COUNTRY COMPARATIVE GUIDES 2024

The Legal 500 Country Comparative Guides

Taiwan

ACQUISITION FINANCE

Contributor

Lee and Li, Attorneys-at-Law

Sarah Wu

Partner | sarahwu@leeandli.com

Andrea Chen

Associate Partner | andreachen@leeandli.com

This country-specific Q&A provides an overview of acquisition finance laws and regulations applicable in Taiwan.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

TAIWAN
ACQUISITION FINANCE

1. What are the trends impacting acquisition finance in your jurisdiction and what have been the effects of those trends? Please consider the impact of recent economic cycles, Covid-19, developments relating to sanctions, and any environmental, social, and governance ("ESG") issues.

Taiwan was severely impacted by Covid-19 in 2021 and there has been a surge in Covid-19 infections during 2022. However, in the post-Covid-19-era, the ongoing or contemplated M&As have not been adversely affected as most of the documents and communication are prepared and done electronically and relevant transaction parties have adapted to the rapidly changing Covid-19 situation. Currently, the M&A market in Taiwan remains cautiously optimistic. In recent years, M&A transactions have been active in the areas of green energy, electronic components, biotechnology and medical, and semiconductors, and the main jurisdictions involved in cross-border M&As have included countries in the Southeast Asia, the Americas, and Japan, alongside with Taiwan.

In addition, it is worth noting that Taiwan embraces ESG as best practice of corporate governance and encourages investments in and financings for companies meeting ESG requirements. In particular, the Financial Supervisory Commission ("FSC") of Taiwan has been promoting responsible investing and sustainable finance (ESG) to encourage major domestic banks to adopt the Equator Principles and commit themselves to the world-renowned benchmark for the finance industry to manage ESG risks. Accordingly, the current trend of domestic lenders is towards avoiding financing companies which mainly identified as inconsistent with sustainable conditions and environmental requirements, violation of human rights, labour and other major social disputes, or under inspections.

2. Please advise of any recent legal, tax, regulatory or other developments (including any reforms) that will impact foreign or domestic lenders (both bank and non-bank lenders) in the acquisition finance market in your jurisdiction.

Legal development

In order to build a friendly environment for international business, the Taiwan Legislative Yuan amended the Taiwan Company Act in 2018 to repeal the recognition mechanism for foreign companies ("2018 Amendment"). Prior to the 2018 Amendment, a foreign company (e.g., bank or non-bank lender) which is not recognised by the Taiwan competent authorities and has not established a branch office in Taiwan in accordance with relevant laws and regulations had no legal capacity to act as a security interest holder in Taiwan. After the 2018 Amendment, foreign lenders may enjoy the same rights and capabilities as local companies without being recognized to act as a security interest holder.

Tax development

Where a lender is a domestic lenders (both bank and non-bank lenders), the interest and fees payable on the loan extended by that lender are subject to profit-seeking enterprise income tax at a 20% tax rate with no withholding tax on the interest or fees it has received.

On the other hand, if a lender is a foreign resident or a profit-seeking entity without an established place of business in Taiwan, the withholding tax rate applicable to a corporate borrower obtaining a loan from that lender is 20% on the interest and fees payable on the loan (if the loan is provided as short-term commercial papers, 15%). This rate could be further reduced to 10% or otherwise following tax treaties that Taiwan has entered into with the relevant country.

In practice, transacting parties would typically include a tax gross-up provision in the financing agreement so that the lender's receipt of payment or repayment would

not be reduced because of the tax withholding requirement.

3. Please highlight any specific high level issues or concerns in your jurisdiction that should be considered in respect of structuring or documenting a typical acquisition financing.

Anti-money laundering and sanctions

Similar to other jurisdictions and international practice, when structuring an acquisition financing in Taiwan, the anti-money laundering and sanctions laws should also be taken into account as the relevant Taiwan regulatory regime and legal requirements have been brought in line with international standards. Such conditions would also form part of the "know your customer" check of the banks in accordance with their respective internal policies.

Foreign investment approval requirement

Where the acquirer is a foreign entity, the acquisition of a Taiwanese entity would require foreign investment approval from the Department of Investment Review ("DIR") of the Ministry of Economic Affairs of Taiwan. Hence, in general practice, obtaining the DIR's approval will be one of the conditions precedent of the first utilisation of an acquisition financing.

Security registration

As mentioned in Question 2, since the 2018 Amendment took effect, a foreign company is not required to be recognised or to set up a branch in Taiwan in order to have the same legal capacity as a local company; thus, legally speaking, it should be able to act as a security interest holder in an acquisition finance. However, according to a ruling issued by the Ministry of Interior dated December 17, 2018, a foreign company that wishes to obtain a real estate mortgage as security still needs to register and have a branch in Taiwan. Although there is no similar ruling in connection with chattel mortgages, the authority in charge of the chattel mortgage adopts the same approach as the Ministry of Interior and requires that a foreign company that wishes to obtain a chattel mortgage as security still needs to register and have a branch in Taiwan. Due to this registration requirement, if there will be mortgages over real estate or chattels in an acquisition financing, a local bank or a foreign bank's Taiwan branch has to be appointed as the security agent to hold the security interest for itself and on behalf of the other lenders.

