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# The Legal 500 Country Comparative Guides

# Hong Kong
# LENDING & SECURED FINANCE


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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in Hong Kong.

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# HONG KONG
# LENDING & SECURED FINANCE

## 1. Do foreign lenders or non-bank lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

**Lending in Hong Kong**

Any person (including foreign lenders and non-bank lenders), not being an "authorized institution" authorised by the Hong Kong Monetary Authority under the Banking Ordinance (Cap. 155) (**"BO"**), carrying on business as a money lender in Hong Kong must obtain a money lender's licence in accordance with the Money Lenders Ordinance (Cap. 163) (**"MLO"**), unless one of the exemptions set out in the MLO applies (including loans secured by charges registrable under the Companies Ordinance (Cap. 622) (**"CO"**)). The term "authorized institution" is defined in the BO to mean (a) a bank, (b) a restricted licence bank, or (c) a deposit-taking company.

However, even though there is no legal authority on this point, it is arguable that the MLO does not have extra-territorial effect, so a lending business carried on outside Hong Kong does not need an MLO licence. This can be the case even if the borrower is incorporated and/or doing business in Hong Kong or the loan is disbursed in Hong Kong, if the lender otherwise operates solely from outside Hong Kong. But the law is not clear, so a cautious view is that the MLO could require a licence if any part of a money lending transaction is carried on in or from, or involves any action in, Hong Kong.

There is also a general corporate registration requirement for "carrying on business" in Hong Kong pursuant to the Business Registration Ordinance (Cap. 310). The test for carrying on business in Hong Kong is not expressly defined, other than to expressly include a company incorporated in Hong Kong or registered in Hong Kong as a registered non-Hong Kong company, and is therefore not precise. However, case law indicates that the threshold is low. Any form of commercial activity is sufficient. The existence of business premises is probably not an essential feature. A business can be carried on through an independent agent. Probably the incurrence of legal obligations within Hong Kong is necessary. As the Business Registration Office (**"BRO"**) is an office of the Inland Revenue Department and the primary purpose of registration is to put the business on the radar of the tax authority (though it also serves to enable persons dealing with the business to find out with whom they are dealing), the test is likely to be based on whether potentially taxable activities are being carried on in Hong Kong. A lender needing to register with the BRO in fact has an obligation only to complete, sign and deliver to the BRO the required application form within 1 month after the business starts (or in the case where the lender is registered as a registered non-Hong Kong company, 1 month after such registration (*see below*)). This does not involve an approval process and the BRO will later issue a business registration certificate.

Further, there is a requirement to register as a registered non-Hong Kong company where a company has established a place of business in Hong Kong pursuant to the CO. The test for establishing a place of business in Hong Kong is not expressly defined in the CO and is therefore not entirely precise. However, case law indicates that (a) the term "establishing a place of business" is not the same as carrying on business in the jurisdiction and the expression points to the company having "a local habitation of its own"; (b) the establishment of a place of business connotes a degree of permanence or recognisability as being a location of the company's business; (c) the term "business" should be interpreted in the general sense of activities, and not confined to the narrow sense of commercial transactions; and (d) the business carried on must be activities which fall within the company's paramount or subsidiary objects. A company needing to register with the Hong Kong Companies Registry in fact has an obligation only to complete, sign and deliver to the Hong Kong Companies Registry the required application form, containing the particulars prescribed by procedural regulations and details of at least one person who is proposed to be an authorized representative on registration of the non-Hong Kong company, and certain supporting documents, within 1 month after the place of

 

business is established. The supporting documents include a certified copy of each of the company's constitutional document(s), certificate of incorporation and (if publication of accounts or delivery of accounts to a person for public inspection is required under the law of the place of incorporation of the company, or the law of any other jurisdiction where the company is registered as a company, or the rules of any stock exchange or similar regulatory bodies in that jurisdiction that impose that requirement) latest published accounts. This does not involve an approval process and the Hong Kong Companies Registry will later issue a registration certificate.

**Taking of security situated in Hong Kong**

There is no general requirement for a lender to obtain a licence / regulatory approval solely by reason of taking the benefit of security over assets located in Hong Kong.

## 2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

s24 of the MLO makes it illegal for any person (whether a money lender (as defined in the MLO) or not) to lend or offer to lend money at any effective rate of interest which exceeds 48% per annum and makes any agreement for the repayment of any loan or the payment of interest on any loan and any security therefore unenforceable in any case in which the effective rate of interest exceeds such rate. s25 of the MLO provides that a Hong Kong court may, having regard to all the circumstances, "reopen the transaction so as to do justice between the parties" if the transaction is "extortionate". For this purpose, a loan in respect of which the effective rate of interest exceeds 36% per annum is presumed to be "extortionate".

## 3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

No. There is no foreign exchange control in Hong Kong. There is also no limit or restriction on the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, Hong Kong.

## 4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction. If so, what is the procedure – and can such security be created under a foreign law governed document?

Security can be taken over all of the following types of assets. The type of security applicable to the relevant asset type is elaborated below.

The law of the place where the secured asset is located (or, in the case of intangible assets, the law governing the intangible asset) is often selected as the governing law of the security document under which security is taken over the asset.

Hence, security over real property (land), plant, machinery, equipment, inventory and receivables situated in Hong Kong and shares in a Hong Kong company will typically be governed by Hong Kong law.

*i. real property (land), plant and machinery;*

**Real Property**

The majority of land in Hong Kong is held on a leasehold tenure under leases granted by the Hong Kong Government. Government leases can (but do not necessarily) restrict dealings relating to the land granted under those leases without the Government's consent and may be subject to compliance of certain requirements set out therein.

Security can be taken over real property by way of a legal mortgage or equitable mortgage.

**Legal mortgage**: A legal mortgage over real property is created by way of a legal charge, in writing and executed as a deed. It gives the protection, powers and remedies traditionally given to a mortgagee, including foreclosure and the equity of redemption under which the mortgagee must re-transfer title to the mortgagor upon full discharge of the underlying debt. However, the mortgagee cannot take possession before default.

**Equitable mortgage**: An equitable mortgage can arise in a variety of situations, such as when the title deeds to the assets are being deposited with the intention of creating a legal mortgage but the formal documentation required to create a legal mortgage is not executed, or if the security provider has no legal estate in the property being secured to begin with. A legal mortgage generally offers greater protection against third parties than an equitable mortgage, but an equitable mortgage involves

 

less formalities.

