may instruct the account bank to make payments to the order of the creditor instead of the assignor.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

Where the relevant contract provides that a foreign court will have exclusive jurisdiction, the courts of Hong Kong will generally

give effect to such choice. However, there may be exceptions; for example where the Hong Kong court found that the choice of jurisdiction was illegal, not made in good faith, or contrary to public policy.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

The doctrine of absolute sovereign immunity applies in Hong Kong. Waiver of sovereign immunity was considered in the cases of *Hua Tian Long (No 2)* and *FG Hemisphere Associates LLC v Democratic Republic of the Congo*. These cases suggest that if an obligor can establish to the satisfaction of the courts of Hong Kong that it is entitled to sovereign immunity, then any waiver of that immunity (in respect of jurisdiction, proceedings or execution) given by it in the relevant agreement may not be enforceable.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank versus a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

Lending business in Hong Kong is governed by the Money Lenders Ordinance. This Ordinance requires every person who carries on business as a money lender to hold a money lender's licence. However, this Ordinance does not apply to authorised institutions (i.e. licensed banks, restricted licence banks and deposit-taking companies approved by the Hong Kong Monetary Authority) nor to loans made to such institutions, and in each such case no licensing under the Ordinance is required. The licensing requirement in this Ordinance does not apply to certain categories of loans (referred to in the Ordinance as "exempted loans", which include, without limitation, certain secured loans, intra-group lending and loans to employees) and certain categories of persons (referred to in the Ordinance as "exempted persons", which include, without limitation, certain types of financial institutions and insurance companies) making loans. The licensing requirements apply equally whether the lender is based in Hong Kong or overseas.

Any person who carries on a business as a money lender in contravention of the Money Lenders Ordinance is liable to a fine of up to HK\$100,000 and imprisonment for up to two years. The lender may also be unable to enforce any relevant loan agreement.

There are no special licensing or eligibility requirements to become a facility agent in Hong Kong, though often a facility agent will be a bank that is an authorised institution.

11 Other Matters

11.1 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

Particular care should be taken when an individual person is providing a guarantee or other security. It is necessary to ensure

that the person is properly identified, and that they are of age and sound mind. Furthermore, the Hong Kong Law Society has provided guidelines designed to mitigate the risk of undue influence. Depending on the facts of the case and whether the individual person has separate legal representation, it may be necessary to serve warning notices on them and have them sign confirmations before entering into the transaction documentation.



Richard Mazzochi

King & Wood Mallesons
13/F Gloucester Tower, The Landmark
15 Queen's Road Central
Hong Kong

Tel: +852 3443 1046
Fax: +852 3443 1299
Email: richard.mazzochi@hk.kwm.com
URL: www.kwm.com

Richard Mazzochi is a partner in the Hong Kong office of King & Wood Mallesons, where he specialises in banking and finance. He has previously worked in Sydney, Singapore and London.

Richard has extensive experience in a broad range of significant matters, including: capital markets financing in the European, American and Asian markets; securitisation, repackagings and other structured finance; structured products (including funds); derivatives; and market regulation (including clearing and settlement systems).

He acts for leading arrangers, sponsors, issuers, borrowers, lenders and dealers.

Richard is qualified in Hong Kong, England & Wales and Australia (NSW).



David Lam

King & Wood Mallesons
13/F Gloucester Tower, The Landmark
15 Queen's Road Central
Hong Kong

Tel: +852 3443 8314
Fax: +852 3443 1299
Email: david.lam@hk.kwm.com
URL: www.kwm.com

David Lam is a partner in the banking and finance department of King & Wood Mallesons, Hong Kong office. He has extensive experience in a wide range of lending transactions, including: acquisition financing; pre-IPO financing; real estate financing; privatisation financing; and general syndicated lending.

He advises lead arrangers, lenders, sponsors and corporate borrowers.

David is qualified in Hong Kong, England & Wales and the People's Republic of China.

David is fluent in English, Mandarin and Cantonese.

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59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com