



**COUNTRY
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Taiwan

LENDING & SECURED FINANCE

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

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TAIWAN

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?

There is no particular licensing or regulatory requirement or restriction on a foreign lender or non-bank lender for making a loan to Taiwanese borrowers outside of Taiwan. Nevertheless, a foreign company is not allowed to operate any business in Taiwan without setting up a branch in Taiwan. Thus, if lending is the foreign company's business, making a loan to Taiwanese borrowers by the foreign company which does not have a branch in Taiwan on a repeated and continuous basis may violate the Company Act. Furthermore, in the case of a foreign loan to a Taiwanese borrower, the foreign exchange control would apply unless such foreign debt has been registered with the Central Bank of the Republic of China (Taiwan) ("CBC") by the Taiwanese borrower.

According to a ruling issued by the Ministry of Interior dated December 17, 2018, a foreign company which wishes to obtain a real estate mortgage as security needs to register and have a branch in Taiwan. Although there is no similar ruling in connection with chattel mortgage, as of now, in practice, a foreign company without a branch in Taiwan still has to register and have a branch in Taiwan in order to obtain a chattel mortgage.

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

According to Article 205 of the Civil Code, if the agreed interest rate exceeds sixteen percent (16%) per annum, the portion exceeding 16% is null and void.

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?

Under the foreign exchange related laws and regulations, a Taiwanese corporate entity or individual has an annual foreign exchange quota of US\$50 million (or its equivalent) or US\$5 million (or its equivalent), respectively, but the CBC has the sole discretion to, from time to time, determine such other amounts of annual quota in consideration of Taiwan's economic and financial conditions or the need to maintain the order of the foreign exchange market in Taiwan. No prior approval from the CBC is required if the Taiwanese onshore borrower converts New Taiwan Dollars into foreign currency for remittance to the offshore lender or vice versa, and the conversion does not exceed the above quota. If the onshore Taiwanese guarantor's quota would be exceeded for such conversion, the CBC has the sole discretion to grant or withhold its approval on a case-by-case basis.

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 the assets listed in above items i through v. The procedure to create security over these assets is different from each other. There is no floating charge under Taiwan law.

Item i: real property (land) and plant

The security to be created on real property (land) and plant is mortgage. To create a valid mortgage over real property (land or plant), the mortgagor and the mortgagee shall enter into a written agreement and a

registration with the competent land office is required.

Item i: machinery and Item ii: equipment

Machinery is generally not deemed as real property but movable property. The security to be created on the movable property such as machinery and equipment is pledge or chattel mortgage, and both security interests give the security interest holder priority over such properties. A pledge is created by a written agreement and physical delivery of the secured property, and such security is perfected through the pledgee's possession of the pledged property, but no registration with the competent authority is required. To create a chattel mortgage, the mortgagor and the mortgagee has to enter into a written agreement. Registration with the competent authority is required for the mortgagee to claim the chattel mortgage against a bona fide third party. However, the mortgagor need not deliver the possession of the mortgaged property to the mortgagee.

Item iii: inventory

As a general rule, the security provider and the security interest holder should enter into an agreement to identify the specific asset subject to the security interest. A general security agreement without identifying the specific asset and amount, such as a floating charge, is not enforceable under Taiwan law. In addition, different types of assets may be subject to different requirements, such as registration or filing with the competent authorities, on the perfection of the security. Therefore, unless the inventory can be ring-fenced, a floating charge over the inventory is not enforceable under Taiwan law. If the inventory can be ring-fenced, a pledge or a chattel mortgage may be created over such inventory (please see the preceding paragraph for the difference between pledge and chattel mortgage).

Item iv: receivables

In general, a pledge is created over receivables. The pledgee and the pledger shall enter into a written agreement to create a pledge over receivables, and such receivables must be identifiable according to the content of the pledge agreement. In addition, the obligor shall be notified of the creation of the pledge for the pledgee to be able to claim the pledge against the obligor.

Item v: shares in companies incorporated in Taiwan

According to the Company Act of Taiwan, a pledge can be created over the shares of a company incorporated in Taiwan. A private company may determine at its discretion whether it will issue share certificates to its shareholders, and if so, the share certificates will be in

certificated or scripless form. On the contrary, a public company is obligated to issue share certificates to its shareholders but the share certificates can be in certificated or scripless form.