**Plant and Machinery**

The common form of security over plant and machinery is by way of charge. A charge creates an encumbrance over the charged asset without transfer of ownership or possession. A charge can be fixed (provided that the chargee exerts sufficient control over the secured asset and the chargor cannot deal with the secured asset without the consent of the chargee) or floating (a charge on a fluctuating body of assets which remain under the management and control of the chargor, and which the chargor has the right to withdraw from the security despite the existence of the charge).

The ability to take effective control will depend, to an extent, on the size, type and location of the assets. Hence, in practice, the security is often in the form of a floating charge, except in the case of a very large/fixed piece of machinery. In order to successfully establish control, it may be wise to affix notification plaques clearly to such assets over a certain value, and to notify third parties that such assets have been charged.

*ii. equipment*

Please refer to **"Plant and Machinery"** sub-section of our response to Question 4 i. above.

*iii. inventory*

Security can be taken over inventory by way of floating charge or fixed charge (provided the chargee exerts sufficient control over the relevant inventory (which rarely happens in practice)).

Security over inventory poses certain practical issues. Control is often difficult to effect if the relevant inventory is being dealt with by the chargor as part of its day-to-day business. There are also other issues, for example where goods are stored on leased premises, a consent from the landlord to access the premises may be required. In addition, it may be difficult to enforce a charge upon goods in transit, particularly if shipped internationally.

In the event that inventory subject to a charge is mixed with (for example, stored together with) unsecured inventory, care should be taken to ensure that the inventory subject to the charge is identifiable and can be distinguished from unsecured inventory (such as physically securing the goods, placing stickers on goods and/or notifying the chargor's customers, trading partners and warehouse owners/managers of the security).

*iv. receivables; and*

Security can be taken over receivables through assignment by way of security, fixed charge (provided the chargee exerts sufficient control over the secured asset) or floating charge.

Receivables are typically secured in favour of a chargee by way of charge (as it may sometimes be difficult to obtain consent for assignment where restrictions exist in the documentation creating them) or, where no restrictions exist in the documentation creating them, security in the form of assignment. In the latter case, the assignment would usually be coupled with a restriction on the assignor stipulating that it can only collect its receivables in the ordinary course of its business and it must pay the proceeds of such collection into a specified (blocked, segregated) collection account.

Provided that the receivables are sufficiently identifiable at the time the security is created, there is no need to enter into updated security or submit lists of receivables on an ongoing basis prior to enforcement.

Unless the requirements for a legal assignment have been fulfilled (being (a) the assignment is in writing under the hand of the assignor; (b) the assignment is absolute; (c) the assignment is notified in writing to the person against whom the assignor could enforce the assigned rights; (d) the assignment must not purport to be by way of charge only; and (e) the intention of the assignor to transfer ownership rights to the assignee must be clear), an assignment by way of security will only take effect as an equitable assignment. In the absence of notification of either an assignment or charge, an underlying debtor may discharge its debt by payment to the assignor/chargor rather than to the secured party. From a practical perspective, this means that the notices will need to be served as early as possible after execution of the assignment (thus perfecting the legal assignment pursuant to s9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23)).

Following a series of cases culminating in *National Westminster Bank plc v Spectrum Plus Limited and others [2005] UKHL 41* (and confirmed in *Re Harmony Care Homes Limited (in administrative receivership) [2009] EWHC 1961 (Ch)*) it has been held that a fixed charge may be created over receivables (and the proceeds of those receivables paid into a bank account) only if the secured party has sufficient control over those proceeds. Even though UK cases are not binding in Hong Kong, they are considered as persuasive authorities and are treated with "great respect" as decided by the Hong Kong Court of Final Appeal in *Solicitor v Law Society of Hong Kong [2008] 2 HKC 1*.

 

The "sufficiency" of control will be determined by the courts on a case-by-case basis, but the current view is that sufficient control will be achieved by ringfencing the account into which the proceeds of the receivables are paid from day one so that the chargor cannot withdraw funds from the account without first obtaining the chargee's consent for withdrawal. The chargee shall be the sole authorised signatory with rights to direct activities in relation to the account and the account bank should agree to only take instructions from the chargee with respect to the account.

*v. shares in companies incorporated in your jurisdiction.*

**Directly held shares/securities, where a chargor (or its nominee) is the registered holder**: Security can be taken over such shares by way of a fixed charge (provided the chargee exerts sufficient control over the shares) and/or floating charge. Legal mortgages (whereby the title to the shares is transferred to the mortgagee) over shares may also be taken, but due to certain responsibilities and commercial implications linked with the mortgagee becoming the owner of such shares (e.g. attending general meeting of the shareholders), this form of security is not often used even though it is more secured.

In practice, chargees take an equitable mortgage and reserve the ability to perfect their share charge by (a) holding the original share certificate(s), (b) obtaining pre-executed blank instrument(s) of transfer and contract notes from the shareholder and (c) (if required) amending the constitutional documents of the company whose shares are being charged to: (i) remove any right that the directors of the relevant company have to refuse to register a transfer in an enforcement scenario; (ii) remove any rights of pre-emption on a sale/transfer of the shares; and (iii) (less commonly) disapply any liens over shares. The pre-executed blank instrument(s) of transfer and contract notes and original share certificate(s) would be retained by the chargee who could, on enforcement, complete the transferee section of the instrument(s) of transfer and contract notes and deliver these to the company for registration.

**Indirectly held shares/securities**: shares/securities listed in Hong Kong can be held in the Central Clearing and Settlement System (**"CCASS"**), administered by the Hong Kong Securities Clearing Company Limited (**"HKSCC"**). Shares held with CCASS are registered in the name of a HKSCC nominee company and recorded by the HKSCC as being held in a CCASS participant's account.

For shares/securities listed in Hong Kong, a depositor has proprietary rights over securities held by a CCASS participant within CCASS. As such, the security interest most commonly granted over securities held within CCASS will be an equitable mortgage/charge over the security provider's proprietary interest in those securities. In addition, the mortgage/charge usually includes an assignment by way of security of its rights against CCASS or the CCASS participant (including the rights in respect of the underlying securities account) and a charge over the related securities account. To perfect the assignment/charge, notice of the assignment/charge must be given to the CCASS participant.