4. In your jurisdiction, due to current market conditions, are there any emerging documentary features or practices or existing documentary provisions/features which borrowers or lenders are adjusting or innovating their interpretation of, or documentary approach to?

As mentioned above in Question 1, the shift towards electronic documentation and communication has greatly improved the transaction and its closing logistics for both borrowers and lenders. With the streamlined processes, the closing of a transaction becomes more efficient and accessible, and the cost-effectiveness of electronic documentation has reduced the need for paper and physical storage, promoting sustainability. Furthermore, the security measures have been enhanced to protect sensitive and confidential information. Overall, the adoption of electronic methods has greatly improved the borrowing and lending experience for all parties involved.

5. What are the legal and regulatory requirements for banks and non-banks to be authorised to provide financing to, and to benefit from security provided by, entities established in your jurisdiction?

Under Taiwan law, there is no specific regulatory requirement for fund providers and there is no license required to be obtained by a lender before its funding or participation in a financing. However, the following legal and regulatory requirements are worth noting when structuring an acquisition financing in Taiwan.

Restriction on intercompany loans

The Taiwan Company Act provides that a Taiwan-incorporated company's fund shall not be lent to its shareholders or any other person unless the borrower maintains a business relationship with the lender or such lending is necessary short-term financing. Due to this restriction, banks, insurance companies and pawn shops in Taiwan would generally engage in acquisition financing as part of their regular businesses, and non-financial institutions would primarily refrain from entering into any similar arrangement.

Securities registration issues

As mentioned above in Question 3, if the security package of an acquisition financing includes real estate mortgage or chattel mortgage, which requires a registration with the relevant authorities in Taiwan, then

the security holder (i.e., the security agent or the mortgagee) must be a company incorporated or registered in Taiwan. In addition, if the lender(s) will take security over the shares of a listed company, it is also advisable to have a local company or a foreign company's Taiwan branch to be appointed or act as the pledgee of such share pledge for the purpose of registration on the book-entry system of the local securities depository (i.e., the Taiwan Depositary and Clearing Corporation, "TDCC").

6. Are there any laws or regulations which govern the advance of loan proceeds into, or the repayment of principal, interest or fees from, your jurisdiction in a foreign currency?

There are no specific laws or regulations that govern the advance of loan proceeds into, or the repayment of principal, interest or fees from Taiwan in foreign currency from a Taiwan law perspective. However, for foreign debt registration, the Central Bank of the Republic of China ("CBC") stipulates that the total annual remittance directly through authorized banks by a natural person may not exceed USD 5 million and total annual remittance by a juridical person may not exceed USD 50 million. For Taiwanese corporate borrowers who wish to deal with said annual quota, they can register their medium and long-term foreign debt with the CBC in accordance with the Directions for the Declaration of Medium- and Long-Term External Debts by Private Enterprises. For those who have registered their foreign debts accordingly, the converted amount of their repayment of the interest and principal of those foreign debts that exceeds the aforementioned annual quota would not be subject to the requirement of the CBC's approval.

In addition, except for certain limited circumstances provided by law (such as foreign investment approved by the DIR or foreign institutional investors registered with Taiwan Stock Exchange, "TWSE"), a foreign person may, subject to certain requirements but without foreign exchange approval, remit to and from Taiwan foreign currencies of up to USD100,000 (or its equivalent) per remittance if the required documentation is provided to the ROC authorities. This limit applies to remittances involving a conversion between NTD and USD or other foreign currencies. Total remittance exceeding the USD100,000 limit requires prior approval from the CBC.

7. Are there any laws or regulations which limit the ability of foreign entities to acquire assets in your jurisdiction or for lenders to finance the acquisition of assets in your jurisdiction? Please include any restrictions on the use of proceeds.

The Taiwan Statute For Investment By Foreign Nationals and Statute For Investment By Overseas Chinese prohibits foreign investors and overseas Chinese from investing in certain entities where the investment may negatively affect national security, public order, good customs and practices and national health or other entities as prohibited by the law. If a foreign/overseas Chinese investor wishes to invest in accordance with the Statute above, he or she is required to submit an investment application, together with the investment plans and relevant documents, to the competent authority for approval.

In addition, investors from the PRC are subject to different rules and regulations from those applicable to investors from other jurisdictions. In a nutshell, under Taiwan law, the investments made by PRC investors are strictly regulated. The definition of a PRC investor includes (i) any company located in any third area (an area other than the PRC or Taiwan) and invested by PRC persons whereby the shares held or capital contributed directly or indirectly by PRC person(s) in aggregate exceeds 30% of the total number of shares or total amount of capital contribution of said third-area company, or (ii) any PRC person who has control over said third-area company. Generally speaking, when the majority of the board consists of PRC citizens, the company would be deemed a statutory-defined PRC investor.

PRC investors' investment in Taiwan must obtain the prior approval from the DIR and all of the businesses of the Taiwanese company must be listed in the Positive List promulgated by the Executive Yuan, and such investment is subject to restrictions applicable to a specific industry/business sector as set forth in said Positive List.

8. What does the security package typically consist of in acquisition financing transactions in your jurisdiction and are there any additional security assets available to lenders?