To create a pledge over shares in certificated forms, a written agreement is required, and the certificates of the pledged shares shall be duly endorsed and delivered by the pledgor to the pledgee. Furthermore, the company issuing the shares shall be notified of the creation of a pledge in order to register such pledge on the shareholders' roster. The creation of a pledge is valid between the pledgee and the pledgor when the certificates of the shares have been endorsed and delivered to the pledgee. However, the creation of the pledge cannot be claimed against the company unless the company is notified of the creation of the pledge.

To create a pledge over shares in scripless forms which are transferred through the book-entry system of Taiwan Depository and Clearing Corporation ("TDCC"), the pledgor and the pledgee have to sign a form prescribed by the TDCC and have the pledge registered with the TDCC.

The above security cannot be created under a foreign law governed document.

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

As provided in the answer to Question 4 above, to perfect a security, a certain procedure has to be completed. Future assets or future obligations have yet to materialize and exist. Thus, a security cannot be validly created over a person's future assets or for future obligations, no matter a company is incorporated in Taiwan or elsewhere. It is the location of the assets or the law governing the obligations that matters.

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?

Separate agreements are required in relation to each type of asset. In general, the security provider and the security interest holder should enter into an agreement to identify the specific asset subject to the security interest. A general security agreement where all of a company's assets are included without identification of specific assets is not enforceable under Taiwan law. In addition, different types of assets may be subject to

different requirements, such as registration or filing with the competent authorities, on the perfection of the security. Such requirements are discussed briefly in our answer to Question 4.

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

No, no notarization or legalisation requirements are required for the creation of security over different types of assets mentioned in our answer to Question 4.

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

To create a mortgage over real property and a chattel mortgage over moveable property require registration with relevant competent authorities in order to be valid or to claim against a third bona fide person. For shares in scripless form and kept in the book-entry system operated by the TDCC, registration of a pledge in TDCC's book entry system in accordance with TDCC's regulations is required. In other share pledge, notification of the pledge to the issuing company is required in order for the pledgee to claim the pledge against the issuing company.

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)?

No stamp duty or notarization is payable for the creation of security over different types of assets. The registration fee for creating a chattel mortgage over a moveable asset is NT\$900 and the registration fee for creating a mortgage over a real property is equivalent to 1/1,000 of the total amount secured by the mortgage. In the event of re-financing with the same lenders, in order to save costs, the parties may take the approach of changing the scope of credit amount covered by the mortgage instead of cancelling the old mortgage and creating a new mortgage.

Upon enforcement, the fee paid to the court for

compulsory enforcement of the debtor's assets (such as foreclosure of mortgage) is about 0.8% of the asset's value unless the asset value is less than NT\$5,000 (about US\$180).

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?

According to the Company Act, unless otherwise permitted by law or by the Articles of Incorporation of the company, a company cannot act as a guarantor of any nature. Thus, if permitted by its Articles of Incorporation, a company may provide guarantees for its group members. The provision of security other than guarantee in favor of other's debts generally will be deemed as providing a guarantee and is subject to the same prohibitions and restrictions.

If the company is a public company, there will be additional restrictions. Pursuant to the Regulations Governing Loaning, Endorsement or Guarantees of Public Companies ("Guarantee Regulation"), a public company may provide guarantees only for the following companies: (1) a company with which the public company conducts business; (2) a company in which the public company directly and indirectly holds more than 50% of the voting shares; and (3) a company that directly and indirectly holds more than 50% of the voting shares in the public company. In addition, a guarantee provided by a public company should comply with the internal rules adopted in accordance with the Guarantee Regulation.

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?

Regarding the prohibitions and restrictions on the provision of guarantees and/or security by a company, please refer to our answer to Question 10.