## 5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

A Hong Kong incorporated company may grant security over future assets, provided that it is sufficiently identified. A legal mortgage cannot be granted over future assets as the security provider does not possess a proprietary interest in those assets at the time of granting. However, it is possible to take equitable security over future assets, provided that those future assets are clearly identified.

Future obligations may be secured in an existing security document, provided they fall within the contemplation of the chargor at the time of the chargee taking the security (and all future obligations contemplated in the underlying document will be secured).

## 6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

Subject to the *lex situs* rule (please refer to our response to Question 4 above) and our comments below, it is possible to use a single Hong Kong law composite security agreement or, a composite debenture, to take security over all of a Hong Kong company's assets situated in Hong Kong. However, under Hong Kong law, a Hong Kong ship mortgage must be in the prescribed form, and it is common to supplement the form (which only contains some basic details of the parties of the underlying vessel) with a separate security deed. Similarly, it is necessary for the relevant party to execute a separate mortgage over real property after acquiring such real property to facilitate registration of it at the Hong Kong Land Registry.

## 7. Are there any notarisation or

 

### legalisation requirements in your jurisdiction? If so, what is the process for execution?

In general, it is not necessary for security documents to be notarised, legalised and/or apostilled if they are executed and used locally. However, in certain circumstances, it may be necessary to provide certain notarised supporting documentation to facilitate registration of the security documents with the registry of relevant foreign jurisdictions.

As for documents executed overseas to be used in Hong Kong, there are different authentication requirements prior to their use depending on the countries from which they are issued.

### 8. Are there any security registration requirements in your jurisdiction?

If the security provider is a company incorporated in Hong Kong or registered in Hong Kong as a registered non-Hong Kong company, and the asset subject to security falls into one of the registrable categories (covering any floating charge and fixed security over most, but not all, asset types), a certified copy of the instrument creating or evidencing the security over that asset, together with a statement of the particulars of that security, must be registered within 1 month after the date of creation against the company at the Hong Kong Companies Registry.

If, subsequent to a security (over an asset that falls into one of the abovementioned registrable categories) being created, a foreign company becomes a registered non-Hong Kong company, the security must be registered against that company within 1 month after the date on which the company is registered as a registered non-Hong Kong company in the same manner as described above.

The obligation on registered non-Hong Kong companies to register security at the Hong Kong Companies Registry does not apply if the underlying property was ***not*** in Hong Kong when the charge was created by the relevant registered non-Hong Kong company.

In addition to the registration requirement at the Hong Kong Companies Registry, for the following asset types, the following perfection, protection and/or priority steps are also necessary or desirable:-

- **real estate:** registration at Hong Kong Land Registry. Please note that according to a recent case of *Winland Finance Ltd v. Gain Hero Finance Ltd [2022] HKCFA 3*, the Hong Kong Court of Final Appeal has ruled that an assignment of sale proceeds of an immovable property in Hong Kong does not create any interest in land and is not registrable with the Hong Kong Land Registry.
- **trade marks, patent or registered design:** registration at the applicable register of the Hong Kong Intellectual Property Department.
- **aircraft:** there is no register of aircraft mortgages in Hong Kong. However, it is market practice to notify the Civil Aviation Department in Hong Kong of the security interest.
- **ship:** registration at the Hong Kong Shipping Registry.

### 9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement? If so, what are the costs and what are the approaches lenders typically take in respect of such costs (e.g. upstamping)?

Registration costs in Hong Kong are minimal. Such fees can be summarised as follows:-

- Registration of a security document at Hong Kong Companies Registry – HK$340
- Registration of a real property mortgage at Hong Kong Land Registry – HK$450 or HK$230 (depending on the value of consideration)
- Registration of a ship mortgage at the Hong Kong Shipping Registry – Free of charge
- Registration of a security document at the Trade Marks Registry – HK$800
- Registration of a security document at the Patents Registry – HK$325
- Registration of a security document at the Designs Registry – HK$470 [***Note: the registration fee is reduced with effect from 1 March 2024.***]

Hong Kong does not currently impose stamp duty or other documentary, transfer or similar taxes on the granting of a loan. Pursuant to s4(1) of the Stamp Duty Ordinance (Cap. 117) (**"SDO"**), only instruments specified under a "head of duty" in the First Schedule to the SDO are subject to stamp duty. The heads of duty are:-

 

(a) *Real Property:* immovable property (i.e. instruments in respect of real property);

(b) *Equities:* Hong Kong stock (i.e. shares, stocks, debentures, loan stocks, funds, bonds or notes, units under a unit trust scheme; and any right, option or interest in or in respect of any of the foregoing, subject to certain exemptions);

(c) *Bearer Instruments:* Hong Kong bearer instruments (i.e. any instrument to bearer by delivery of which any stock can be transferred, subject to certain exceptions); and

(d) *Duplicates:* duplicates and counterparts of the above.

No stamp duty is payable in connection with the taking of security (unless the share mortgages over shares in the Hong Kong stock take the form of legal mortgages, then a nominal duty of HK$5 will be chargeable on each instrument of transfer transferring the legal title to the lender or its nominee), but any transfer of the beneficial interest in shares and real property at the time of enforcement (including a sale of a mortgaged property) will attract *ad valorem* stamp duty, which depending on the value of the subject matter, could be quite substantial.

## 10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard, including for example corporate benefit concerns?

Apart from the following circumstances, there is no general limitation on the ability of a company guaranteeing or securing the obligations of another group company in so far as such "group company" is a subsidiary of the company giving the guarantee or security, apart from:-

- any prohibition as may be stipulated under a company's articles of association;
- the general requirement that there must be commercial benefit to the party providing the guarantee or third party security (not to the group as a whole); and
- any statutory requirement relating to financial assistance as described in more detail below.

To mitigate the risk of a shareholder challenging the guarantee or security provided, especially in the case of upstream and cross-stream guarantee and security, a shareholders' resolution should be obtained (in addition to the necessary directors' resolution). However, shareholders' approval will not block a validity challenge by creditors or liquidator.

**Financial Assistance**

As a general rule, if a person is acquiring shares in a Hong Kong-incorporated company, that company or any of its subsidiaries shall not directly or indirectly provide financial assistance for the purpose of such acquisition before or at the same time as the acquisition takes place. In addition, if a person has acquired shares in a Hong Kong-incorporated company and any person has incurred a liability for the purpose of the acquisition, that company or any of its subsidiaries shall not directly or indirectly provide financial assistance for the purpose of reducing or discharging the liability.