In acquisition financing transactions, the security package typically consists of (i) pledge over shares of the borrower, its holding company (if available), and the target, (ii) pledge over deposits in bank accounts, (iii) pledge or assignment of receivables, (iv) pledge over

intellectual property rights, (v) mortgage over real estate, and (vi) mortgage over movable assets, each as briefly explained below:

Shares

Security interest is commonly created over shares in certificated and scripless form by entering into a share pledge agreement between the pledgor and the pledgee. A Taiwanese public company is obliged to issue the former type of shares to its shareholders, whereas a Taiwan-incorporated private company may freely determine whether it will issue share certificates in certificated or scripless form to its shareholders.

Bank accounts

The accounts of the borrower or security providers (or, more precisely, the cash deposits maintained in the relevant bank account) are usually required to be pledged to control the fund flows. In terms of formality, the pledgee and pledgor must enter an account pledge agreement that identifies the name of the account, the account number and the bank with which the account is maintained, and such pledge will not become enforceable against the account bank until the account bank is notified of its creation.

Receivables

Security interests over receivables (which should be assignable) are commonly created by a pledge or assignment agreement in Taiwan. Take assignment, for instance, the assignment of receivables is effected between the assignor and assignee when the assignment is agreed upon by both parties. However, as a matter of law, the pledge or assignment can only be enforceable against the debtor of the pledged or assigned receivables after a notice of pledge or assignment is delivered to the debtor.

Intellectual property rights

Security interests over intellectual properties are commonly created by a written pledge agreement, and intellectual properties that can be pledged include patents and trademarks. The Taiwan Patent Act provides that the pledgee is not allowed to practice the pledged patent unless it is expressly provided in the agreement. Such pledge must be recorded with the Intellectual Property Office in Taiwan with the required documents in order to establish a valid defence against a third party.

Real estates

If the borrower or any of its subsidiaries (after the acquisition) owns valuable real estate (such as land and buildings) in Taiwan, a first priority ranking real estate mortgage is usually preferred by the lenders as the value of real estate is relatively stable compared to shares or intangible assets.

Movable assets

For security over inventory and movable assets, such as machinery and equipment, the security may be created in the form of a chattel mortgage in accordance with the Personal Property Secured Transactions Act of Taiwan. A chattel mortgage would allow the mortgagor to retain possession and use of the chattel that is mortgaged and at the same time allow the mortgagee to have a security interest over the chattel without having physical possession thereof. In order to perfect a chattel mortgage, the mortgagee and the mortgagor must execute a chattel mortgage agreement and file a registration application with the authority.

9. Does the law of your jurisdiction permit (i) floating charges or any other universal security interest and (ii) security over future assets or for future obligations?

Taiwan law does not recognise the concept of “floating charge”, “all-asset lien”, or “general security.” The security provider and the security interest holder must enter into an agreement to identify the specific asset over which the parties contemplate creating the security.

With respect to security over future assets or for future obligations, it is controversial under Taiwan law whether a right to be generated in the future can be assigned in advance. For instance, receivables are commonly created by a pledge or assignment agreement in Taiwan. However, in the event that the seller and debtor have an on-going business from which receivables are generated from time to time and the seller wishes to assign the existing and future receivables to a bank, in practice, the parties to the assignment agreement would generally stipulate their agreement on assigning the future receivables, and the assignment of the future receivables will be documented in a written confirmation when they come to exist so as to tackle the issue of security over future assets.

10. Do security documents have to (by law) include a cap on liabilities? If so, how is this usually calculated/agreed?

In general, there is no statutory cap on liabilities in creating a security or providing a guarantee. However,

the Taiwan Civil Code provides that the parties to a security or guarantee agreement may agree on a maximum amount of liabilities for which the security or guarantee secures. While the amount may be freely agreed by and between the parties, in practice, the maximum amount for a first ranking mortgage would usually be 1.2-1.5 times the financing amount or value of the mortgaged properties.

11. What are the formalities for taking and perfecting security in your jurisdiction and the associated costs and timing? If these requirements are different for different asset classes, please outline the main points to note for each of these briefly.

In Taiwan, the formalities for taking and perfecting security generally include the execution of a written security agreement and if applicable, the delivery of a notice to the debtor of the assigned or pledge receivables or contractual rights. In addition:

Real estate

With respect to security over real estate, the mortgagor and the mortgagee are required to execute a standard form of mortgage agreement, which is separate and different from the private mortgage agreement and is required by the local land registry, and register the mortgage with the local land registry. Such form must be made in Chinese and filed with the land registry where the mortgaged property is located.

Movable assets

For security over movable assets, the mortgagor and the mortgagee are required to fill in certain forms prescribed by the authority and submit the same for registration. The required information for the registration application generally includes the name, the type, the brand, the manufacturer, the number of pieces, the value and the location of the mortgaged movable assets as required by the authority.

Share pledge

For companies issuing shares in scripless form, the pledge of such shares shall be transferred through the book-entry system of the local securities depository (i.e., the Taiwan Depositary and Clearing Corporation, "TDCC"). For the creation and perfection of the pledge, the pledgor and the pledgee would be required to sign and execute a TDCC standard form and register it with the TDCC instead of endorsing and delivering the actual shares.