In addition, according to the Company Act, a company cannot redeem or buy back any of its outstanding shares unless otherwise permitted by law. For instance, a company may purchase up to 5% of its outstanding shares and transfer the same to its employees. To give

another example, a listed company may buy back its outstanding shares in the circumstances permitted under the Securities and Exchange Act. The restriction on a company's ability to buy back its outstanding shares extends to the company's controlled company; in addition, the violation of such restriction may cause the buy-back to be void. A subsidiary of the parent company cannot purchase the shares of the parent company. Nevertheless, the Company Act does not prohibit a sister subsidiary from purchasing the shares of another sister subsidiary if the other sister company, together with its parent company, does not directly or indirectly hold more than 50% of the sister company.

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?

As general practice for a syndicated loan, syndicate member banks will appoint an agent bank 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. In addition, there will 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. Given this, the agent bank may claim the whole amount of the loan from the borrower and distribute the proceeds obtained therefrom to the syndicate member banks in accordance with their proportion of participation in the loan. Nevertheless, under Taiwan law, 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. Pursuant to the Civil Code, a mortgage/pledge would not be validly created in favour of the creditor/mortgagee/pledgee if there is no underlying credit owned by the mortgagee/pledgee against the debtor.

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. Please see our answer to Question 12.

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?

Generally, the choice of a foreign governing law to govern a contract would be recognized as a valid choice of law and given effect by the courts of Taiwan, provided that the relevant provisions of the foreign governing law would not be applied to the extent such courts hold that: (i) the application of such provisions would be contrary to the public order or good morals of Taiwan; or (ii) such provisions would have the effect of circumventing mandatory and/or prohibitive provisions of Taiwan law. However, where the contract is about the creation/perfection of a security interest, such as a pledge and mortgage, the choice of law will be subject to the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements.

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)?

A final and binding judgment rendered by a foreign court shall be recognized and enforceable by the court of Taiwan without a review of merits, provided that the court of Taiwan in which the enforcement is sought is satisfied that:

(i) the foreign court rendering the judgment has jurisdiction over the subject matter pursuant to Taiwan law;

(ii) the judgment and the court procedures resulting in the judgment are not contrary to the public order and good morals of Taiwan;

(iii) if a default judgment was entered into against the losing party, the losing party was (a) duly served within a reasonable period of time within the jurisdiction of such court in accordance with the laws and regulations of such jurisdiction, or (b) process was served upon the losing party with the judicial assistance of Taiwan; and

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

To our knowledge, there is reciprocity for enforcement of judgments between Taiwan and New York/England.

Taiwan is not a contracting party to the New York Arbitration Convention.

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

If a debtor is unable to pay its debts, it may deal with its insolvency through two approaches provided by the Bankruptcy Act: the settlement procedure and bankruptcy procedure. If a company is a public company and has an opportunity to be rehabilitated, it can file a petition for reorganization to rehabilitate its business operations in accordance with a reorganization plan approved by the interested parties and reorganized by the court.

The settlement procedure is a pre-bankruptcy procedure and can be conducted through the court or chamber of commerce. However, only a merchant can file for a settlement with a local chamber of commerce and there are only a handful of cases where creditors approached a chamber of commerce for a settlement. An application for settlement through court should be filed by the creditor before filing a bankruptcy petition.

A bankruptcy procedure may be filed either by the insolvent debtor as a voluntary bankruptcy procedure, or by one or more of its creditors as an involuntary bankruptcy procedure. However, in the event that a company's assets are not sufficient to pay off its debts, its board of directors should file a bankruptcy petition promptly unless the company is qualified to file a reorganization procedure.

A reorganisation proceeding is slightly similar to the "chapter 11 proceedings" used in the US if a company is in financial difficulties, ceases its business or is likely to cease operations but is able to restructure its obligations and be re-established. The company or its shareholder(s) or creditors meeting the qualification requirements provided under the Company Act may apply to the court for a reorganisation proceeding.

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?

If a company enters into a bankruptcy proceeding, the security owned by the company will become part of the bankruptcy estate and all enforcement actions against the company will be stayed and all unsecured creditors

must follow the bankruptcy proceeding. A secured lender has a preferential right to claim proceeds from the sale of the underlying security through the bankruptcy proceeding while it still retains the right to initiate a compulsory enforcement action during the bankruptcy proceeding. In addition, if the sale proceeds (from court auction through compulsory enforcement proceedings) are insufficient to repay the claims in full, it may participate in the bankruptcy proceeding to get additional distribution *pari passu* with the unsecured creditors.