The purpose of this rule is to prevent the resources of a Hong Kong-incorporated company and/or its subsidiaries from being used to assist a purchase of its own shares, which might be prejudicial to the interests of shareholders and/or creditors of the company not involved with or benefitting from the share purchase. The meaning of the term "financial assistance" includes financial assistance given by way of loan, transfer of rights in respect of loans, guarantee, security, indemnity, release, waiver, gift or other financial assistance if the net assets of the company are reduced to a material extent by the giving of the assistance or if the company has no net assets.

The CO sets out certain exceptions to the financial assistance rule. Under the CO, if prior to a company (whether listed or unlisted) entering into a transaction that has the effect of providing assistance to another party to acquire the company's own shares or the shares of its Hong Kong-incorporated holding company, the directors of the company resolve that (a) the company should give the assistance; (b) it is in the best interests of the company to give the financial assistance; and (c) the terms and conditions under which the assistance is to be given are fair and reasonable to the company, and one of the following conditions is met:-

- the proposed financial assistance, and all other financial assistance previously given and not repaid, is in aggregate not more than 5% of the paid up share capital and reserves of the company (as disclosed in the most recent audited financial statements of the company) (i.e. shareholders funds) (s283 CO);
- the proposed financial assistance is approved by written resolution of all members of the company (s284 CO); or
- the proposed financial assistance is approved by an ordinary resolution (s285 CO), and no court order is pending or has been made restraining the giving of the assistance on the application of shareholders holding at least

 

5% of the total voting rights or members representing at least 5% of the members of the company (ss286 to 288 CO),

the company would not be in contravention of the financial assistance rule.

Further, on the ***same day*** that the directors pass the resolution mentioned above, each director who voted in favour of the resolution shall make a solvency statement (i.e. a statement that such director has formed the opinion that immediately after the transaction there will be no ground on which the company could be found to be unable to pay its debts and the company will be able to pay its debts in full as they become due). Thereafter, the financial assistance shall be given no later than 12 months after the day on which the solvency statement is made.

More importantly, the CO provides that, where a company gives financial assistance in contravention of the CO, the financial assistance and any contract or transaction connected with it will not be invalidated solely because of that contravention (s276 CO). Although commentaries argue what is meant by the word "solely", it seems that the rights of third parties, usually the lenders, are not affected by the prohibition on financial assistance. However, generally, lenders would not ignore any non-compliance with the CO and will require that the relevant parties to comply with all appropriate conditions and get all necessary authorisations.

**Corporate Authority**

Companies must act in accordance with their constitutional documents (articles of association). Under the CO, a Hong Kong-incorporated company is required to have articles of association, but no longer a memorandum of association (which traditionally contained a company's objects clause) since the new CO came into force on 3 March 2014. For existing companies, the provisions of its memorandum are considered to be provisions of its articles (s98(1) CO). If a company either elects not to have an objects clause or removes it, the company's powers are unfettered: it will have the capacity, rights, powers and privileges of a natural person (s115(1) CO). However, if a company does state its objects in its articles (even though it is not obliged to do so), it must not do any act which is not authorised by its articles (s116(1) CO).

If a company does an act (including a transfer of property to or by the company) in breach of any objects clause it may have in its articles or contrary to an express exclusion or modification in its articles, that act will not be invalid **only** because of the breach (s116(5) CO). There must be some other "negative factors" present (e.g. the third party was dealing with the company in bad faith or was actually aware that the act was in breach of the company's articles) before the act will be invalid, as the breach is not then the only problem. S116(5) CO should be read in conjunction with s120 CO, which provides that a person is not to be regarded as having notice of the articles, return or resolution filed with the Hong Kong Companies Registry **merely** because they are available for inspection at the Hong Kong Companies Registry. The difficulty with both these sections is the inclusion of the words **"only"** (s116(5) CO) and **"merely"** (s120 CO). As these sections have not been tested by the Hong Kong courts, their exact effect is unclear. Presumably those acting in bad faith or who actually knew of a breach would not be protected by these provisions. But it is unclear about those who would in the normal course of their business carry out a company search to check on the capacity of their contractual counterparties, but for some reason omitted to do so. Possibly the failure to carry out a search or check, which a reasonable person in the same position as the third party would have carried out (especially in suspicious circumstances), will be treated as a "negative factor" making the company's act invalid, as under the old law. Hence, lenders should always carry out company searches and checks to ensure that the proposed transaction is within the ambit of the company's objects clause (if any) and that the company in question and its directors have requisite powers to enter into the proposed transaction.

**Corporate Benefit and Directors' Duties**

Directors of a Hong Kong-incorporated company have a fiduciary duty to act in what they believe is for the commercial benefit of the company, and not just in the interests of the corporate group as a whole. Determining whether a director acted in the best interest of the company is a matter of fact and directors are advised to seek shareholders' approval in uncertain circumstances. This duty is particularly significant in relation to upstream guarantee, cross-stream guarantee and third party security transactions. In order to negate potential shareholder claims that there was no corporate benefit, it is common to require the company to pass a shareholder resolution (in addition to a board resolution) confirming the transaction irrespective of whether the company would derive any commercial or other benefit (sufficient or otherwise) from the transaction.

**Loans to Directors**

The CO sets out certain restrictions in respect of loans made by a company to its own directors and persons connected with its directors. Pursuant to the CO, subject to a few exceptions (such as, transactions among group

 

companies and a loan, quasi-loan and credit transaction of value not exceeding 5% of the net assets or called-up share capital of the company), a Hong Kong company cannot make loans to, or guarantee or provide security for the obligations of, its directors or persons connected to, or controlled by, the directors of such Hong Kong company or of a holding company of such Hong Kong company without prior shareholders' approval obtained in accordance with a prescribed procedure (in cases involving public companies, such as a private company or a company limited by guarantee that is a subsidiary of a public company, the approval of disinterested shareholders is needed).

Under the CO, breach of this prohibition may result in the underlying loan agreement, guarantee or security document being voidable at the company's instance.

## 11. Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?

Please refer to the **"Financial Assistance"** and **"Loans to Directors"** sub-sections of our response to Question 10 above.