12. Are there any limitations, restrictions or prohibitions on downstream, upstream and cross-stream guarantees in your jurisdiction? Please also provide a brief description of any potential mitigants or solutions to these limitations, restrictions or prohibitions.

There is no specific restriction on providing upstream security under Taiwan law. However, it is worth noting that pursuant to the Taiwan Company Act, a director shall faithfully conduct the business of the company and has a duty of care as well as a fiduciary duty to act as a good administrator for the benefit of the company. In the context of acquisition financing, a director voting for a grant of security in favour of the lenders should demonstrate the benefit of such decision, whether direct or indirect, to the company. This corporate benefit requirement is reviewed on a case-by-case basis and to prevent the risk of being challenged for breach of fiduciary duty. The perceived benefits should be recorded in the board meeting minutes. In practice, when there is any doubt about the corporate benefit of providing security, it is always advisable to obtain an unanimous shareholder resolution to mitigate the risk of any minority shareholder's claims for damage.

13. Are there any other notable costs, consents or restrictions associated with providing security for, or guaranteeing, acquisition financing in your jurisdiction?

Under the Taiwan Company Act, unless otherwise permitted by relevant laws and regulations (such as a bank as permitted under the Banking Act) or its Articles of Incorporation ("AoI"), a Taiwanese company shall not act as a guarantor. If the AoI places any restrictions on the proposed guarantor, an amendment is required prior to such company acceding as an additional guarantor. In addition, if a public company wishes to act as a guarantor, it shall also comply with its internal regulations, such as the Rules for Endorsements and Guarantee. The Taiwan courts have ruled that if a company provides its assets as security for others (e.g., chattel mortgage over equipment), the provision by its nature is not different from providing suretyship for others and acting as a guarantor and, therefore, shall also be subject to the aforementioned restriction. Furthermore, representatives of a juridical person agreeing to be the guarantor of the obligation of the juridical person are liable only for the obligation of the juridical person occurring within the duration of their offices. As such, the lender may, if applicable, ask the company to appoint a successor to act as a guarantor.

14. Is it possible for a company to give financial assistance (by entering into a guarantee, providing security in respect of acquisition debt or providing any other form of financial assistance) to another company within the group for the purpose of acquiring shares in (i) itself, (ii) a sister company and/or (iii) a parent company? If there are restrictions on granting financial assistance, please specify the extent to which such restrictions will affect the amount that can be guaranteed and/or secured.

In Taiwan, no specific prohibition on financial assistance currently exists. However, a company must comply with relevant requirements of the Taiwan Company Act, when providing financial assistance. In general, where a company intends to give financial assistance by lending money, it can only do so if the company and the borrower has (1) a business relationship or (2) a short-term financing need (the latter is further subject to a 40% net worth cap with respect to the lending company). The purpose of these restrictions is to prevent illegal use or dissipation of funds and to ensure that a company keeps sufficient funds so as to protect the rights and interests of its shareholders and creditors.

As for giving financial assistance by providing guarantee or security, a company can only do so if it is permitted by law or the company's articles of incorporation. The same restriction applies to the provision of security. In other words, if a company wishes to act as a guarantor or to provide its assets as security for the benefit of the buyer in an acquisition, no matter the purpose of which is to acquire shares in itself, a sister company and/or a parent company, it must follow the requirements under its articles of incorporation and obtain the approval of the board of directors. To determine whether the company should provide financial assistance, the board of directors must consider whether this arrangement is in line with the best interests of the company. If the buyer only purchases a part of the target's shares, rather than all of its shares, the transaction will benefit certain specific shareholders, and the target's directors will need to find compelling reasons to support their decision. From this point of view, it would be easier to justify the provision of financial assistance in an acquisition of all the target's shares.

15. If there are any financial assistance issues in your jurisdiction, is there a procedure available that will have the effect of making the proposed financial assistance possible (and if so, please briefly describe the procedure and how long it will take)?

As mentioned above in Question 14, the approval of the board of directors is usually required for the company to provide guarantee or its assets as security. If its articles of incorporation does not allow such financial assistance, an amendment to the articles of incorporation would also be required. As the amendment has to be approved by the board of directors as well as the shareholders meeting, it normally would take about 1-2 weeks for a private company and 3-5 weeks for a listed company to complete the procedure depending on the size and shareholder structure of the company.

16. If there are financial assistance issues in your jurisdiction, is it possible to give guarantees and/or security for debt that is not pure acquisition debt (e.g. refinancing debt) and if so it is necessary or strongly desirable that the different types of debt be clearly identifiable and/or segregated (e.g. by tranching)?

As mentioned above in Question 14, there is no specific statutory restriction prohibiting a company from offering financial assistance to a buyer in an acquisition. Therefore, it is possible to give guarantees and/or security for debt that is not pure acquisition debt (e.g. refinancing debt) under Taiwan law. However, as the company has to obtain its internal approval from the board of directors, it is advisable to segregate different types of debt (e.g. by tranching) so that the purpose of each type of debt can be clearly identified and considered.

17. Does your jurisdiction recognise the concept of a security trustee or security agent for the purposes of holding security, enforcing the rights of the lenders and applying the proceeds of enforcement? If not, is there any other way in which the lenders can claim and share security without each lender individually enforcing its rights (e.g. the concept of parallel debt)?