In the event that a company is under reorganization, all enforcement actions against the company will be stayed no matter whether the lender is a secured (such as a mortgagee or a pledgee) or unsecured creditor. The lender may not foreclose the collateral security, and they should follow the reorganization proceeding issued by the court.

18. Please comment on transactions voidable upon insolvency.

In the event of 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: (i) provision of security for outstanding debts within six months prior to the bankruptcy adjudication; and (ii) 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 which 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.

19. Is set off recognised on insolvency?

If a creditor of the bankrupt has debts owed to the bankrupt at the time of adjudication of the bankruptcy by the court, such creditor may set off its credit rights against the debts owed by it to the bankrupt, regardless of whether the types of payments are the same or not (Article 113 of the Bankruptcy Law). However, debts obtained by the bankrupt's creditors after the adjudication of the bankruptcy and credit rights obtained by the bankrupt's debtors after the adjudication of the bankruptcy cannot be offset. Where the bankrupt's debtors know that the bankrupt ceases to make payment or petitions for adjudication of bankruptcy, credit rights obtained by such debtors cannot be offset unless the credit rights are obtained due to legal reasons or other reasons before they become aware of the

bankrupt's above status.

Set-off is also recognized in reorganization procedure but the creditor should exercise the set-off against the reorganizer (Paragraph 2 of Article 296 of the Company Act).

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?

In the event of a bankruptcy, certain credit rights are preferential, some examples are as follows:

(1) land value increment tax, land value tax and house tax levied on the sale of the real property which will rank prior to the mortgagee and the unsecured creditors;

(2) the following labour claims will rank prior to unsecured creditors: (a) labour wages due and payable by the employer but overdue for a period shorter than six months; (b) retirement payments payable by the employer pursuant to the Labour Standards Act but not yet paid; and (c) severance payable by the employer pursuant to the Labour Standards Act or Labour Pension Act but not yet paid; and

(3) fees and debts incurred for the benefit of the bankruptcy estate which will rank prior to unsecured creditors.

In addition, if a creditor has a retention right over the bankrupt's assets, it can still exercise such retention right. Where a property does not belong to the bankrupt's assets, the owner of the property may claim back such property against the bankruptcy administrator.

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

No, there are no such reforms.

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?

According to the statistics of the CBC as of January 2024, the proportion of indirect financing provided by financial institutions versus the balance of securities (including listed stock, short-term bills, corporate bonds, government bonds and securitization beneficial certificates) issuance is about 70% to 30%. Given interest rate is relatively low in Taiwan compared to USA, traditional bank debt would remain to be the major funding resources for enterprises. In view of possible interest rate increase and optimistic outlook of Taiwan stock market in 2024, many listed companies might consider seeking more funds from capital markets in 2024.

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

After the United Nations (UN) Climate Change Conference in Glasgow (COP26), environment, social and governance (ESG) undoubtedly is the hottest topic not only in the world but also in Taiwan. Cooperating with several public sectors, associations in the financial sector and non-profit organisations in Taiwan, the Financial Supervisory Committee of Taiwan (FSC), the authority of financial institutions, markets and products, issued and promulgated the Green Finance Action Plan 3.0 in September 2022 to achieve the objectives, such as guiding the financial industries, promoting the understanding of Greenhouse Gas (GHS) emissions by the financial industries and its investment and financing positions, promoting active response to climate-related risks and opportunities, and supporting of sustainable development and carbon emissions reduction. Complying with international standards such as Principles for Responsible Investment and the Equator Principles, lenders gradually incorporated ESG concepts into their internal policies and lending terms. In particular, we have seen more and more facilities agreements stipulating compliance with the Equator Principles and relevant disclosure documents as conditions precedent. On the other hand, to encourage the borrowers to achieve certain sustainability performance targets (such as the greenhouse gas emission reduction), the banks will offer certain incentives to the borrowers (usually, when the borrower achieves certain sustainability performance target(s), the margin on the loan will be reduced).

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