## 12. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

Yes, lenders in a syndicate can (and, in fact, customarily) appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate.

## 13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

Not applicable.

## 14. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

Hong Kong courts usually recognise and apply the parties' choice of law (including English law) to govern the substantive merits of a claim subject to certain exceptions, for example:

- When the choice of foreign law is not *bona fide*.
- When the choice of foreign law contradicts public policy.

However, Hong Kong courts will apply local law in relation to procedural rules, revenue matters, penalties or confiscation of property.

## 15. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?

There are three main ways through which foreign judgments can be enforced in Hong Kong.

**1. The Foreign Judgments (Reciprocal Enforcement) Ordinance**

Subject to certain conditions and restrictions, a monetary judgment from the superior courts of certain specific jurisdictions, including Australia, Singapore, France, Germany, etc. (but not English or US courts) may be enforced in Hong Kong by registration in the High Court of Hong Kong within 6 years after the date of the judgment pursuant to the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) (the **"JRE Ordinance"**).

**2. Common law regime**

Any monetary judgment from any jurisdiction (other than mainland China) that is not within the scope of the JRE

 

Ordinance (including a judgment from an English or US court) can be enforced in Hong Kong at common law within the jurisdiction of the High Court of Hong Kong by an action or counterclaim for the amount due under it if the judgment is:-

a. for a debt or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and
b. final and conclusive.

Again, there are certain conditions and restrictions for such enforcement, including the original judgment was not obtained by fraud, its enforcement or recognition would not be contrary to public policy, etc.

**3. Recognition and enforcement of PRC judgments**

Under the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645) (the **"2024 MJREO"**) that recently came into effect on 29 January 2024, a mainland China judgment in civil or commercial matters, whether monetary or non-monetary, may be recognised and enforced in Hong Kong by way of a simple registration procedure (by *ex parte* application, i.e. without involving the judgment debtor, to the Hong Kong courts), subject to certain requirements under the 2024 MJREO being fulfilled (and *vice versa*, subject to compliance with relevant requirements under the corresponding PRC judicial interpretation of the Supreme People's Court).

The 2024 MJREO provides a more comprehensive mechanism for the mutual recognitions and enforcement of Hong Kong and PRC judgments than the previous Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) (the **"2008 MJREO"**) in the following ways:-

- *Removal of the exclusive jurisdiction requirement:* the 2008 MJREO only applies to a claim in relation to a contract with an agreement to submit to the exclusive jurisdiction of the courts in Mainland China. This is replaced in the 2024 MJREO by a jurisdictional test as to whether there was a connection with mainland China at the time the subject proceedings were accepted by a mainland court.
- *Scope of enforceable matter:* While the 2008 MJREO was only applicable in respect of an exhaustive list of mainland China judgments, the 2024 MJREO adopts an exclusion list, as a result of which most types of civil and commercial matters will be covered.
- *Types of remedies*: While the 2008 MJREO only covered judgments providing for monetary relief, the 2024 MJREO generally covers judgments providing for both monetary (excluding exemplary or punitive damages) and non-monetary relief. However, in respect of judgments ruling on tortious claims for infringement of intellectual property rights, the 2024 MJREO only covers monetary relief (but including exemplary or punitive damages) determined with reference to the infringing act committed in the requesting place, but judgments ruling on tortious claims for infringement of trade secrets will additionally cover non-monetary relief.

The 2024 MJREO applies to judgments made on or after its commencement date, i.e. the 2008 MJREO continues to apply to mainland China judgments in respect of contracts containing an exclusive jurisdiction agreement handed down prior to the commencement of the 2024 MJREO.

**4. Recognition of arbitral awards**

In addition to the above regimes, Hong Kong is a member of The Convention of Recognition and Enforcement of Foreign Arbitral Awards (the **"New York Arbitration Convention"**) by way of PRC's accession.

## 16. What (briefly) is the insolvency process in your jurisdiction?

The main types of insolvency proceedings to which a company may become subject under Hong Kong law are receivership, compulsory liquidation and creditors' voluntary liquidation. In particular, lenders may consider the appointment of a receiver (where available) as an option for enforcing their security (although such an appointment can occur outside insolvency). In addition, creditors' schemes of arrangement may be proposed (which may be propounded outside insolvency), either as a standalone compromise or arrangement or in conjunction with formal insolvency proceedings.

**Receivership**

A creditor may appoint a receiver either by making an application to the court or, if the contractual terms of the relevant security document grant a right of appointment to the creditor, pursuant to such contractual terms, so as to safeguard its interests.

The appointment must be in writing and in the case of real estate, be registered with the Hong Kong Land Registry. In the case of a corporate debtor, the Hong Kong Companies Registry must be notified of the details of the appointment within 7 days of the appointment.

 

Although the receiver is usually appointed by the creditor, it is always provided in the underlying security documents that the receiver is the debtor's agent. In the case of real estate, s50(2) of the Conveyancing and Property Ordinance (Cap. 219) (**"CPO"**) expressly provides that any receiver appointed pursuant to the power in s50(1) of the CPO will be deemed the agent of the mortgagor. In order to avoid incurring any liability, the creditor should not interfere with, or direct, the receiver's activities. The receiver's powers are generally regulated by the underlying security documents and normally include powers to take possession of and to sell the property.

**Compulsory Liquidation**

Compulsory liquidation (or winding-up) involves the appointment by the court of a liquidator, typically upon the application of a creditor, to wind up the company, realise its assets and distribute them to creditors according to their ranking. A winding-up petition is not usually favoured by secured lenders if other more convenient enforcement options are available.

Following the presentation of a winding-up petition and before the winding-up order is made, the court can appoint a provisional liquidator to safeguard the assets of the company where they are determined by the court to be in jeopardy and/or at risk of dissipation.

A liquidator will be subsequently appointed by the court, having regard to the resolutions passed at the first creditors' meeting and the first meeting of contributories (in practice, the contributories are typically the shareholders).

The liquidator controls the liquidation process under the supervision of the court. A creditors' committee (the committee of inspection) may be appointed to work with the liquidator in relation to certain matters. For example, the court or the committee of inspection must approve compromises with creditors and the commencement of litigation. The powers of the company's directors cease when the winding-up order is made.