The concept of a "security agent" is recognized under

Taiwan law in the context of a "joint and several creditor" relationship but no security "trustee" concept exists from a Taiwan law perspective. A bank acting as a "trustee" shall be regulated by the Taiwan Trust Enterprise Act and such context is different from what we would normally see in financing markets.

As a general practice in Taiwan, syndicate member banks will appoint an agent bank (i.e., "security agent", not a "trustee") to act for and on behalf of the syndicate member banks, including registering the agent bank as, for instance, a mortgagee and foreclosing the mortgaged property. From the Taiwan law perspective, there shall be a clause in the syndicated loan agreement to the effect that the syndicate member banks' claims against the borrower under the syndicated loan agreement are joint and several and the security agent may claim the full amount of the loan from the borrower, enforce the security, and apply the proceeds from the security to the claims of all the lenders.

Nevertheless, it is questionable whether or not a third party, who is not a creditor/lender, could validly hold the collateral as a trustee or a security agent for other creditors/lenders under Taiwan law. Pursuant to the Taiwan Civil Code, a mortgage/pledge would not be validly created in favour of the creditor/mortgagee/pledgee if the mortgagee/pledgee does not have underlying credit against the debtor. Therefore, if a security agent (or a "security trustee" under the laws of other jurisdiction) is not having a joint and several creditor relationship with other lenders, it may not be able to hold the security interest for and on behalf of the finance parties from the Taiwan law perspective.

18. Does your jurisdiction have significant restrictions on the role of a security agent (e.g. if the security agent in respect of local security or assets is a foreign entity)?

Under Taiwan law, there are no significant restrictions on the role of a security agent. However, if there is any security interest which requires registration with local authorities (e.g., pledge over shares of a listed company to be registered with the TDCC, mortgage over real estate or chattels required to be registered with the relevant authority), it is advisable to appoint a domestic local bank or a foreign bank's Taiwan branch to be the security agent for the ease of registration.

19. Describe the loan transfer mechanisms that exist in your jurisdiction and how the benefit of the associated security package can be transferred.

According to the Taiwan Civil Code, the assignment of a right/claim under a contract (including a loan transfer) is prohibited if (i) such assignment shall not be permitted due to the nature of the relevant right/claim; (ii) the parties have agreed that the right/claim shall not be assigned (provided that the contractual restriction shall not be effective against any bona fide third party); or (iii) the claim is exempt from attachment by courts pursuant to applicable law. For the above (i), if a right/claim arises only from an individual's particular status and can be made only by such person due to such status, the right/claim will fall into this category. In addition, the assignment of a right/claim will not be effective against the debtor until the debtor has been notified of such assignment.

In general, loan transfer mechanisms should be subject to the aforementioned requirements and, procedure wise, be similar to and follow the formalities under the standard form published by the Asia Pacific Loan Market Association ("APLMA"). By entering into a transfer/assignment agreement, the existing lender may assign all or part of its rights (and, if so agreed by the obligors, its obligations) to a new lender, and any guarantee or security interests will be automatically transferred on a pro rata basis.

20. What are the rules governing the priority of competing security interests in your jurisdiction? What methods of subordination are used in your jurisdiction and can the priority be contractually varied? Will contractual subordination provisions survive the insolvency of a borrower incorporated in your jurisdiction?

General principle

Security interests, such as a pledge or a mortgage, will have priority over other claims or rights of the borrower's creditor unless otherwise provided by mandatory provisions of laws. The sale proceeds of the mortgaged or pledged property in a court compulsory execution proceeding will be allocated and distributed in accordance with the following order:

(i) expenses paid by the pledgee or the mortgagee for the compulsory execution proceedings; (ii) applicable taxes having priority over the security interest under mandatory provisions of laws; (iii) statutory security interest; (iv) the mortgagee or pledgee of the property;

(v) certain labour claims if the employer winds up or liquidates its business or has been adjudicated bankrupt; (vi) applicable taxes, if any, having no priority over the security interest; and (vii) unsecured creditors.

Subordination agreement

In the case of unsecured financing, the lender in practice would require that the borrower enter into a subordination agreement with the borrower's shareholders or affiliates so that the unsecured loans provided by these persons to the borrower will be subordinate to the loan provided by the lender. Unlike a security interest having priority over unsecured debts of the borrower, the subordination agreement is merely the contractual undertaking of the borrower and its shareholders or affiliates, and does not have the effect of priority preferred by law. Therefore, the contractual subordination provisions will not survive the insolvency of a borrower incorporated under Taiwan law.

21. Is there a concept of "equitable subordination" in your jurisdiction whereby loans provided by a shareholder (as a creditor) to a company incorporated in your jurisdiction are subordinated by law upon insolvency of that company in your jurisdiction?

The Taiwan Company Act has adopted equitable subordination rules by stipulating that if a controlling company has caused, directly or indirectly, its subordinate company to conduct any business contrary to normal business practice or not profitable, and if the controlling company has a claim on said subordinate company, then the controlling company shall not claim for offsetting such claim against its indemnification liability, if any, to the subordinate company. In addition, in case the subordinate company enters into bankruptcy or composition procedures under the provisions of the Bankruptcy Act of Taiwan or enters into the process of reorganisation or special liquidation of its company in accordance with the Company Act, the aforementioned claim, with or without the right to exclusion or priority, shall be satisfied in the order second to all other obligatory claims of the subordinate company.