Secured lenders can enforce their security whilst the company is in liquidation. Although there is an automatic stay of all actions and proceedings against the company, in case court proceedings have to be commenced for a secured lender to enforce its security, it can be anticipated that the liquidator will consent to, or the court will generally allow, the lifting of the stay.

**Creditors' Voluntary Liquidation**

A creditors' voluntary liquidation may be commenced by the passing of a members' special resolution that the company be wound up voluntarily. Such voluntary liquidation would proceed as a creditors' (rather than members') voluntary liquidation if a certificate of solvency to the effect that the company is able to pay its debts in full within the 12 months from the commencement of the winding-up cannot be issued. A meeting of the creditors of the company must be summoned for a date not later than 14 days after the meeting of the company at which the members' resolution for voluntary winding up is to be proposed. Notice of the creditors' meeting must be given to creditors and advertised in appropriate newspapers in the prescribed manner.

A statement of affairs of the company must be tabled at the relevant meeting of creditors and any nomination of a liquidator by the meeting of creditors will prevail over any contrary nomination made by the shareholders.

The directors' powers in relation to the company cease during the period of the liquidator's appointment, except where the committee of inspection, if there is one, or otherwise the creditors, agree that they can continue for limited purposes (i.e. as necessary for enabling the directors to comply with the relevant provision of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (**"CWUMPO"**) or with the court's sanction). Secured lenders can enforce their security whilst the company is in liquidation. While there is no moratorium on proceedings against the company by a secured creditor, the court has a discretion to stay legal proceedings on the application of a creditor, contributory or the liquidator.

There exists an alternative procedure (the **"s228A Procedure"**) that allows the directors to commence a voluntary winding-up without a shareholders' meeting. This type of voluntary liquidation is initiated by a directors' meeting at which it must be resolved, among other things, that the company (i) cannot by reason of its liabilities continue its business; (ii) that the directors consider it necessary that the company be wound up; and (iii) that it would not be reasonably practicable for the company to be wound up under any of the other procedures prescribed by CWUMPO (with reasons provided to support the latter two views). The directors would need to file a winding-up statement with the Hong Kong Companies Registry and meetings of members and creditors would need to be summoned within 28 days of such filing. The s228A Procedure should not be invoked unless there is no other viable way to commence the liquidation. Misuse of this procedure carries a penalty, including a fine and imprisonment, and can potentially invalidate the winding-up process as well as any consequent appointment of liquidators.

 

**Creditors' Scheme of Arrangement**

A creditors' scheme of arrangement is a statutory, binding compromise reached between a company and its shareholders and/or creditors (or one or more classes of them). The procedure is not limited to insolvent companies. However, it is most commonly used in an insolvency context to effect a restructuring of the company's debts. As noted above, it is not an insolvency procedure. A creditors' scheme of arrangement must be (a) approved by a majority in number representing at least 75% in value of the (relevant class of) creditors present and voting, in person or by proxy and (b) sanctioned by the court. The rights of secured and preferred creditors cannot be affected without their consent and thus, secured creditors may enforce their security prior to the scheme becoming effective or otherwise expect to stand outside the scheme. However, once a scheme of arrangement has been sanctioned by the relevant classes of creditors and the court, it will bind all such creditors and may, depending on its terms and subject to approval by its secured creditors, restrict the rights of secured creditors (commonly only relating to the unsecured portion of their claims).

Note that Hong Kong does not currently have any statutory corporate rescue regime or debtor protection insolvency procedure, such as the UK administration order or Chapter 11 of the US Bankruptcy Code, so the rights of security holders are generally unaffected by a liquidation or a scheme of arrangement, because neither a liquidation nor a scheme of arrangement (until implemented) will necessarily preclude security enforcement.

The Hong Kong government has been, since 2020, seeking to finalise a new bill (the **"Bill"**) to introduce, among other things, a new statutory corporate rescue procedure (**"CRP"**) and insolvency trading provisions in Hong Kong.

The Financial Services and the Treasury Bureau (the **"Bureau"**) consulted various stakeholders in Hong Kong and the Bureau introduced the "Legislative Proposal of the Companies (Corporate Rescue) Bill" (the **"Proposals"**) before the Panel of Financial Affairs in the Legislative Council in November 2020. The Proposals aim to provide an option for distressed companies to rehabilitate their businesses and help creditors to achieve a better return than in an immediate liquidation.

Under the Proposals, the members or the directors of the company would be able to pass a resolution to appoint an independent third-party to be the provisional supervisor (**"PS"**). If the company has already entered into liquidation, the provisional liquidator or liquidator would be able to appoint a PS with the leave of the court, provided that they are of the view that the company is insolvent or likely to become insolvent at some future time and provisional supervision is reasonably likely to achieve the statutory objects. At the end of the provisional supervision, the company would be able to enter into a voluntary arrangement, being a rescue plan its PS has prepared.

Creditors holding security over all, or substantially the whole, of a company's property may be entitled to oppose the nomination of the PS, though greater clarity on this aspect may be needed.

Once a company is under provisional supervision, there would be a moratorium on civil proceedings and actions against the company and its property, and generally no application or resolution for the winding-up of the company could be made, although there would be exceptions.

The Proposals also noted that the moratorium would not operate to terminate automatically contracts entered into by the company except that a contractual *ipso facto* clause (that is, broadly, a provision in an agreement which allows its termination due to the insolvency or winding-up of a party) would continue to be enforceable.

The government's aim was to finalise the Bill for introduction to the Legislative Council in the first half of the 2020/2021 legislative session. However, in June 2021, the Hong Kong government indicated that it would continue to engage with stakeholders to refine the legislative instructions, given the complexity of the issues and the different views expressed by the different stakeholders. As at the time of writing, there have been no further updates as to when the Bill will be put on a legislation timetable in the Legislative Council.

## 17. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

The commencement of insolvency procedures generally does not affect a secured creditor's rights to enforce its security, unless the security transaction is voidable or payments can be clawed back by the liquidator (please refer to our response to Question 18 below).

## 18. Please comment on transactions voidable upon insolvency.

**Transactions at an Undervalue (natural person) (s49 Bankruptcy Ordinance (Cap. 6) ("BO"))**

 

Where a debtor, being a natural person, is adjudged bankrupt by the Hong Kong courts and has entered into a transaction with any person at an undervalue within 5 years before the presentation of the bankruptcy petition against him or her which, as a matter of Hong Kong law, constitutes a transaction at an undervalue, it may be set aside on application to the Hong Kong courts by the debtor's trustee in bankruptcy. A debtor, being a natural person, enters into a transaction with a person at an undervalue if:-

a. that debtor makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for that debtor to receive no consideration;
b. that debtor enters into a transaction with that person in consideration of marriage; or
c. that debtor enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by that debtor.

It is also necessary for the trustee in bankruptcy to establish that at the time the transaction took place, the debtor was or became insolvent as a result thereof. If the transaction took place with an associated party with the debtor (within the meaning of s51B of the BO), otherwise than by reason only of being his employee, there will be a presumption that the debtor was insolvent at the relevant time.

**Transaction at an Undervalue (company) (ss265D and 265E CWUMPO)**

Where a debtor, being a company, is wound up by the Hong Kong courts and has entered into a transaction with any person at an undervalue within 5 years before the commencement of the winding-up which, as a matter of Hong Kong law, constitutes a transaction at an undervalue, it may be set aside on application to the Hong Kong courts by the liquidator. A debtor company enters into a transaction with a person at an undervalue if:

a. that debtor company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for that debtor company to receive no consideration; or
b. that debtor company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by that debtor company.

It is also necessary for the liquidator to establish that at the time the transaction took place, the debtor company was, or became in consequence of the transaction, unable to pay its debts (within the meaning of s178 of the CWUMPO). If the transaction took place with a person connected with the debtor company (within the meaning of ss265A(3), 265B and 265C of the CWUMPO) otherwise than by reason only of being its employee, there will be a presumption that the debtor company was unable to pay its debts at the relevant time.

**Unfair Preferences (natural person) (s50 BO)**

A bankruptcy trustee may apply to the Hong Kong courts to set aside a transaction where a debtor is adjudged bankrupt and has given an unfair preference to any person within six months before the presentation of the bankruptcy petition against him or her. A debtor (whether a natural person or a company) gives an unfair preference to a person if:-

a. that person is one of the debtor's creditors or a surety or guarantor for any of the debtor's debts or other liabilities; and
b. the debtor does anything or suffers anything to be done which has the effect of putting that person into a position which, if the debtor is declared bankrupt, will be better than the position that person would have been in if that thing had not been done.

and the debtor was influenced, in deciding to give that unfair preference, by a desire to procure the effect under paragraph (b) above.

In respect of an unfair preference given to an associate of a debtor who is a natural person and who is an associate otherwise than by reason only of being the debtor's employee, the relevant period is extended from 6 months to 2 years and there exists a rebuttable presumption that the debtor had the requisite desire to prefer. Pursuant to s51B of the BO, an associate of a debtor broadly includes, among others:-

i. that debtor's spouse, or a relative, or the spouse of a relative of that debtor or that debtor's spouse;
ii. a person with whom that debtor is in partnership, and the spouse or a relative of the debtor with whom the person is in partnership;
iii. a person whom that debtor employs or is employed by;
iv. a trustee of a trust of which the beneficiaries include, or the terms of the trust confer a power that may be exercised for the benefit of, that debtor or an associate of that debtor;

 

and

v. a company of which that debtor has control or if that debtor and persons who are the debtor's associates together have control of it.

It is also necessary for the trustee in bankruptcy to establish that at the time the preference was given, the debtor was or became insolvent as a result thereof.

**Unfair Preferences (company) (ss266 to 266B CWUMPO)**

A liquidator may apply to the Hong Kong courts to set aside a transaction where a company which is wound up has given an unfair preference to a person within six months before the commencement of its winding-up proceedings. A debtor gives an unfair preference to a person if:-

a. that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities; and
b. the company does anything or suffers anything to be done which has the effect of putting that person into a position which, if the company is going into insolvent liquidation (that is, goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding-up), is better than the position it would have been in if that thing had not been done,

and the company was influenced, in deciding to give that unfair preference, by a desire to procure the effect under paragraph (b) above.

In respect of an unfair preference given to a connected person of the company who is a connected person otherwise than by reason only of being the company's employee, the relevant period is extended from 6 months to 2 years and there exists a rebuttable presumption that the company had the requisite desire to prefer. Pursuant to ss265B and 265C of CWUMPO, a person is connected with a company if he is an associate of a director or a shadow director of the company or an associate of the company.

The definition of "associate" under CWUMPO is broader than that under the BO. A person is an associate of another person if that person:-

i. is a spouse or cohabitant of that other person, or a relative of that other person, or of that spouse or cohabitant, or a spouse or cohabitant of that relative;
ii. is in partnership with that other person, or a spouse, cohabitant or relative of that other person; or
iii. employs or is employed by that other person.

In addition, a person in the capacity as trustee of a trust is an associate of another person if the beneficiaries include, or the terms of the trust confer a power that may be exercised for the benefit of, that other person or an associate of that other person.

A person is an associate of a company if that person is a director, shadow director or other officer of the company. A company is an associate of another company if (i) the same person has control of both; (ii) a person controls one company and his associates control the other company; or (iii) a group of two or more persons controls each company, and both groups consist of the same persons or associates of such persons. A company is an associate of another person if that person has control of the company or that person and persons who are associates of that person together have control of the company.

It is also necessary for the liquidator to establish that at the time the preference was given, the debtor company was, or became in consequence of the transaction, unable to pay its debts (within the meaning of s178 of the CWUMPO).

**Avoidance of Floating Charges (ss267 and 267A CWUMPO)**

To the extent a security document creates a floating charge over the assets and undertakings of a company, the floating charge may be partially or wholly held to be invalid if it is created at a time in the period of 12 months ending with the day on which the winding up of the company commences and the company is at that time, or becomes in consequence of the transaction under which the charge is created, unable to pay its debts (within the meaning of s178 of the CWUMPO), except to the extent of (i) the amount of any new money paid to, or at the direction of, the chargor at the time of, or subsequent to, the creation of the floating charge; or (ii) any property or services supplied to the chargor at the same time as, or after, the creation of the floating charge; and, in each case, interest payable under the terms of the charge or the underlying transaction document at the lesser of the rate specified in the charge or transaction document and 12 per cent per annum.

The relevant period is extended from 12 months to 2 years if the floating charge is created in favour of a person connected with the company as defined in ss265A(3), 265B and 265C of CWUMPO.