22. Does your jurisdiction generally (i) recognise and enforce clauses regarding choice of a foreign law as the governing law of the contract, the submission to a foreign jurisdiction and a waiver of immunity and (ii) enforce foreign judgments?

Choice of a governing law

The parties to a corporate acquisition financing transaction may freely choose a governing law as agreed upon and are not mandatorily required to choose Taiwan law except for certain security documents such as real estate and chattel mortgage agreements. In practice, domestic banks prefer to choose the laws of Taiwan as the governing law, while international banks would opt for the laws of England, New York, Singapore or Hong Kong on the grounds of familiarity and ease in the further distribution in the global secondary market. However, for certain security (such as real estate mortgages and chattel mortgages), the governing law should be the laws of the jurisdiction where such security is located.

Enforce foreign judgements

Under Taiwan law, any final judgment made by a foreign court will be recognized and enforceable in Taiwan without review of the merits only when the Taiwan court in which the enforcement is sought is satisfied that:

(i) the foreign court rendering the judgment had jurisdiction over the subject matter according to the laws of Taiwan;

(ii) the foreign judgment is not contrary to the public order or good morals of Taiwan;

(iii) if the foreign judgment was rendered by default by the foreign court, the defendant was personally served while within the jurisdiction of such foreign court, or the process was served on the defendant with the judicial assistance of the ROC; and

(iv) judgments of the Taiwan courts are recognized by such foreign court on a reciprocal basis.

23. What are the requirements, procedures, methods and restrictions relating to the enforcement of collateral by secured lenders in your jurisdiction?

Security will normally become enforceable in accordance with the terms set forth in the relevant security document. Subject to the different types of security and the contractual arrangements provided in the security documents, enforcement procedures may generally be implemented as follows:

Public auction

Real estate mortgage is generally enforced through court auction in accordance with the Taiwan Compulsory Enforcement Act. The mortgagee must obtain an execution title issued by the court prior to the court enforcement action. After the conclusion of the auction, the ownership of the real estate would be transferred to the winning bidder, and the unpaid loans should be satisfied by the mortgagee receiving proceeds from the sale of the real estate.

Private auction

The pledgee or mortgagee may also sell the security (e.g., mortgaged chattels or real estate) to a third party through a private auction, which does not require the involvement of a court or the need for a public auction. However, the pledgee/mortgagee must seek to obtain a fair market value for the security and follow the correct procedural steps to effect the sale. In this respect, usually, the parties would agree in the relevant security agreement that the pledgee/mortgagee is authorised to sell the security to a third party on enforcement.

Title transfer

The Taiwan Civil Code provides that if the agreement on title transfer has been duly registered with the authority at the time the security becomes enforceable, making such agreement public and known to third parties, the ownership of the mortgaged property may be transferred to the mortgagee if the mortgagor or the debtor fails to pay or defaults, enabling the mortgagee to enforce such security.

Assignment of contractual rights

By entering an assignment agreement with the borrower, the ownership of the security or pledges of personal property may be transferred to the lender and thus enable the lender to enforce the security or become a contracting party itself. Where the security is created by way of assignment (e.g., assignment of insurance or material contracts), the enforcement action can be conducted without going through court proceedings as the assignee is entitled to exercise and enforce the rights upon assignment. Time wise, the assignment will take effect once the assignment agreement is duly executed by the parties thereto and the relevant notice of assignment is delivered to the counterparty to the project document. In practice, the assignor and assignee should agree that prior to notification of the occurrence of an event of default, the assignor can still exercise its rights as if it is still the party to the assigned contract; but if notified that an event of default has occurred and is continuing, the assignee may exercise the rights under the assigned contracts.

24. What are the insolvency or other rescue/reorganisation procedures in your jurisdiction?

Taiwan law provides for a reorganisation proceeding, which is by and large similar to the “chapter 11 proceedings” used in the US if a company is in financial difficulty, ceases its business or is likely to cease operations but is able to be re-established. The company or its shareholder(s) or creditors meeting the qualification requirements provided under the Company Act may apply with the court for a reorganisation proceeding. A reorganisation plan, which normally contains a restructuring of the company’s debts, will be prepared by the reorganisation administrators and should be agreed by the secured creditors’ meeting, unsecured creditors’ meeting and shareholders’ meeting, and subsequently approved by the court. The shareholders’ meeting will not have a voting right if the company does not have net assets. The reorganisation plan approved by the court is binding on the company and all its creditors and shareholders.

25. Does entry into any insolvency or other process in your jurisdiction prevent or delay secured lenders from accelerating their loans or enforcing their security in your jurisdiction?

As the secured creditors are entitled to enforce their rights over the collateral without going through the bankruptcy procedure, entry into any insolvency or other process under Taiwan law would not prevent or delay secured lenders from accelerating their loans or enforcing their security in Taiwan. If the sale proceeds available from the enforcement are insufficient to repay the debt in full, the secured creditors may then participate in the bankruptcy procedure for the distribution for any unpaid portion of the debt as unsecured creditors.