 

**Extortionate Credit Transactions (s264B CWUMPO)**

A liquidator may challenge a transaction where credit was provided to the insolvent company on the grounds that it was extortionate. The liquidator or administrator would need to establish that:

- the transaction was entered into in a period of 3 years ending with the day on which the company went into liquidation (the commencement of winding up in voluntary liquidation or the date of the winding up order in the case of compulsory liquidation); and
- having regard to the risk accepted by the credit-provider, the terms of the transaction were such as to require grossly exorbitant payments to be made in respect of the provision of the credit or it otherwise grossly contravened ordinary principles of fair dealing. There is a presumption that the transaction was extortionate, unless the defending credit-provider proves the contrary.

**Fraudulent Conveyance (s60 CPO)**

Any disposition of property made with intent to defraud creditors is voidable on the application of any person prejudiced by the disposition.

**Onerous Property (s268 CWUMPO)**

A liquidator may, with leave of the court, disclaim onerous property held by the insolvent company (for example, land burdened with onerous covenants).

## 19. Is set off recognised on insolvency?

Insolvency set-off is mandatorily applied as at the date of the relevant winding up order. The conditions of provability and mutuality are important features for the application of insolvency set-off.

As regards mutuality, broadly speaking prior to the insolvency (i) there should be only two debtor-creditors and (ii) each claimant is both beneficial owner of the claim owed to it and personally liable on the claim owed by it. Trust arrangements, for example, may displace mutuality.

If a creditor has both secured and unsecured claims, the creditor must, broadly, elect to either:

- surrender his security and prove in the liquidation; or
- set-off only against the unsecured claims.

## 20. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency?

As noted above, the commencement of insolvency procedures generally does not affect a secured creditor's rights to enforce its security.

However, security granted by the company within the "hardening periods" on or before the insolvency of a company would be susceptible to challenge by liquidators and the security interest could be invalidated under the applicable avoidance transaction provisions, such as unfair preference (ss266 to 266B CWUMPO), transaction at an undervalue (ss265D and 265E of the CWUMPO), avoidance of floating charges (ss267 and 267A CWUMPO), extortionate credit transactions (s264B CWUMPO), fraudulent conveyance (s60 CPO), and onerous property transactions (s268 CWUMPO), in which the detailed descriptions are provided in Question 19 above.

In a seller-buyer relationship, a "retention of title" clause (or **"Romalpa clause"**) protects the seller, where title remains with the seller until the buyer pays up the entire purchase price of the goods.

In the context of insolvency, the Romalpa clause may fall short of its purpose should the goods be sold to a third-party *bona fide* purchaser for value without notice of the Romalpa clause.

## 21. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

There is currently no proposal for legal reform which would significantly affect the areas covered in this questionnaire.

## 22. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

Given the size of local deposit that the banks can utilise, the loan market is still dominated by traditional bank borrowings, especially in the case of plain vanilla financing. Credit funds are more active in event-driven

 

financing, e.g. leverage financing or project financing. Given the ability to obtain a large amount of proceeds in a short period of time, some companies (in particular, PRC real estate companies) will also tap the bond market for funds on a regular basis.

### 23. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as new law, regulation or other political factors

i. Given the popularity of offshore financing by PRC enterprises in Hong Kong, the new foreign debt regulation regime of the National Development and Reform Commission of the People's Republic of China (**"NDRC"**) will impact drafting of lending documentation where a PRC or PRC-related enterprise is involved. The NDRC has promulgated the Administrative Measures for the Review and Registration of Medium- and Long-Term Foreign Debt by Enterprises (Order of NDRC No.56) (the **"Administrative Measures"**) on 10 January 2023, which came into effect on 10 February 2023. The new Administrative Measures explicitly cover indirect offshore borrowing by a PRC enterprise, where (a) the enterprise's main business activities are within the PRC, (b) the borrower is an enterprise incorporated outside of the PRC and (c) the borrowing is based on equity interests, assets, revenue or other similar rights of PRC enterprises. The implication is that many enterprises not incorporated in the PRC but conducting business within the PRC may be required to consider whether or not the new Administrative Measures are applicable to their financing plans. Moreover, parties need to factor in sufficient timing for obtaining approval from the NDRC before making any drawdown of loans or issuance of bonds. From the date of acceptance of the requisite application documents, there is a 3-month substantive review process prior to the issuance of a certificate approving the offshore financing. The timeline could be extended if additional disclosure / explanation is required by the NDRC.

ii. In its 2024-2025 Budget, the Hong Kong Government came out with a series of measures to promote green finance and sustainable development, including: the extension of the existing Green and Sustainable Finance Grant Scheme to subsidise the issuance of green and sustainable debts, the launch of Green and Sustainable Fintech Proof-of-Concept Subsidy Scheme to subsidise green fintech initiatives and various policies to encourage the green transition of the shipping and aviation industries. The abundant resources from the Hong Kong Government to promote green and sustainable finance and the effort of industry players to improve sustainability-related loan documentation is likely to further popularise the structuring of green, social and sustainability-linked loans.

iii. On 28 February 2024, the HKMA announced certain adjustments to countercyclical macroprudential measures for property mortgage loans and other related supervisory requirements, due to recent decline in property prices in Hong Kong. These adjustments include:-

   a. Raising the maximum loan-to-value ratio for self-occupied residential properties. After the adjustment, the maximum loan-to-value (**"LTV"**) ratio for self-occupied residential properties with a value of HK$30 million or below will be increased to 70%. For self-occupied residential properties valued at HK$35 million or above, the maximum LTV ratio will be increased to 60%. The maximum LTV ratio for non-self-use residential properties will be increased from 50% to 60%.
   b. Increasing the maximum LTV ratio for non-residential properties from 60% to 70%.
   c. Increasing the maximum LTV ratio for property mortgage loans assessed based on the net worth of borrowers from 50% to 60%. This adjustment is applicable to both residential and non-residential properties.
   d. Suspending the interest rate stress testing requirement for property mortgage lending.
   e. Restoring the financing caps for property development projects back to the pre-2017 levels – the overall financing cap will be increased from 50% of the expected value of the completed properties to 60%, within which the financing cap for the value of the

 

property site will be increased from 40% to 50%, and the financing cap for the construction cost will be increased from 80% to 100%.

Such adjustments would, depending on the credit appetite of lenders, permit borrowers to borrow at higher LTV ratios.

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