26. In what order are creditors paid on an insolvency in your jurisdiction and are there any creditors that will take priority to secured creditors?

When a debtor is in insolvency proceedings, the priority of payments is generally as follows:

- **Liquidators**: the costs and expenses incurred by the liquidators in the liquidation proceedings. These are preferential debts that take priority to any forms of secured or

unsecured debts.

- **Tax authorities**: overdue taxes. These are also preferential debts that take priority to any forms of secured or unsecured debts (other than the costs and expenses incurred by the liquidators).
- **Secured creditors**: for example, a pledgee and mortgagee who may claim a preferential payment on the amount of proceeds derived from the enforcement of pledged/mortgaged property.
- **Unsecured creditors**.
- **Shareholders**: the residual or surplus will be distributed among the shareholders or contributors in accordance with the rights attached to their shares/contributions.

27. Are there any hardening periods or transactions voidable upon insolvency in your jurisdiction?

For borrowers becoming insolvent during the acquisition process, the Bankruptcy Act of Taiwan incorporates the claw-back rules expressly, providing that the lender could request the Taiwan court to revoke a transaction conducted by the borrower before it declared bankruptcy. The bankruptcy administrator may, within six months of the bankruptcy adjudication, apply to the court for the invalidation of the following acts of the debtor: (1) provision of security for outstanding debts within six months prior to the bankruptcy adjudication; and (2) repayment of the debts not yet due. In addition, the bankruptcy administrator shall, within two years after declaration of the bankruptcy proceeding, file with the court to rescind the transaction that the bankrupt conducted with or without consideration before the bankruptcy proceeding if such transaction is deemed detrimental to the rights of the bankrupt's creditor and is revocable under the Civil Code of Taiwan.

28. Are there any other notable risks or concerns for secured lenders in enforcing their rights under a loan or collateral agreement (whether in an insolvency or restructuring context or otherwise)?

Under Taiwan law, natural persons, juristic persons, partnerships and any other incorporated association with a representative or an administrator are subject to bankruptcy adjudication. An unincorporated association without a representative or administrator is excluded from a bankruptcy proceeding, and there is no special legislation applicable to such an entity.

In addition, although the lender and the borrower may sign an agreement pursuant to which the ownership of the mortgaged or pledged security will be transferred to the mortgagee or pledgee automatically when the borrower defaults (e.g. under bankruptcy/restructuring proceeding), in the case of a mortgage-backed security, such agreement to transfer cannot be enforced against a bona fide third party unless the mortgage is registered with the competent authorities.

In the context of reorganisation, the execution of the reorganisation plan should be completed within one year after the date of the court's approval pursuant to Taiwan law. The court may extend the one-year period on an application by the reorganiser(s) with prior consent of the reorganisation supervisor. Failure to timely execute the entire reorganisation plan may result in the termination of the company's reorganisation proceedings. If the company's assets are not sufficient to pay off its debt, the court will declare the company bankrupt.

On a related note, secured lenders may enforce against the debtors in Taiwan after obtaining a favourable final court judgment. While there are no specific local regulations or rules relating to debt recovery by foreign creditors and they should in general have the same rights as domestic lenders do, it is worth noting that since the proceeds received by a foreign lender from local enforcement proceedings would usually be in New Taiwan Dollar (TWD), the conversion of such proceeds into foreign currency will be further subject to the annual quota and approval from the CBC as mentioned above in Question 6.

29. Please detail any taxes, duties, charges or related considerations which are relevant for lenders making loans to (or taking security and guarantees from) entities in your jurisdiction in the context of acquisition finance, including if any withholding tax is applicable on payments (interest and fees) to lenders and at what rate.

Under Taiwan law, stamp duty is imposed on documents including receipts for monetary payments, deeds for the sale of movables, contracts for work-for-hire, and contracts for sale, transfer or partition of real property executed in Taiwan. Where a finance document in an acquisition financing deal bears characteristics of any of the aforesaid documents, it would be subject to stamp tax.

In addition, according to Article 88 of the Income Tax Act, any interests, participation fees, and any payments other than principal to an offshore individual or enterprise will be subject to a withholding tax, which is generally 20% deducted at the time of payment, unless a favorable rate of withholding tax may apply under a tax treaty between the place/country the offshore lender resides and Taiwan.

30. Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?

The Income Tax Act of Taiwan stipulates that from 2011, excess interest shall not be considered as an expense or loss if the proportion of related party debt to equity of a profit-seeking enterprise exceeds a specified ratio, and the entity shall, when filing its tax return, disclose the information regarding the debt-to-equity ratio of the debt owed to related parties and other relevant information in its annual income tax return; provided however that, banks, credit cooperatives, financial holding companies, bills finance companies, insurance companies and securities firms would not be subject to such rules.

31. What is the regulatory framework by which an acquisition of a public company in your jurisdiction is effected?

There are several industries which are heavily regulated under Taiwan law, including but not limited to financial institutions, telecommunications companies, broadcasting companies, trust businesses, securities investment trust enterprises, foreign exchange brokers and electricity enterprises. The relevant laws and regulations generally require that the acquisition of such companies and enterprises shall obtain prior approval from the competent authorities, or there would be certain investment limitations on the targets.

In Taiwan, requirements for the acquisition of public companies are mostly identical to those applicable to private companies, though the former is generally subject to certain laws and regulations that safeguard the integrity of the acquisition process and the rights of minority shareholders.

32. What are the key milestones in the timetable (e.g. announcement, posting of documentation, meetings, court hearings, effective dates, provision of consideration, withdrawal conditions)?

In the event that the target public company is listed on the Taiwan Stock Exchange (TWSE) or Taipei Exchange (TPEx), a take-private acquisition would be subject to rules governing the delisting process, and an acquisition of 20% or more of the total issued shares of such public company within a period of 50 days will be further subject to the Regulations Governing Tender Offers for Purchase of the Securities of a Public Company (“Tender Offer Regulations”). These laws and regulations could lead to variations in terms of the financing timeframe, the structure of fund utilisation or the conditions precedent, all of which should be considered when structuring the financing deal.

Take tender offer for instance. The offeror may launch a tender offer only after it has filed the tender offer to the FSC and announced the same along with the required documents (including, among others, the reporting form, tender offer prospectus, legal opinion, and proof of payment of consideration) in accordance with the Tender Offer Regulations. No court hearing is required during the process but the offeror must announce, among others, any change in the conditions, the achievement of minimum acceptance threshold, and the completion of the tender offer. As payment of the consideration shall be made on the completion of the tender offer, any conditions precedent of utilisation must be met prior to or at least on the completion date. If the offeror fails to acquire the proposed number of shares within the tender offer period or suspension of the tender offer is approved by the competent authority, the offeror may not re-launch a tender offer on the same target company within one year therefrom.

33. What is the technical minimum acceptance condition required by the regulatory framework? Is there a squeeze out procedure for minority hold outs?

Pursuant to the Taiwan Securities and Exchange Act, a mandatory tender offer would be triggered by an acquisition of 20% or more of the total issued shares of a public company within a period of 50 days. In addition, the use of consideration other than cash in tender offers is permitted by the FSC, such as domestic or foreign securities that satisfy certain requirements prescribed by the FSC as consideration; provided that stocks traded on PRC stock exchanges may not be accepted as consideration for a tender offer; moreover, properties of an offer can be used as consideration if approved by the FSC on a case-by-case basis.

While there is no squeeze-out procedure that applies to

tender offers under Taiwan law, a squeeze-out may take place following a merger, in which the dissenting minority shareholders may request the company to buy back their shares at a "fair price". The price may be negotiated between the company and the shareholders, and if no agreement can be reached, the company may apply to the competent court for deciding a fair price.

34. At what level of acceptance can the bidder (i) pass special resolutions, (ii) de-list the target, (iii) effect any squeeze out, and (iv) cause target to grant upstream guarantees and security in respect of the acquisition financing?

As the minority squeeze-out provisions are not stipulated in the Company Act of Taiwan, the public company acquisition and the terms are still required to be approved by the shareholders of the target company with:

- a majority vote at the shareholders' meeting, which requires the attendance of shareholders representing two-thirds or more of the total number of the company's issued shares; or
- a super-majority vote (where applicable) at the shareholders' meeting attended by shareholders representing a majority of the total number of the company's issued shares.

Once the attending shareholders approve the acquisition and terms, all shareholders of the target company are bound by the approval of the proposed acquisition. As such, a public company may conduct a cash merger/cash-share exchange to squeeze out its minority shareholders and file an application to delist the listed target from the TWSE/TPEx by obtaining approval from the shareholders meeting said quorum requirements and voting thresholds. However, if the acquiring company holds 90% of the target company's shares, the acquisition can be carried out with the approval of both companies' boards of directors without the shareholders' approval.

In addition, the shareholders' approval is often structured as the condition precedent for utilising funds in the acquisition financing context. In Taiwan, transacting parties would typically agree that substantial parts of the acquisition funds cannot be utilised unless the necessary shareholder approval is duly obtained.

35. Is there a requirement for a cash confirmation and how is this provided, by who, and when?

For acquisition involving tender offer, according to relevant Taiwan law, the competent authority will require the acquirer to provide documents evidencing the certainty of funds when the application for the tender offer is submitted for approval. Such required information typically includes, without limitation, the financing amount prepared or obtained by the acquirer for the proposed tender offer and the identity of the party that provides or structures the financing arrangement. On the other hand, as no regulatory approval is required for non-tender-offer acquisitions (e.g., done through merger or share swap), no review of the certainty of funds would be required given that such acquisition is purely private between the parties.

36. What conditions to completion are permitted?

There is no specific regulation prohibiting the parties from agreeing on certain conditions precedent to completion. In practice, the legal implications of conditions to completion are examined and agreed on a case-by-case basis. In an acquisition financing, the commonly seen conditions precedent include, among others: (i) required regulatory approvals for the acquisition to complete; (ii) necessary corporate actions; (iii) all material third-party consents obtained; (iv) legal opinions regarding the confirmation of the capacity and authority of the obligors entering into the finance documents, the validity and enforceability of the finance documents; and (iv) no material adverse effect and no event of default.

Contributors

Sarah Wu
Partner
sarahwu@leeandli.com

Andrea Chen
Associate Partner
andreachen@leeandli.com